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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE

AND

FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: DCL&ER, Division of Environmental Protection TITLE NUMBER: 47

CITE AUTHORITY § 20-5M-10

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

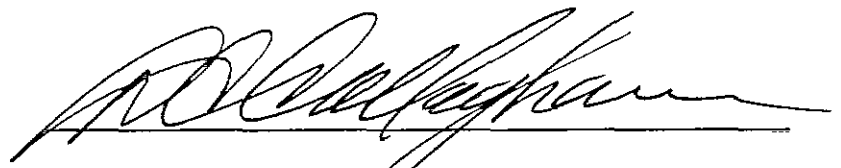
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 56

TITLE OF RULE BEING PROPOSED: Assessment of Civil Administrative Penalties

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.



David C. Callaghan, Director
Division of Environmental Protection

7.00

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

Form #1

Do Not Mark In This Box.

1992 JUL 10 11 42 AM

SECRETARY OF STATE

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

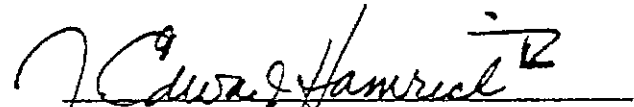
LOCATION OF PUBLIC HEARING: Air Pollution Control Building, Conference Room, 1558 Washington Street, East
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL , WRITTEN , BOTH

COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Laidlev Eli McCoy, 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



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

FILED
JUN 15 1992
OFFICE OF THE SECRETARY
DEPARTMENT OF COMMERCE, LABOR & ENVIRONMENTAL RESOURCES

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

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

FILED
JUL 28 1992
OFFICE OF THE SECRETARY OF STATE

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

FISCAL NOTE FOR PROPOSED RULE

FILED

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

Type of Rule: 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

DATE: January 21, 1993

TO: Legislative Rule-Making Review Committee

FROM: Department of Commerce, Labor and Environmental
Resources; Division of Environmental Protection

LEGISLATIVE RULE TITLE: Assessment of Civil Administrative
Penalties

1. Authorizing statute (s) citation: §20-5M-10
- 2.a. Date filed in State Register with Notice of Hearing: 6/16/92
- 2.b. What other notice, including advertizing, did you give of the hearing? Notice published in 5 newspapers, affected state agencies, U.S. EPA, Water Quality Advisory Committee, WV Chamber of Commerce, and other interested parties.
- 2.c. Date of hearing (s): 7/28/92
- 2.d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments;
Attached X No comments received _____
- 2.e. Date agency approved proposed Legislative Rule filed in State Register following public hearing: 1/25/93
- 2.f. Name and telephone of agency contact: Frank Pelurie,
558-1052.
3. If the statute under which the rule was promulgated and submitted requires certain findings and determinations to be made as a condition precedent to their promulgation: N.A.
- 3.a. Date on which a notice of the time and place of hearing for the taking of evidence and a general description of the issues to be decided was filed in the State Register:

- 3.b. Date of hearing: _____
- 3.c. Date the required findings and determinations together with reasons therefor were filed in the State Register:

- 3.d. Findings and determinations, and reasons (attached).

DEPARTMENT OF COMMERCE LABOR AND ENVIRONMENTAL RESOURCES

DIVISION OF ENVIRONMENTAL PROTECTION
OFFICE OF WATER RESOURCES

RESPONSIVENESS SUMMARY

Regulations: Assessment of Civil Administrative Penalties.

The West Virginia Division of Environmental Protection (DEP) has received thoughtful criticism during the public comment period on the proposed rule, "Assessment of Civil Administrative Penalties", Title 47, Series 56. The rule would set forth procedures and criteria to be used in assessing administrative penalties imposed under the provisions of the West Virginia Code, Chapter 20-5M-10.

To comply with federal and state public participation requirements the DEP issued on June 24, 1992 a notice announcing the beginning of a thirty-day public comment period and a public hearing on the proposed rule. The notice was published in five newspapers, representative of various geographic areas across the state. Copies of the public notice were also sent to state agencies affected by the rule, the U.S. Environmental Protection Agency, the members of the Water Quality Advisory Committee, the WV Chamber of Commerce and other interested parties.

Twenty-four people attended the public hearing that was held July 28, at 7:00 p.m. in the Air Pollution Control Building, in Charleston, West Virginia.

In addition to two oral comments, the DEP received four written statements by July 28, the date on which the official record was closed. All public comments were reviewed in developing the final draft regulations.

The following is this agency's response to recommendations and concerns raised in oral and written comments.

One commenter requested an addition to Section 3.2 requiring the assessment officer to determine remedial actions and set a compliance schedule.

The purpose of these rules is to provide an efficient mechanism by which a standardized calculated penalty for common or minor violations may be imposed. Corrective or remedial actions and compliance schedules are established in Administrative Orders issued by ground water regulatory agencies under their civil enforcement authority.

A commenter suggested that a "Notice of Dismissal" (Section 2.7) should be characterized as constituting a dismissal "with prejudice". In addition, the same commenter stated that any written decision dismissing the initial civil administrative penalty assessment should constitute a dismissal "with prejudice" (Section 5.4).

The Division maintains that a Notice of Dismissal or any written decision dismissing the civil administrative penalty should be *without prejudice* so as not to preclude the agency from pursuing further legal action. A notice dismissed "with prejudice" would close this avenue to the agency.

The same commenter proposed that if a violator waives his right to an informal hearing, the regulations should require the assessment officer to establish a schedule for payment of the administrative penalty prior to the expiration of the twenty-day period from the violator's receipt of the notice of civil administrative penalty.

The Division believes that the violator should request an informal hearing on the assessment, if he wishes to discuss the facts surrounding the violation, the ratings applied to the violations or a schedule of payment. The informal hearing provides the appropriate mechanism to discuss these issues on a case-by-case basis. If the violator does not request an informal hearing, the penalty will become due and payable at the end of the thirty-day period.

The commenter proposed that the thirty-day calendar period for requesting a formal hearing should commence upon the violator's receipt of the written decision.

The Division agrees with the commenter and has added language to Section 5.5 which clarifies that the thirty-day calendar period will begin when the violator receives written notification of the decision made at the informal hearing. Section 5.5 has been modified as follows: "Request for formal hearing. Within thirty (30) calendar days after written notification of the Director's et al.'s decision..".

More than one commenter argued that Section 6, which provides for individual civil administrative penalties, should be deleted in its entirety. One commenter stated that the Groundwater Protection Act does not specifically authorize the director et al. to assess a civil administrative penalty upon individuals. The commenter suggested that the proposed regulations should be modified to specify the circumstances under which corporate officers, or other individuals may be personally assessed civil administrative penalties for violations of the Act by the corporation. One commenter also noted that, "Only under certain circumstances do courts pierce the 'corporate veil' to impose individual liability upon corporate shareholders or officers, etc. for the torts and other wrongdoing of the corporation." One commenter further suggested that the penalties should be imposed only in the most extreme circumstances and on a case-by-case basis.

The Division maintains that authority to assess civil administrative penalties is provided by Chapter 20-5M-10. Furthermore, as defined in the Act, the term "person" clearly includes individuals. The Division believes that individual assessments will be utilized only in rare occasions. The purpose of individual assessment is to allow an individual, who causes violations contrary to the owner/operator's intent, to bear responsibility for his actions rather than penalizing the facility. Penalizing the responsible individual also increases

accountability and is intended to provide specific deterrence to that individual's continued violation of the law. Furthermore, the Division maintains that liability of an individual who authorizes an illegal act has been sufficiently assured through case law to justify its inclusion in the regulations. In imposing a civil administrative penalty, the Division takes into consideration the environmental harm caused by the violation, negligence displayed and history of non-compliance. All these factors are to be evaluated on a case-by-case basis.

One commenter stated that if an individual waives his right to a hearing, consistent with the provision at Section 6.4., the regulations should require the assessment officer to establish a schedule for payment of the administrative penalty prior to the expiration of the thirty-day period from the individual's receipt of the notice of individual civil administrative penalty.

As stated previously, the Division believes that the informal hearing process provides the mechanism for addressing any problem the violator may have in paying the assessed penalty. A payment schedule based on individual, detailed circumstances can and should be negotiated during the informal hearing. Therefore, the Division has not adopted the commenter's suggestion.

One commenter suggested that Section 7 should be deleted in its entirety. The commenter noted that the rigid penalty formula is not appropriate for complex ground water enforcement cases because these should be handled on a case-by-case basis. Further, the commenter believed that implementation of the rules would lead to the inequitable treatment of industrial facilities.

The Division maintains that the flexibility built into the assessment formula ensures its applicability over a wide range of enforcement cases. In addition, the penalty calculation procedure provides a basis for equitable and fair penalty assessment. Industrial facilities will be assessed penalties in accordance with the mechanism provided in this Section. The Division believes that the provisions set forth in this Section are essential to ensure consistency and avoid arbitrary penalty assessments; therefore, the Division will not delete this Section.

One commenter urged the DEP to amend all civil administrative penalties regulations to provide that only one such penalty may be assessed by the DEP for any violation.

Chapter 20, Article 5M, Section 10(c) states, "Any administrative civil penalty assessed pursuant to this section shall be in lieu of any other civil penalty which may be assessed under any provisions of this code for the same violation." This Section ensures that, if ground water contamination occurs at a solid waste facility, the owner of that facility would only be subject to that set of established penalty regulations established which are determined by the director et al. to be the most appropriate/applicable.

The same commenter noted that unless Section 2.3 of the regulations establishes explicit "other appropriate factors," the Division will be precluded from considering the "other

factors" in assessing civil administrative penalties. The commenter suggested that one of the factors which should be considered is the alleged violator's ability to pay the penalty assessed by the director et. al.

In response, the Division has added the following language to Section 2.3: ".. and any other pertinent information or factors that have bearing on the referral."

While the Division recognizes that different violators will not have uniform financial capabilities, the Division believes that the financial status of the facility or ability to pay should not be a factor in calculating a civil administrative penalty. Further, the ability to pay is very difficult to assess in an objective manner, and would unduly complicate assessments and the scope of the informal hearing. Therefore, the Division is unwilling to take into account the violator's ability to pay in assessing a civil administrative penalty.

The same commenter suggested that the definition of "director et al." (Section 2.4) should be changed to reflect the fact that the responsibility of the former Division of Natural Resources now resides with the Director of the Division of Environmental Protection. In addition, the commenter maintained that the words "or their authorized representative(s)" should be deleted, since only a Director is allowed to assess administrative penalties under West Virginia's Code § 20-5M-10.

The Division has changed the definition of director et al. to reflect the fact that in response to H.B. 217 and by Governor Gaston Caperton's Executive order number 8-92, the Director of the Division of Environmental Protection has assumed the statutory responsibility for implementing provisions of the Groundwater Protection Act.

However, the Division maintains that while WV Code § 20-5M-10 does state that the Director of the Division of Health, the Commissioner of Agriculture and Director of the Division of Environmental Protection may assess a civil administrative penalty, the statute also provides that the directors/commissioner may appoint an assessment officer to act on their behalf. Furthermore, W Va. Code § 22-1 et seq. gives the Director broad authority to delegate the powers and duties of his office to appointees, whose acts will be under his supervision and for whom he shall be responsible. The Division also notes that the time constraints imposed by statutes make it unreasonable to expect the Director, who bears many other duties and responsibilities, to personally preside over each and every civil administrative penalty case. Consequently, the Division will not delete "or their authorized representative(s)" from the rule.

More than one commenter suggested that written notification of violation be provided to an alleged violator by the inspector "within 15 calendar days of the date of inspection" as established in rules that implement the Hazardous Waste Management Act and the Solid Waste Management Act.

The Division agrees that the time frame for issuance of a Notice of Violation should not be

completely open-ended. However, a time limit of 15 days from inspection is unreasonable because several inspections may be required to collect evidence, to test and to monitor the site. Therefore, at this time, the Division will not specify a time limit on Notice of Violation issuance.

More than one commenter encouraged the DEP to use the term "alleged violator" rather than "violator" throughout the penalty provisions.

Section 2.10 of the proposed rules clearly defines *violator* as "the person who is *alleged* to have violated the Act, or any rule, regulation, order or permit conditions imposed pursuant to the Act. Consequently, the DEP does not deem it necessary to use the term "alleged violator" throughout the proposed rule.

One commenter argued that Section 3.1 unnecessarily gives an inspector "or other authorized representative of the director et al." powers to issue notices of violation. If the Section is retained in the rule, the commenter argued that a preassessment conference should be allowed subsequent to the issuance of a Notice of Violation, but prior to the issuance of any civil administrative penalty.

The Division agrees that Section 3.1 may be redundant in that the definition of "director" includes authorized representatives and that other portions of the code specify violations. Section 3.1 does not add or subtract from these statements and, therefore, is included as a restatement of the Director's authority to issue an Notice of Violation. Furthermore, the Division does not find the need for a preassessment conference. The informal hearing provided in Section 5 will be adequate to review the Notice of Violation before the Administrative Penalty Order is finalized.

The commenter noted that the rule (Section 4) does not specify who will be designated the assessment officer and recommended that the assessment officer should be some person other than the inspector who issued the notice of violation.

The Division agrees with the commenter and has added the following language to Section 2.2. of the proposed rule: "Any person(s) initiating the Notice of Violation is prohibited from being the Assessment Officer for the facility in question."

The commenter suggested rearranging Sections 4,5 and 6 to describe the penalty assessment in a less fragmented manner.

The Division has sought to describe the penalty assessment procedure in a simple, logical manner. The Division believes that Section 4, 5 and 6 adequately explain the process. Consequently, the Sections have not been rearranged.

The commenter pointed out that Section 5.1 allows a civil administrative penalty imposed by an assessment officer to become a final order without further review by the Director, if

no informal hearing is requested by the violator. The commenter noted that this portion of the proposed rule is contrary to the language of the Act, under which the authorization to assess civil penalties is given solely to the Director of the DEP. The commenter urged that the Division add appropriate procedures to the final rule to ensure that all notices of violation are reviewed by the Director prior to their assessment.

The Division contends that the Director has the necessary authority to delegate this responsibility. Chapter 20, Article 1, Section 7 Paragraph 27 states that the Director is authorized and empowered to "delegate the powers and duties of his office, except the power to execute contracts, to appointees and employees of the Division...."

The commenter urged the DEP to include an "ability to pay" factor in Section 7 as part of the Director's consideration of the appropriateness of a civil penalty assessment. Further, the commenter urged the DEP that Section 7.3, which relates to a facility's history of noncompliance, be revised. Noncompliance history would be considered only on a "by site" basis for civil administrative penalties to be assessed for that particular site.

As previously stated, the Division believes that culpability is not tied to ability to pay. Moreover, the Division does not have resources/expertise to analyze and determine the financial health of regulated entities. Problems associated with objectively establishing the financial status of individuals, corporations, or partnerships would unduly complicate and delay the assessment review process, which is designed to provide a quick, simple mechanism to address minor violations. Therefore, in assessing civil administrative penalties, the Division will not take into account the violator's ability to pay.

The Division also believes that a regulated facility's continued violation of the statutes indicates an overall unwillingness to install protective equipment and/or adopt proper management procedures to comply with the statutes. Consequently, the Division is unwilling to limit consideration of a company's history of violations to a site-by-site basis.

The commenter argued that the criteria establishing ratings in Tables A, B and D are too subjective, and suggested that an enforcement checklist with numerical ratings for each discrete item of noncompliance should be used instead.

The rating charts employed in these regulations admittedly do not eliminate all subjectivity. Some degree of judgement regarding the severity of violations and the good faith of the violator is required. The Division maintains that it is not feasible to list all possible violations of the statutes, regulations, permits and orders. Moreover, any conceivable checklist or other numerical quantification could not address the wide variety of impacts which may result from different violations. The Division believes that the subjectivity of the evaluations is minimized in several ways. First, the ratings themselves demand a certain definition of the facts observed, and a clear explanation of the ratings is expected at an informal hearing. Second, by employing one assessment officer at each ground water regulatory agency, the Division expects that general consistency among assessments will

develop. Objectivity in penalty assessments is further ensured by having the assessment officer, rather than an inspector, determine the amount of penalty. Finally, the penalty calculation procedure will, itself, limit subjectivity because it limits discretion. For these reasons the Division will not adopt the commenter's suggestions.

The commenter pointed out that the Table C matrix would impose greater penalties for minor violations of the Act than are provided under similar matrices established for minor solid waste or hazardous waste violations and urged the Division to start out with smaller figures, such as \$100, for violations with no potential harm and an insignificant deviation from requirements.

The Division concurs with the commenter. Table C will be replaced with one identical to Table D of the solid waste regulations. The Division's intent was to use the Table for Chapter 20-5F violations, found in 47 CSR 4.

The commenter suggested that a new criterion under Table E should be added to allow consideration of the fact that the violator may have gone beyond the minimum requirements in bringing the facility into compliance. Also, the commenter requested clarification of Table D. Specifically, the commenter asked how the assessment officer will know whether the violator "has or has not completed all actions to correct the violation."

The Division observes that the Negligence/Good Faith ratings (Table E) already serve as a mechanism to account for exceeding minimum requirements, by crediting the owner or operator's efforts to assure compliance. Furthermore, it should be noted that all operators must meet minimum requirements and it is preferable that a facility meet all requirements at an acceptable level than to have some actions far exceed the minimum compliance level while others do not. For these reasons, the Division has not added a new criterion to Table E, as suggested by this comment. In response to the comment pertaining to Table D (5 to 7 scale), the Division has changed the wording from "inadequate action to correct the violation" to "inadequate action to prevent the violation."

One commenter noted that Table E arbitrarily allows no more than a 50% decrease in the penalty where there is an absence of negligence, whereas the table would allow a 100% increase in the penalty where the violator has been negligent or failed to respond to a previous enforcement action. The commenter submitted that the Division should take into account any good faith efforts to comply with the Act and allow a greater reduction of the penalty.

In all instances where a violation has occurred a civil administrative penalty may not be issued depending on the circumstances surrounding the violation. This effectively provides for the commenter's desire to have the penalty reduced by 100 percent. If the division believes the circumstances surrounding a violation warrant penalty issuance it serves no purpose to negate the penalties' impact by possibly reducing it to zero. Furthermore, the Division maintains that a 100 percent increase in the penalty for flagrant disregard of the

Act, permit, or order is warranted.

One commenter argued that Section 2.3, which defines "Civil Administrative Penalty Referral", does not reflect the fact that Chapter 20-5M-10(c) imposes to designated agency officials a mandatory duty to take into account the seriousness of the alleged violation and any good faith effort made to comply with the applicable requirements established by the rules. The commenter suggested that the word shall be added to the definition in order to make it clear that the written document "shall include" rather than "include" all the factors established by the law.

In response, the Division has added the word "shall" to Section 2.3 of the rule.

One commenter suggested that Section 5 be modified to allow violators to formally waive their right to an informal hearing and to request that the matter proceed directly to a formal hearing before the Water Resources Board.

The Division believes that the comment reflects a misunderstanding of the assessment process. Chapter 20-5M-10 clearly establishes that if the violator does not wish to request an informal hearing on the assessment, he may choose to appeal the order to the Water Resources Board (in accordance with § 20-5M-11) where the matter proceeds as a typical administrative order appeal.

The Division of Environmental Protection wishes to thank all those who attended the public hearings and submitted comments and concerns.

ATTENDEES AT PUBLIC HEARING ON
TITLE 47 SERIES 56

<u>Name</u>	<u>City</u>
Roger Nordlinger	Nitro, WV
Norm Steenstra	Charleston, WV
Tom Degen	Chloe, WV
David Yaussy	Charleston, WV
Andrew A. Frishkorn	Coraopolis, PA
Libby Chatfield	Charleston, WV
Joe C. Bender	Clendenin, WV
Patrick Pearlman	Charleston, WV
Richard F. Sherman	Belle, WV
Bruce R. Leavitt	Pittsburgh, PA
James Smith	Charleston, WV
Barbara Smith	Charleston, WV
Richard G. Baier	Charleston, WV
William Bosworth	Lancaster, OH
Gary A. Jack	Fairmont, WV
Jeffrey S. Laskey	Coraopolis, PA
Mike McThomas	Charleston, WV
Ben Greene	Charleston, WV
Chris Hamilton	Charleston, WV
Jerome E. Cibrik	So. Charleston, WV
Ronald Griffin	Clarksburg, WV
Clayton Roesler	Hurricane, WV
Timothy P. Mallan	Roanoke, VA
Missy Woolverton	Charleston, WV

FILED

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

JAN 28 8 54 AM '93

SERIES 56
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§ 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. 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 and any good faith efforts made to comply with applicable requirements as well as any other appropriate factors established by these regulations, and any other pertinent information or factors that have bearing on the referral.

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 written 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 Groundwater Protection Act Violation

Deviation from Requirement

1 2 3 4 5 6 7 8 9 10

Potential
for Harm

1	350	460	550	650	750	850	950	1050	1150	1250
2	500	700	800	900	1000	1100	1200	1300	1400	1500
3	650	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	1950	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
<u>1</u>	<u>100</u>	<u>140</u>	<u>190</u>	<u>250</u>	<u>320</u>	<u>400</u>	<u>490</u>	<u>590</u>	<u>700</u>	<u>725</u>
<u>2</u>	<u>200</u>	<u>240</u>	<u>290</u>	<u>350</u>	<u>420</u>	<u>500</u>	<u>590</u>	<u>690</u>	<u>800</u>	<u>825</u>
<u>3</u>	<u>400</u>	<u>440</u>	<u>490</u>	<u>550</u>	<u>620</u>	<u>700</u>	<u>790</u>	<u>890</u>	<u>1000</u>	<u>1125</u>
<u>4</u>	<u>700</u>	<u>740</u>	<u>790</u>	<u>850</u>	<u>920</u>	<u>1000</u>	<u>1090</u>	<u>1190</u>	<u>1300</u>	<u>1425</u>
<u>5</u>	<u>1025</u>	<u>1065</u>	<u>1115</u>	<u>1175</u>	<u>1245</u>	<u>1325</u>	<u>1415</u>	<u>1515</u>	<u>1625</u>	<u>1750</u>
<u>6</u>	<u>1375</u>	<u>1415</u>	<u>1465</u>	<u>1525</u>	<u>1595</u>	<u>1675</u>	<u>1765</u>	<u>1865</u>	<u>1975</u>	<u>2100</u>
<u>7</u>	<u>1725</u>	<u>1765</u>	<u>1815</u>	<u>1875</u>	<u>1945</u>	<u>2025</u>	<u>2115</u>	<u>2215</u>	<u>2325</u>	<u>2450</u>
<u>8</u>	<u>2075</u>	<u>2115</u>	<u>2165</u>	<u>2225</u>	<u>2295</u>	<u>2375</u>	<u>2465</u>	<u>2565</u>	<u>2675</u>	<u>2800</u>
<u>9</u>	<u>2425</u>	<u>2465</u>	<u>2515</u>	<u>2575</u>	<u>2645</u>	<u>2725</u>	<u>2815</u>	<u>2915</u>	<u>3025</u>	<u>3150</u>
<u>10</u>	<u>2775</u>	<u>2815</u>	<u>2865</u>	<u>2925</u>	<u>2995</u>	<u>3075</u>	<u>3165</u>	<u>3265</u>	<u>3375</u>	<u>3500</u>

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~~ 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:		_____
History of Noncompliance	+	_____
Total Assessment:		_____

Circumstances Resulting in this Filing

47 C.S.R. 56

**Assessment of Civil Administrative Penalties
Legislative Rule**

This is a new rule that implements the provisions of §20-5M-10. The rule establishes the procedures and criteria to be followed in the assessment of civil administrative penalties.

47-56
p.6

GROUNDWATER PUBLIC HEARING
July 27, 1992

Introduction: "Good evening ladies and gentlemen. I believe it's a little after five and time to get our public hearing, concerning proposed legislature establishing procedures for the certification of monitor well drillers, underway. Gentlemen, are we ready to begin?"

"The Department of Environmental Protection (DEP) has filed with the Secretary of State's office proposed regulations defining the procedures for the certification of monitor well drillers. The filing initiates the required public comment period and it is the first step in seeking legislative approval of the rules. The new regulations are designed to ensure monitor wells are properly drilled, constructed, altered and/or abandoned.

"Monitor wells provide data used to determine if ground water contamination has occurred and monitor progress of site-specific mediation efforts. The proposed rules have been developed as a result of the implementation of the Groundwater Protection Act, which provides for the protection of public health and ground water aquifers.

"We are here this evening to take statements concerning the proposed regulations. We will entertain public comment until tomorrow at 4 p.m., July 29. The reason for the short comment period in this case is we need time to prepare a presentation for the legislative rule-making committee and hopefully get the proposed regulations introduced into the legislature come January.

"At this time, we'd like to invite anyone who chooses to make statements to come to the podium and deliver them. I see here, through the sign-up sheet, Mr. David Yassef has comments concerning these proposed regulations. Mr. Ben Greene has also indicated he would like to speak. Mr. Greene, would you come forward at this time?"

Ben Greene: "For the record, my name is Ben Greene. I'm representing the West Virginia Mining and Reclamation Association and the WV Coal Association. Together, we compromise more than 400 companies. We make up more than 90% of the coal production and some other mineral production around the state.

"The purpose is to express our comments, observations and views on Title 47, Rule 59 that has been proposed for monitoring well drilling certification. It is ironic, when you review the rules, in our judgement, that we see the Department of Health (DHHR) proposing a

monitoring well certification program when we have not seen any septic tank or other known ground water influences that are more important, in our judgement, than the certification program.

"Though I question whether a \$225 fee is of economic significance in terms of the individual, when you compare that to the more than \$20 million that has been estimated in the insecticide, pesticide and fertilizer regulations that public comment has already been taken on, to the individual it does become very significant.

"For the coal industry this raises several questions. The authority for issuing seems to come from 5M5b where the word 'monitoring' does appear. It does not appear beyond that that I can find in this statute. It does seem to question maybe the length and breadth of the regulation is a little bit of overkill.

"As you begin the review of these regulations, it tends to vest certain authority in the DHHR and then it invests certain additional authority in the Chief of the Office of Water Resources (OWR). In the definition section, the Water Resources chief is given designed standards and locations by definition authority, whereas the DHHR commissioner is given application and certification form duty. And then track over to the enforcement at 3.2 and there there seems to be a transfer from the DHHR back to OWR.

"Now if you can find all that and go back to what the act itself says, the act says those regulating agencies that have ongoing programs will continue those programs. Of course all of our ground water monitoring experience has been under the former Department of Energy, now the DEP, and specifically in their mine and reclamation sections.

"So if I could make a recommendation, it would be that there needs to be at least a coordinated effort, site specific and agency specific, that is clear cut in these regulations.

"A certifying monitor well driller has an on site reference. On site, in terms of the mining industry, you could talk permit, you could talk the operation or you could talk actual drilling site.

"If you take registered, professional, engineering kind of experience where you're talking supervision, you're talking somebody who looks over multiple permits and multiple areas. I'm not quite sure what was intended here by on site. If you go back to the previous regulation at 2.13, they are already in effect. There you're talking about the individual that is actually operating the drilling rig. I think that could be the individual that's standing there either pushing the buttons, holding the wire or manning the rotary drill, which is the most common in the mining industry.

"And then if you go to 2.8, 'an individual that engages in monitor well drilling construction, alteration or abasement or who

supervises these activities.' And that is by far the most preferable definition. Although there seems to be an interchanging, and I don't know whether that is fault or a flaw in the regulation or a fault or flaw in my research. But there seems to be a possible interchanging of certified monitoring well driller and just monitoring well driller. It may be intended, it may not. It certainly seems, in my judgement, to need to be clarified.

"You go down to 4.2, '2 years under the supervision of a certified mine driller.' If you take that to the mining industry, we've been drilling monitoring wells since the passage of the Federal Surface Mining Act in 1977, and more particularly since the permanent program in WV granted primacy on January 21, 1981. So we have a long history of drilling monitoring wells under our regulated program, if you will. I don't know whether we intend to jump over that now with a new agency and a different program or not. I simply raised the question.

"There is a second experience qualification at 4.3 in the proposed regulation. It talks about having drilled several wells as a business. We in the mining industry do not do it as a business, but as a requirement of obtaining permits and as a requirement of both federal and state law. I would hope that experience would be as good as somebody that is out there on the commercial market. I would think that it would be.

"Again, another observation about a certified program is I don't know of anything technically, technologically or scientifically that is wrong with the ongoing program. I'd like if anybody'd show any scientific fact that there is in fact a huge program here in how monitoring wells are being drilled, particularly in relation to the mining industry.

"4.5 gives the commissioner, and here the DHHR has a new name in terms of public health I believe comes in, and it seems the commissioner can suspend or revoke or he has certain powers, yet you go back to the definitions and those powers, I don't think, are properly conferred. Nor do I see how he can revoke something when he has transferred the enforcement to OWR or out to the other Division of Environmental Protection, being mines and reclamation. So, we need to, in my judgement, be clear in who and what agency is really in charge.

"One that I've had the most feedback and one that needs to be rethought and given additional consideration should these regulations go forth is 4.12, the oral and written examination requirement. When you're dealing with the mining industry, again you're dealing with a group of people who are scared to death of written examinations. It would also seem to me that the 70% is a very arbitrary figure. The 30

day waiting period requirement again may be penal.. If a guy is employed and he's a driller, in particular if he's a contract driller, the possibility he may have to be off for 30 days while he waits to take another oral exam could be a very penal regulation. I'm sure it wasn't intended that way but as written and as I interpret it, it certainly could have that kind of power. But I would urge your proper attention and study of 4.12, the oral and written examination part.

"Part 5 of the rig identification, I fail to find any statutory authority or any requirement that says the drilling rigs have to have the numbers of the certified drillers on the side in numbers 2" high that are plainly legible and visible from a distance. Again a mining industry scenario of a rotary drill where you may have 3 or 4 drillers who are certified who operate the same piece of equipment 3 shifts a day. It's not unusual. You could be drilling monitoring wells generally in the daylight hours on any two shifts. So you could have a series of numbers that might be deemed a requirement that is more detrimental to what you're trying to establish here than not. It would seem to me the proper direction of this regulation would be dwelling more in the hydrogeology and the how and what you've encountered and how you protect it. It would need identification in the surface facility, the concrete pad and some of the other things that seem to be creeping in on the certification.

"And finally, my comments will be on #7, the due process part. And here it provides for a DHHR hearing and declaratory ruling procedure. I take you back through the scenario that enforcement had already been turned over to OWR back in #3. OWR, in turn, looks to Mines and Minerals, who actually carry out the program. So I wonder what good that tedious procedure would be unless it would only have application, and I believe it goes beyond that, to the procedure of testing and certification to begin with.

"Mr. Chairman that concludes my comments on Rule 59, Title 47. If there are any questions I'll be happy to respond. If not, I thank you for the opportunity to participate in the hearing."

Chairman: "Thank you Mr. Greene. I would be amiss in not identifying the participants in the hearing. Most of the people do know each other, but we'll go ahead for the sake of the record and identify the OWR representatives.

"I am Jim Waycaster. I'm with the public information office of OWR. To my right is Dave Watkins. He's the program leader of ground water. Dr. Eli McCoy, chief of OWR, is in the audience as well.

"Mr. Yassey, are you ready at this time to make your remarks?"

David Yasse: "My name is Dave Yasse. I'm an attorney with the law firm of Robinson and McElwee in Charleston. I'm here today on behalf of the WV Manufacturer's Association. The WVMA is an organization comprised of over 200 businesses in the industrial sector. It has a history of constructively commenting on the environmental regulations that are put forth by the DEP and other agencies. It wishes to continue with that history this evening.

"The WVMA opposes promulgation of these monitor well certification regulations because it believes they are unnecessary and unduly expensive. A disproportionate amount of the funds that are dedicated to the ground water program of the ground water fees that are regulated under the ground water fee regulations are going to be dedicated to the certification program.

"WVMA believes all available funds should be directed to identifying and/or mediating ground water contamination. We understand there is some belief the Environmental Protection Agency (EPA) will require a monitoring well certification program. But we do not believe there are any current well driller certification regulations that have been proposed by the EPA. Nor do we expect it will be occurring in the near future.

"We think that if any type of monitoring well regulations are appropriate at this time, it would be a regulation which would establish regulations for monitoring wells in their construction and the way they are put into the ground, rather than a new program for certifying monitoring well drillers.

"If, despite the WVMA's concerns, this regulation is adopted, the WVMA is concerned about requiring certification for all supervisors. It was alluded to by Mr. Greene, not everyone who supervises at a monitoring well drilling site should be required to have certification. We're thinking of situations in which a company would have a geologist present, either as an employee of the company or as a consultant, who would be involved in directing well placement and actually supervising, but not directly supervising, the drilling of the monitoring wells themselves. In that situation, as long as there is someone present who is certified for monitoring well drilling, it should not matter if there are additional people participating in the supervision as long as someone is responsible under the act.

"Also we feel there is a need to clarify what certification applies to individuals and what certification applies to persons. The terms are often used interchangeably in the act, whereas they may have very different legal meanings. A person, of course, can include such things as a corporation or a partnership, where an individual would presumably mean a single person.

"Furthermore, we believe there is a need to define the term 'monitoring well.' Any certification program which will be applying to those who drill monitoring wells should have some definition of that term included.

"I have no further comments at this time, unless there are any questions. Thank you."

Chairman: "Would anyone else at this time like to make a statement regarding the proposed regulations? If not, we'd like to reiterate that the agency will be accepting comments until tomorrow at 4 p.m. regarding these proposed regulations. I'd also like to point out that when these were drafted all references to DNR will be changed through the proclamation to DEP.

At this point we would like to close the formal portion of the hearing and agency people will remain to answer questions regarding these proposed regulations. Thank you very much for attending."

Chairman: "I open the record for this evening's public hearing concerning two proposed rules that implement the requirements of the Groundwater Protection Act Chapter 20-5M-10. Now we're going to talk about these two rules separately in the statements portion of the hearing this evening.

"The first proposed rule we'll be speaking about establishes civil administrative penalties for Groundwater Protection Act violations. The rule also sets forth the procedure and criteria to be used in assisting the civil administrative penalties. These proposed penalties may be used instead of civil action to address violations of the act. However, they do not inhibit or prohibit due process because the violator retains the option of accepting or refusing the penalty order.

"First, I would like to indicate the first proposed rule of the governor's proclamation all the references to DNR is changed to DEP.

"At this point we would like to begin the statement portion addressing the civil administrative penalty rule. On the sign-up sheets, Mr. Norm Stenstra indicated his desire to speak concerning these proposed rules. Mr. Stenstra. . ."

Norman Stenstra: "Being first is always a bummer. To start I'd kind off like to set the background in prospective of what happened with the groundwater bill and where we're going, particularly with regulations that came out of that legislation.

"I think it's wise to look at this as a rough experiment in cooperation between industry, the regulatory agencies and the environmental community. Particularly what happened this time that

was different was the formation of working groups. Those were groups of people that tried to get together on specific topics and look at and identify the issues and, if possible, rub out some of the rough points. But, at no point in time, was it ever meant by any party, I believe, to be a consensus. I think we need to look at it as a preamble to the process.

"That's what I wanted to talk about a bit was the regulatory process that the legislature, in their wisdom, have created. This is the beginning of the ground water process, to come to the hopes and dreams and expectations we all had about ground water.

"As I said, it was an experiment. It was a rough one. It sometimes worked and sometimes didn't. Getting citizens down here or citizens at different places in the state to meet on specific issues--be it solid waste, be it electric power, was difficult. They were volunteers that worked on their own terms. I think the idea was to get the issues out and begin the process.

"But that process has to be taken in context with the legislative intent of that bill. Having been identified with this issue now for 4 years, and it being the #1 priority of the environmental community, you have seen and will continue to see meetings. In Morgantown there were specific environmental comments. You'll hear some tonight, yet, after my speech.

"We intend to continue to define and refine these regulations and go through the entire process, that involves not only legislative review on the committee, but also the legislative session in 1993.

"So I just wanted to set that as a tone that we all kind of decided to throw the dice on this and sit down and talk.

"In many ways this has been a very fruitful endeavor for people to try to solve, a tough and complicated issue. This is the beginning. So I leave you with that. Okay?"

Chairman: "Thank you Mr. Stenstra."

David Yasse: "My name is Dave Yasse. I am an attorney with the law firm of Robinson and McElwee. I am here tonight on behalf of the WVMA. The WVMA is composed of about 200 companies with emphasis in the manufacturing sector.

"The civil administrative penalties that have been proposed are a matter of great interest to the membership and we appreciate this opportunity to comment on them.

"We have several issues we would like to bring out tonight. There will also be a written comment. This will be filed tomorrow. But I'd like to hit some highlights tonight.

"The first concern is the matter of duplication of penalties. WVMA is not sure how the civil administrative penalties will be implemented by the DEP, especially in light of those civil administrative penalties which currently exist 47CSR4 which address solid waste and hazardous waste violations.

"We would oppose operating under both systems if, for example, there's a ground water violation at a solid waste facility. Both this regulation and all other civil administrative penalty regulations, including the one for the air caps, should provide the payment of one civil administrative penalty and prevent assessment of any other cap by the DEP.

"In reference to Section 3, we do not feel there is any need to provide authority in this rule for issuances of notices of violations. This rule should only deal with civil administrative assessment procedures rather than establishing which actions or activities for emissions constitute penalties. We believe those should be handled in a separate regulation such as the ground water protection regulations, which we'll be addressing later.

"If an NOV can be issued, there's separate authority for issuing an NLV under this regulation. Then there ought to be a separate appeal provision which isn't provided by Section 3.

"Next, we believe the DEP should structure its rules in the following fashion. First, after notice of violation is received by the assessment officer, he will determine whether a civil administrative penalty should be recommended to the director. Notice, at that time, would be given to the alleged violator, who would be given the opportunity to request the informal hearing, this referenced by the regulation. If there is no request, the civil administrative penalty recommendation would go to the director, who would decide whether to assess it or not. If it was assessed, the director would give notice of the assessment to the alleged violator and give an opportunity to appeal to the Water Resources Board within 30 days.

"If an informal hearing is requested on the other hand, it would be held and a recommendation for withdrawal or issuance would be made to the director, who would again decide whether the assessment should be lowered or issued as recommended. And there would again be an appeal period of 30 days.

"Now it may be this is only a restatement of what the Division intended. If so, we recommend the rule be redrafted and set out in a little clearer fashion.

"Again, the penalties for minor violations in the Table C matrix are higher for minor violations than those assessed under the matrix C for the solid waste and hazardous waste civil administrative penalties. We do not believe violations of ground water requirements

should result in greater penalties under the Groundwater Act than they would under the Hazardous Waste or Solid Waste for minor violations.

As I said, the WVMA will be submitting more detailed comments tomorrow. However, these represent the highlights. I hope they will be given consideration. Thank you."

Chairman: "Thank you. Would anyone else like to make a statement regarding the civil administrative penalties portion?

"If not, we'll move on to the second rule which is the proposed series of practices which must be followed by any person who owns or operates facilities or conducts activities subject to provisions of the Groundwater Protection Act.

"The practices are designed to prevent ground water contamination from facilities or activities that are already subject to regulatory requirements by the DNR, or now DEP. These facilities or activities include generators of electrical power and industrial establishments such as refineries, tanneries, paper or pulp mills and chemical plants. The proposed rule would not apply to facilities or activities that, although under the jurisdiction of the DEP, are regulated by other agencies through valid agreements. Class II injection wells would be included in this category. At this time we would like to open up for statements regarding the proposed rule. Mr. Freshorn. .

Mr. Freshorn: "I don't really have any statements to say right now. Except if there were questions it would be appropriate to ask at this time."

Chairman: "There are no questions at this time. Mr. Degen, would you like to speak at this time?"

Tom Degen: "My name is Tom Degen. I'm on the Board of Directors of the WV Environmental Council. I was also in one of the work groups. We dealt with solid waste, which is where my emphasis is. I have some written comments about specifics. I won't go over all of them now, but I do have some highlights I'd like to go over.

"Section 47-58-12, pro-emissions. I think the '/or' where it says 'and/or' needs to be removed. Otherwise the sentence appears to allow the contamination of ground water by any facility or activity with a valid permit. I feel this is contradictory with the provisions of the Groundwater Act. Also, it should be a permit that specifically allows the contamination of ground water, not just a permit.

"Under remediation, I feel the provision should have not just the authority, but the duty to order remedial actions as provided in the Groundwater Protection Act, Section 5E.

"I find that throughout the regulation much of the language is vague to the point of rendering the regulations unenforceable. Phrases and words like 'inspected regularly,' 'maintained regularly,' 'should,' 'appropriate measures,' 'may,' are not terms that provide a basis for enforcement action. These things should be spelled out.

"Along the same lines, there are references throughout to contamination 'prevention practices,' 'skill prevention practices,' 'run-off and/or infiltration control systems,' etc. . . . If there is a standardized body of practices like that, they should be referenced. Otherwise, you don't really know what's being talked about here. If there is not a standardized body that can be referenced, then it should developed.

"There isn't enough detail in these regulations for an applicant or an operator to really know how to comply. Section 5.7.4 mentions, well actually it doesn't mention, I feel their should be requirements for review and approval of the ground water protection practices and the BMPs. To issue ground water certification is meaningless if the agency doesn't review the BMPs and ground water protection programs and issue some kind of approval.

"In Section 6.1.2, I assume here that it is referring to, among other things, coal combustion byproduct's surface impoundments. If that's true, I feel they're fairly inadequate, even though I understand the regulations which are more protective of ground water could be applied. That would be Title 47, Series 38, the solid waste regulations. But even in those regulations, coal combustion byproduct's facilities are not subject to the same requirements as other solid waste facilities.

"In the Groundwater Protection Act, Subsection H of Section 5, states that E, F and G of the Groundwater Protection Act 'shall not apply to coal extraction and earth disturbing activities directly involved in coal extraction.' It should be remembered that a coal combustion byproduct facility is not a coal extracting activity or an earth disturbing activity directly involved in coal extraction.

"With this in mind, it is unclear why these facilities are regulated differently from other solid waste facilities. For example, in 5.5.2AH in the Title 47 Series 38 regulations, coal combustion byproduct's facilities are exempted from the provisions of Section 483CB, which are the liner requirements for surface impoundments. They are also not subject to any of the ground water monitoring requirements.

"I feel this is irresponsible. Without ground water monitoring wells, how will it be known these impoundments do not need to meet the same requirements that other solid waste facilities must meet? I think I'll leave off the specifics right now.

"I also want to address the process. I was a member of one of the work groups. I want to discuss some of the problems I had with the work group. I was in another work group which had a secretary of minutes. This work group had no secretary, no minutes, no record. Reports came out of the committee that were not seen by the other members of the committee, voted on and approved, like minutes would be.

"As a volunteer, I felt I was at a distinct disadvantage. I have to leave my work and miss pay to go down and then I have to pay gas, phone, meals out of my pocket. So I'm paying twice to participate in this project.

"I've been in other work groups where compensation was offered and expenses. I was invited to be on the work group to help develop practices that would eventually be formulated under regulations. Yet when I submitted comments on the drafted solid waste regulations, I was told we weren't going to address them. I don't feel that's appropriate. I feel that was the perfect time and place to address those regulations.

"Our group did not finish at the last meeting we had. We hadn't finished going over comments that another member and myself had submitted, yet another meeting was not called. I didn't even receive notices the regulations were promulgated and out to public notice. I found out on my own, more or less by accident, and had to ask for a copy of the regulations.

"I guess in summary, the first person that says the environmentalists had input into this process is going to get a bit of an argument from me. I feel we were given just enough input so that someone could say that, but we really don't feel that the input was really seriously considered. Thank you."

Chairman: "Mr Yasse. . ."

David Yasse: "Again I'm Dave Yasse here on behalf of the WVMA. The WVMA believes the DEPs proposed ground water protection regulations are a reasonable attempt to set standards for facility design or activities which will prevent ground water contamination. However, the WVMA does have some concerns about the rule.

"First and foremost, it is somewhat confusing as drafted. We would appreciate clarification of, for example, the application of Sections 8, 9 and 10. Are the intended to imply the facilities which

are not electric generating stations or industrial establishments or do they apply to new types of sources at those facilities which are not currently covered by the regulations? This needs to be clarified somewhat before the WVMA may comment on the extent and scope of the sections.

"Another problem that is presented is difficulty in determining what constitutes contamination under the rule. Under the Act we believe that existing natural background water quality is to be protected. And therefore, any discharge which does not increase the natural concentration of a constituent in ground water should not be considered contamination.

"Furthermore, increase of a constituent above natural background levels should not be considered contamination if it is allowed by a permit, deviation or variance, as provided by the act.

"The WVMA believes that the definition of industrial establishment, which establishes the scope of the facilities which are covered by the act, should be similar to the language used in the act itself. By defining industrial establishment in terms of facilities and activities which may adversely affect ground water, which are not otherwise regulated by the DHHR or the department of agriculture. The DEP will be extending its jurisdiction to the limits allowed by the act without exceeding those limits.

"I would contrast the DEP's definition which extends DEP's authority to any activity which causes a waste, which would include our houses.

"We encourage putting BMPs and Groundwater Protection Plan requirements together in the same section to eliminate redundancies and make the GPP the centerpiece of the DEP's Groundwater Protection Program.

"The motivation for prevention of ground water contamination is already provided by the Act. A means to accomplish it should be left to each facility through the use of the GPP. There are already many ground water protections in place as a result of the Underground Storage Tank Act, Spill Prevention Control Countermeasures Program, NPDES program, RICRA and the Solid Waste Program, just to name a few.

"Each of these requires BMPs or design standards as part of those regulations in order to prevent ground water contamination. The GPP should be used to fill in the gaps in the coverage already provided by those acts, depending on what requirements already apply to each facility. There is no need for a regulation which attempts to duplicate. It may actually contradict the requirements of those environmental programs.

"We do have some concerns about the specifics of the regulation that's been put forth. We will address those in written comments. We

are basically looking for a consolidation and a different grouping to make the regulations clearer and more easily applied. We also will be proposing an expressed ground water monitoring section which would provide authority for the director to require ground water monitoring where he believes it is appropriate.

"As I say, we will be filing written comments tomorrow. We look forward to working with the DEP further on this rule. Thank you."

Chairman: "Would anyone else like to make a statement concerning the proposed practices and regulations? If not, the agency will be receiving comment until 4 o'clock tomorrow afternoon on both the civil administrative penalties and the proposed practices regulation. At this time I would like to close the statement portion of the hearing and representatives of DEP's OWR will remain here to answer your questions."

WEIRTON
STEEL CORPORATION

Gene P. Current
Manager, Environmental Control
304/797-2394

RECEIVED
JUL 29 1992
Water Resources
Division

July 28, 1992

Laidley Eli McCoy, Chief
Water Resources Section
Division of Environmental Protection
Department of Commerce, Labor and Environmental Resources
1201 Greenbrier Street
Charleston, West Virginia 25311

Attention: Patrick Campbell

Re: Comments on the Proposed West Virginia Regulations
to Implement the Groundwater Protection Act

Dear Messrs. McCoy and Campbell:

Weirton Steel Corporation ("Weirton"), an integrated steelmaking facility located in Weirton, West Virginia, hereby submits comments with respect to the proposed Groundwater Protection Regulations ("proposed groundwater protection rules"), which were public noticed on June 24, 1992. Comments are also provided on the proposed Assessment of Civil Administrative Penalties' Regulations ("proposed penalty rules").

INTRODUCTION

In general, Weirton supports the West Virginia Division of Environmental Protection ("the Division") in its development of regulatory standards to prevent the degradation of groundwater. However, Weirton has specific concerns with the timing, as well as the scope, of these regulations.

First, from a timing standpoint, Weirton believes that the Division has put the cart before the horse by proposing groundwater protection practices before the groundwaters of West Virginia are even classified according to their current and potential uses and before groundwater standards to maintain the current, or attain the potential, uses are established. Weirton strongly recommends that the Division delay the promulgation of its proposed groundwater protection rules and first concentrate on classifying groundwaters throughout the State by use and developing groundwater standards for each type of use. Once these use classifications and groundwater standards are in place, we recommend that the Division repropose amended groundwater protection rules that will help ensure that



groundwater quality is preserved (or, in appropriate cases, restored) and that, at a minimum, address all concerns raised in these comments. The Division should promulgate groundwater protection practices that apply only in areas of the State where groundwater has been identified as a significant, usable resource and is likely to be degraded. The monitoring of all aquifers and remediation to drinking water standards, without regard to cost and regardless of their potential for ever being used as a source of drinking water, is a misappropriation of scarce resources that the State of West Virginia cannot afford.

Regulations establishing groundwater use classifications, numerical standards, points of application and remediation procedures can either create a climate favorable for future economic development or encourage new business to move to greenfield sites thereby abandoning previously impacted industrial areas and exposing pristine aquifers to potential contamination. Inflexible groundwater regulations will make it difficult to convince entities that investments in existing and/or new facilities in West Virginia make good business sense.

Second, as to the scope of the regulations, Weirton believes that many of the groundwater protection rules proposed for facilities that generate electric power should apply to other industries as well, including the steel industry. In fact, many West Virginia companies, including Weirton, own and operate their own electric power plants. Under the proposed groundwater protection rules, Weirton would have to comply with the groundwater protection practices at Section 47-58-6, which apply to facilities that generate power, as well as the groundwater protection practices at Section 47-58-5, which apply to industrial establishments. In addition, Weirton believes that the Division's development of groundwater protection practices should concentrate on all types of activities that have the potential to contaminate groundwater and include other sources, such as agricultural, municipal and recreational activities, so that the full impact of such a program on all aspects of life in West Virginia can be evaluated.

Further, Weirton believes that the Division has failed to adequately estimate the economic impact that the proposed groundwater protection rules could have on the regulated community. The Division's conclusion that these costs are minimal and will be more than offset by avoiding potential remediation efforts appears to be predicated on the unrealistic position that all groundwater in the State is pristine, regardless of the existing and potential uses and conditions. At a minimum, the Division must recognize that the cost of complying with the proposed groundwater protection practices will be significant and will be passed on to the citizens of West Virginia directly through the shutdown of industrial facilities and the resultant loss of jobs and/or indirectly through higher prices for goods and services. Groundwater standards and practices should not impede property transfers or discourage the economic development of previously impacted property in heavily industrialized areas.

Steel mills typically occupy hundreds of acres of land that have been the site of industrial activity since the turn of the century. The application of stringent groundwater standards and protection practices across the board will place West Virginia steel companies at a competitive disadvantage with other steel companies outside of the State.

Finally, because the steel industry manages large quantities of raw materials and generates low toxicity wastes, it has compiled extensive data on the characteristics of such materials and wastes and is in a position to manage them

onsite in a manner that is protective of human health and the environment. Many of the low toxicity wastes currently are, or in the future may be, reused by the generating industry (e.g., mill scale and slag) or by another industry. If promulgated as proposed, the groundwater protection rules would impede waste minimization initiatives by discouraging the regulated community from managing wastes onsite prior to being reused, recycled and/or recovered onsite or offsite. The rules would also impede the steelmaking process by making raw materials management virtually impossible.

Weirton also has the following specific comments on portions of the proposed groundwater rules:

TITLE 47, SERIES 58: GROUNDWATER PROTECTION REGULATIONS

1. Section 47-58-2. Definitions

Some additional terms, which appear throughout the proposed groundwater regulations but are not defined, should be defined in this section of the proposed groundwater rules. At a minimum:

The term "contaminants" should be defined to exclude specific constituents present in raw materials and low toxicity, nonhazardous wastes, including wastewaters.

The term "innocuous" should be defined to include all low toxicity, nonhazardous wastes, including wastewaters.

The term "substantive change" should be limited to activities or operational modifications that are likely to have a negative impact on a usable groundwater source.

a. Section 47-58-2.6. "Naturally Occurring Substance"

Weirton recommends that the "naturally occurring substance" definition be expanded to include other naturally occurring substances that are commonly managed at steelmaking facilities (e.g., limestone, iron ore), including all raw materials. In addition, the scope of the term "naturally occurring substance" should be expanded to include low toxicity, nonhazardous wastes (e.g., slag) that currently are, or in the future may be, reused, recycled or recovered by the generating industry or by another industry.

2. Section 47-58-5. Groundwater Protection Practices For Industrial Establishments

As discussed above, Weirton believes that the Division should first focus on identifying the quality of groundwaters throughout the State and the existing and potential uses for groundwaters throughout the State. Second, the Division should establish specific groundwater standards for each designated use. Groundwater protection practices should be proposed and promulgated only after the Division obtains a clear picture of the quality of groundwaters throughout West

Virginia, and groundwater protection practices should only apply in areas of the State where groundwater has been identified as a significant, usable resource.

Protection practices for all activities that have the potential to contaminate groundwater, such as agricultural, municipal and/or recreational activities, should also be proposed and promulgated. The majority of industrial facilities have a lesser potential to contaminate groundwater than these other sources. In addition, the groundwater protection practices for industrial establishments should be modeled after the criteria at Section 47-58-6 of the proposed groundwater rules, which apply to facilities that generate electric power.

In general, regardless of the type of activity or facility, any requirement to install a groundwater monitoring well(s) and/or conduct groundwater remediation should be based upon proven risk assessment techniques applied on a case-by-case basis rather than by applying the most stringent set of criteria in all cases. Existing and potential groundwater uses and quality must also be evaluated to properly document the need for and goals of any forced remediation program.

**a. Section 47-58-5.2. Outside Material Storage Areas
(Coal, Raw Materials, etc.)**

Groundwater monitoring wells should not be required for outside material storage areas managing "naturally occurring substances," as well as any other raw materials or low toxicity nonhazardous wastes, unless the agency can demonstrate that: (1) there is an imminent threat of harm to human health and the environment outside of the facility property boundary; and (2) there are no existing groundwater monitoring wells onsite that can be used to provide samples representative of groundwater conditions within the facility property boundary.

b. Section 47-58-5.3. Loading and Unloading

Because non-liquid materials, including wastes, can be readily contained and cleaned up and, therefore, do not pose a threat to groundwater quality, spill prevention and control facilities and procedures for loading and unloading operations should only apply to the management of liquids.

**c. Section 47-58-5.4. Wastewater Impoundments
(Holding, Storage, Equalization, Treatment, etc.)**

Wastewater impoundments should be evaluated under the comprehensive groundwater protection plan process as described at Section 47-58-6.2 of the proposed rules, which is applicable to facilities that generate electric power. In addition, groundwater monitoring wells should not be required for wastewater impoundments, unless the agency can demonstrate that: (1) there is an imminent threat of harm to human health and the environment outside of the facility property boundary; and (2) there are no existing groundwater monitoring wells onsite that can be used to provide samples representative of groundwater conditions within the facility property boundary.

d. Section 47-58-5.5. Best Management Practices ("BMP") Plans

The proposed requirements at Section 47-58-5.5 should be substantially revised to be consistent with the BMP Plan requirements proposed at Section 47-58-6.2, which apply to facilities that generate electric power. At a

minimum, the BMP Plan requirements should only address groundwater. The reference to surface water should be deleted. Because the regulated community is already required to follow the State BMP Plan for construction activities, references to these activities should be deleted from this Section of the proposed groundwater protection rules. In addition, the BMP Plan for groundwater protection should not address equipment cleaning and maintenance activities that are conducted inside buildings because such activities are unlikely to affect groundwater quality.

e. Section 47-58-5.6.

In order to ensure consistency throughout each industry and among different industries in West Virginia, we recommend that site-specific groundwater protection plan requirements be listed in each industrial establishment's water permit and triggered at the time of permit renewal. However, this should be done after the Division has promulgated groundwater uses and standards.

f. Section 47-58-5.7. Implementation Schedule

As discussed above, in order to ensure consistency throughout each industry and among different industries in West Virginia, we recommend that the implementation schedule for site-specific groundwater protection plan requirements be included in the industrial establishment's water permit at the time of reissuance. This would give the Division and the permittee an opportunity to exchange information regarding the need for groundwater protection and how it can best be implemented.

g. Section 47-58-5.8. Impoundment Closure Requirements

i. Section 47-58-5.8.1.

Consistent with the provision at Section 47-58-6.3.2, which applies to facilities that generate electric power, and in an attempt to advance pollution prevention initiatives, the regulations should provide that:

All solids, sludges, etc. should be properly disposed of ~~in a landfill~~ or reused in accordance with the Solid Waste Management Regulations.

ii. Section 47-58-5.8.2.

The term "innocuous" should be specifically defined at Section 47-58-2 to include all low toxicity, nonhazardous wastes, including wastewaters.

iii. Section 47-58-5.8.3.

Consistent with the provision at Section 47-58-6.3.4, which applies to facilities that generate electric power, the regulations should provide that:

Impoundments should be filled in, graded and leveled to the maximum extent possible including, where practicable, filling with soils or other material approved by the director, capped if the director determines necessary, and vegetated.

iv. Section 47-58-5.8.4.

As previously discussed, groundwater monitoring requirements should not be triggered until the Division has classified groundwaters throughout the State by use and developed groundwater standards for each use designation. Once all of these standards are in place, assuming groundwater monitoring is required, groundwater monitoring should not continue beyond such time as the industrial establishment can demonstrate with analyses from a maximum of four sampling events over a one-year period that groundwater quality has not degraded over such period. A statistical method should be used for determining whether degradation has occurred.

h. Section 47-58-5.9. Site Selection Criteria

The relocation of operations from shallow groundwater zones or karst areas within industrial establishments should only be required if such relocation is economically practicable and there is an imminent threat of harm to human health and/or the environment.

i. Section 47-58-5.10. Pipelines and Pumps

i. Section 47-58-5.10.2.

Pipelines managing sanitary wastewaters and/or innocuous process wastewaters should not be subject to the leak detection and secondary containment requirements. In addition, these requirements should not apply to new pipeline that is excluded from regulation under the underground storage tank program of the U.S. Environmental Protection Agency ("federal EPA") at 40 C.F.R. Part 280.

ii. Section 47-58-5.10.3.

Industrial establishments should be afforded an opportunity to use unlined ditches as primary conveyances when such ditches manage inert and innocuous wastewaters.

j. Section 47-58-5.11. Sumps and Tanks

i. Section 47-58-5.11.1.

Consistent with the provision at Section 47-58-6.6.1, which applies to facilities that generate electric power, an industrial establishment should be able to implement a manual inspection program (e.g., every forty-eight hours), in lieu of installing a leak detection system, for sumps and tanks that are installed above ground.

ii. Section 47-58-5.11.2.

The list of concerns that would favor the installation of sumps and tanks underground should be expanded to include aboveground space limitation concerns.

k. Section 47-58-5.12. Diking and Spill Containment

i. Section 47-58-5.12.1.

The term "contaminants" should be specifically defined at Section 47-58-2 to exclude constituents present in raw materials and low toxicity, nonhazardous wastes, including wastewaters.

ii. Section 47-58-5.12.2.

The language "appropriate to" should be changed to "commensurate with."

3. Section 47-58-6. Criteria Applicable to Facilities
Who Generate Electric Power

As previously discussed, many West Virginia companies, including Weirton, own and operate their own power plants. Under the proposed groundwater regulations, Weirton would have to comply with the groundwater protection practices at Section 47-58-6 and the groundwater protection practices at Section 47-58-5, which apply to industrial establishments. As discussed above in the comments on the groundwater protection standards for industrial establishments, many of the standards for facilities that generate electric power are quite different than the standards for industrial establishments. Weirton believes that, instead of the standards proposed for industrial establishments, many of the standards proposed for facilities that generate electric power should apply to other industries as well, including the steel industry.

a. Section 47-58-6.1. Outside Material Storage Areas
(Coal, Raw Materials, Loading, Unloading, etc.)

Groundwater monitoring wells should not be required for outside material storage areas managing "naturally occurring substances," as well as any other raw materials or low toxicity, nonhazardous wastes, unless the agency can demonstrate that: (1) there is an imminent threat of harm to human health and the environment outside of the facility property boundary; and (2) there are no existing groundwater monitoring wells onsite that can be used to provide representative samples of groundwater conditions within the facility property boundary.

i. Section 47-58-6.1.2. Wastewater Impoundments (Holding,
Storage, Equalization, Treatment, etc.)

Groundwater monitoring wells should not be required for wastewater impoundments, unless the agency can demonstrate that: (1) there is an imminent threat of harm to human health and the environment outside of the facility property boundary; and (2) there are no existing groundwater monitoring wells onsite that can be used to provide samples representative of groundwater conditions within the facility property boundary.

b. Section 47-58-6.2. Groundwater Protection Plan

i. Section 47-58-6.2.2.

Because the regulated community is already required to follow the State BMP Plan for construction activities, references to these activities should be deleted from this Section of the proposed groundwater protection rules. In addition, the BMP Plan for groundwater protection should not address equipment cleaning and maintenance activities that are conducted inside buildings because such activities are unlikely to affect groundwater quality.

ii. Section 47-58-6.2.3.

In order to ensure consistency from facility to facility in West Virginia, we recommend that the comprehensive groundwater protection plan requirements be listed in each facility's water permit and be triggered through the Division's existing water permitting programs at the time of permit renewal. However, this should be done after the Division has promulgated groundwater uses and standards. This would give the Division and the permittee an opportunity to exchange information regarding the need for groundwater protection and how it can best be implemented.

c. Section 47-58-6.3. Impoundment Closure Requirements

i. Section 47-58-6.3.5.

As previously discussed, groundwater monitoring requirements should not be triggered until the Division has classified groundwaters by use throughout the State and developed groundwater standards for each use designation. Once all of these standards are in place, assuming groundwater monitoring is required, groundwater monitoring should not continue beyond such time as the facility can demonstrate with analyses from a maximum of four sampling events over a one-year period that groundwater quality has not degraded over such period. A statistical method should be used for determining whether degradation has occurred.

d. Section 47-58-6.5. Pipelines and Pumps

i. Section 47-58-6.5.2.

Pipelines containing sanitary wastewaters and/or innocuous process wastewaters should not be subject to the leak detection and secondary containment requirements. In addition, these requirements should not apply to new pipeline that is excluded from regulation under the federal EPA's underground storage tank program at 40 C.F.R. Part 280.

4. Section 47-58-8. Criteria Applicable to New Facilities or New Activities Not Specified in Sections 5, 6, 7, 14, or 15

As discussed above, Weirton believes that the Division should first focus on identifying the quality of groundwaters throughout the State and the existing and potential uses for such groundwaters. Second, the Division should establish specific groundwater standards for each designated use. Groundwater protection

practices for new facilities or new activities should be proposed and promulgated only after the Division obtains a clear picture of the quality, as well as existing and potential uses, of groundwaters throughout West Virginia. Groundwater protection practices should apply only in areas of the State where groundwater has been identified as a significant, usable resource.

Further, regardless of the type of activity or facility, any requirement to install a groundwater monitoring well(s) and/or conduct groundwater remediation should be based upon proven risk assessment techniques applied on a case-by-case basis rather than by applying the most stringent set of criteria in all cases.

a. Section 47-58-8.1.

A groundwater monitoring well(s) should not be required if an existing well(s) on the facility property can provide samples that would be representative of background groundwater quality. In addition, any requirement to install a groundwater monitoring well(s) should be based upon a review of the results of a thorough site-specific risk assessment.

i. Section 47-58-8.1.3.

Weirton recommends that the "naturally occurring substance" definition at Section 47-58-2.6 of the proposed groundwater protection rules be expanded to include other naturally occurring substances that are commonly managed at steelmaking facilities (e.g., limestone, iron ore), including all raw materials. In addition, the scope of the term "naturally occurring substance" should be expanded to include low toxicity, nonhazardous wastes (e.g., slag) that currently are, or in the future may be, reused, recycled or recovered by the generating industry or by another industry.

ii. Section 47-58-8.1.4.

A facility should be exempt from any requirement to employ runoff and infiltration control systems for the bulk storage of naturally occurring substances unless the Director determines otherwise. Such systems should only be required on a case-by-case basis after a full evaluation of the existing and potential uses of the potentially affected groundwater.

b. Section 47-58-8.2. Pipelines and Pumps

Pipelines containing sanitary wastewaters and/or innocuous process wastewaters should not be subject to the leak detection and secondary containment requirements. In addition, these requirements should not apply to new pipeline that is excluded from regulation under the federal EPA's underground storage tank program at 40 C.F.R. Part 280.

c. Section 47-58-8.3. Sumps and Tanks

The groundwater protection requirements for underground storage tank regulated sumps and tanks should be no more stringent than the federal EPA's underground storage tank standards at 40 C.F.R. Part 280.

5. Section 47-58-9. Criteria Applicable to Existing Facilities or Existing Activities Not Specified in Sections 5, 6, 7, 14, or 15

a. Section 47-58-9.1.

The requirements at Section 47-58-8 should only apply to existing facilities or activities if a "substantive" change in activities or a "substantive" operational modification is planned. A change in activities or an operational modification should be defined as "substantive" if it is likely to have a negative impact on a usable groundwater source.

b. Section 47-58-9.2.

In some cases (e.g., where the groundwater is not usable), an existing facility or activity that is contaminating groundwater should be permitted to continue operating, provided the facility can show that its operations are not contributing to the further degradation of the groundwater.

6. Section 47-58-11. Impoundment Closure Requirements Not Specified in Sections 5, 6, 7, 14, or 15

a. Section 47-58-11.2.

The term "innocuous" should be specifically defined at Section 47-58-2 to include all low toxicity, nonhazardous wastes, including wastewaters.

b. Section 47-58-11.4.

As previously discussed, groundwater monitoring requirements should not be triggered until the Division has classified groundwaters by use throughout the State and developed standards for each use designation. Once all of these standards are in place, assuming groundwater monitoring is required, groundwater monitoring should not continue beyond such time as the industrial establishment can demonstrate with analyses from a maximum of four sampling events over a one-year period that groundwater quality has not degraded over such period. A statistical method should be used for determining whether degradation has occurred.

7. Section 47-58-13. Remediation

a. Section 47-58-13.1.

i. Section 47-58-13.1.3.

As discussed above, groundwater monitoring requirements should not be triggered until the Division has classified groundwaters by use throughout the State and developed groundwater standards for each use designation. Once all of these standards are in place, assuming groundwater monitoring is required, the parameters specified by the Director for monitoring during the remedial operation must be selected based on information collected regarding historic and current activities conducted at the site of the cleanup and limited to relevant properties and constituents that are reasonably expected to be present.

Further, Weirton has the following specific comments on portions of the proposed penalty rules:

TITLE 47, SERIES 56: ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

1. Section 47-56-2. Definitions

a. Section 47-56-2.7. "Notice of Dismissal"

A "Notice of Dismissal" should be characterized as constituting a dismissal "with prejudice."

2. Section 47-56-5. Hearings and Appeals

a. Section 47-56-5.1. Right to Informal Hearing

If an informal hearing is waived, consistent with the provision at Section 47-56-5.6, the regulations should provide that:

The assessment officer shall establish a schedule for payment of the administrative penalty based on all relevant factors highlighted in writing to the assessment officer prior to the expiration of the thirty-day period from the violator's receipt of the notice of civil administrative penalty.

b. Section 47-56-5.4. Written Decision

Any written decision dismissing the initial civil administrative penalty assessment should constitute a dismissal "with prejudice."

c. Section 47-56-5.5. Request for Formal Hearing

The thirty calendar day period for requesting a formal hearing should run from the violator's receipt of the written decision.

3. Section 47-56-6. Individual Civil Administrative Penalties

In general, Weirton believes that Section 47-56-6 of the proposed penalty rules should be deleted in its entirety. Civil administrative penalties should be imposed on individuals only in the most extreme circumstances. To the extent a civil penalty is imposed, the penalty should be determined on a case-by-case basis based upon specific facts. Inflexible formulas should not be used.

a. Section 47-56-6.4.

To the extent the rules contain an individual civil administrative penalty provision, if an informal hearing is waived, consistent with the provision at Section 47-56-5.6, the regulations should provide that:

The assessment officer shall establish a schedule for payment of the administrative penalty based on all relevant factors highlighted in writing to the assessment officer prior to the expiration of the thirty-day period from the individual's receipt of the notice of individual civil administrative penalty.

4. Section 47-56-7. Civil Administrative Penalty Calculation Procedures

Weirton believes that Section 47-56-7 of the proposed penalty rules should be deleted in its entirety. A rigid civil penalty formula is not appropriate for complex groundwater enforcement cases because these types of cases are best handled on a case-by-case basis. Further, in light of the breadth of the factors contained in the proposed penalty rules, Weirton believes that implementation of the rules will lead to the inequitable treatment of industrial facilities in West Virginia.

CONCLUSION

In light of the absence of water quality classifications and standards for the groundwaters of West Virginia, Weirton recommends that the Division delay the promulgation of its proposed groundwater protection rules and first concentrate on classifying groundwaters throughout the State and developing groundwater standards for each type of use. Once these use classifications and groundwater standards are in place, we recommend that the Division repropose amended groundwater protection rules that, at a minimum, address our comments. Further, we recommend the reproposal or promulgation of the proposed penalty rules once they have been revised to address our comments.

Weirton appreciates the opportunity to comment on the proposed groundwater protection rules and the proposed penalty rules and requests that the Division give these comments full consideration in the process of reproposing revised regulations and/or promulgating final regulations.

Sincerely,



Gene P. Current
Manager, Environmental Control



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virginia
highlands
conservancy

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Publishers of the Highlands Voice and the Monongahela National Forest Hiking Guide

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JUL 31 1992

DIVISION OF WATER RESOURCES
GROUND WATER OFFICE

July 28, 1992

Laidley Eli McCoy, Chief
DEP, Office of Water Resources
1201 Greenbrier Street
Charleston, WV 25311

RE: Groundwater Protection Act
Proposed Rules, Title 47,
Series 56, 58 and 59

Dear Eli,

My ever increasing work load at the clinic precludes my being at the public hearing on the proposed regulations implementing the Groundwater Protection Act for Civil Administrative Penalties (Series 56), Groundwater Protection Practices (Series 58), and Monitoring Wells (Series 59).

However, I do have several questions and observations on each of the proposals and submit the following three pages of comments on behalf of myself and the West Virginia Highlands Conservancy.

This is restating the obvious, but please know that WVHC, and I personally, remain intensely interested in the development and implementation of all phases of the Groundwater Protection Act.

Most disturbing to us at this point in time are indications in these DNR proposed regulations for groundwater protection practices and in the Water Resource Board proposed groundwater standards that we are backsliding from the intent of the Act where existing sources of pollution are concerned. It is, was, and always has been my understanding of those tortuous task force meetings that Section 4 of the Act contemplated the elimination of current polluting activities. Timing and extent of reducing levels of contamination back to drinking water standards was left open, and flexible language about basing the level of remediation on "practical" measures was painfully allowed in the final draft, but the words "no further contamination" clearly meant that existing facilities would be required make efforts to revise, retrofit, or to take some action to improve the situation.

Current proposals both from DNR and WRB appear to bless, condone and allow existing sites to continue polluting with little or no regard to requiring improvements at those facilities.

Sincerely
Cindy Rank
Cindy Rank, President

Groundwater Protection Regulations (Title 47, Series 56, 58 & 59)
Comments on behalf of W.V. Highlands Conservancy...July 28, 1992
By Cindy Rank, President, HC 1, Box 227, Rock Cave, WV 26234

Title 47 Series 58: Groundwater Protection Regulations

Section 5 According to the definition of "Industrial Establishment" in 2.4, coal waste piles, coal preparation plants, and other coal related facilities are to be regulated according to Section 5: Protection Practices for Industrial Establishments.

I participated in the coal workgroup and the language in Section 5 absolutely and unequivocally does not reflect the discussions and drafts that came out of that group. I include here as Attachment A the last draft of that workgroup (5pp). The language in proposed regulation 47-58-5 is totally unacceptable.

Section 6 I was also party to the electric power workgroup, and while the proposed language in Section 6 is indeed the language that was considered by our group, in final regulation form, and in the context of the overall regulation as proposed, the language stops short of what I thought we had worked through.

Proposed Section 6 reads as if there is no obligation to address groundwater pollution at existing facilities beyond evaluating their "potential" to release contaminants to the groundwater.

It was always my understanding that the evaluation process would involve a certain amount of time and that we therefore agreed to extend the time frame for assessing current conditions at existing facilities, but that at the end of that assessment process there would be a mechanism in place that would trigger "every reasonable effort" to "remove or mitigate the source of such contamination" where problems were identified.

Groundwater Protection Plans were to require procedures to prevent groundwater pollution at all future sites, but would also be applied to existing sites in a reasonable fashion in a reasonable time frame according to the specific nature of the facility and the problems associated with it.

The language of the first two sentences of Title 47 Series 58 Section 9.2 is much more to the point and expresses more clearly the intended meaning of 20A-5M-4(b) as it was hammered out during those most difficult Groundwater Task Force meetings that addressed standards of purity and quality.

Without directing some cleanup of current pollution at existing sites these regulations are inappropriate and unacceptable.

The intention of the Groundwater Protection Act was not to bless, condone or permit current levels of pollution but to identify existing sources of pollution, to adopt reasonable measures to remove or mitigate those sources, to prevent pollution at future sites, and to strive to reduce levels of contamination over time.

Section 9.2 Although this section allows for a generous amount of discretion on the part of the director, i.e. in providing schedules of compliance, evaluating the level of protection, etc., it, more than any other section of the proposed regulations, states most clearly the intent of the 1991 Groundwater Protection Act.

Similar language must be adopted for all facilities addressed in sections 5 and 6 of these regulations, e.g. add a new 6.1.1.b. which reads "Where evaluation of an existing facility shows that contamination is occurring, a schedule of compliance must be submitted by the facility or director and approved by the director whereby the facility or activity must retrofit or improve or discontinue existing systems, activities, or procedures to make them, to the satisfaction of the director, protective of groundwater. Furthermore the facility or activity may be directed to begin remedial actions."

Section 13

13.1.1. When talking in terms of "preferred" solutions, the use of permanent solutions to the maximum extent "possible" is more appropriate language than "practical" as now proposed. The word "preferred" already allows sufficient flexibility for any lawyer, wordsmith, or industry mogul.

13.1.2. "If active remedial measures are technically and economically feasible", cleanup actions should not rely at all on dilution and dispersion. Forget the "primarily" altogether if there is a feasible, workable alternative.

13.2. It is not altogether clear to me just what this section says, but I assume it means that if, in fact, any required remediation does not fully restore the quality of the groundwater, then the director may order the facility or activity to mitigate for the loss of use, or for any significant adverse impact to groundwater. In some instances the director should even be required to order that mitigation (including replacement where loss of use is involved).

Title 47 Series 56: Assessment of Civil Administrative Penalties

Section 3.2. This section prescribes the procedures and content of Notices of Violations. There should be added a new section 3.2.4 that reads "Suggested corrective actions to be taken and a compliance schedule setting forth a time frame for accomplishing these corrective actions."

Section 6 Individual Civil Administrative Penalties are appropriate enforcement mechanisms to protect the groundwater resources of the state and are wisely included in these regulations.

Title 47 Series 59: Monitoring Well Regulations

Section 2.7 A definition for "monitoring well" is missing. This is an interesting approach, to say the least, but is it not important to include a definition here for clarity in applying the rest of the regulation?

Section 2.8 "Monitoring Well Driller" is defined as an individual who engages in monitor well drilling...or who supervises such activities. This is not sufficient or acceptable. The definition must be limited to the responsible individual at the drilling site, not to someone who could supervise say, from her home in Rock Cave.

Section 4.1. This section requires that a certified monitor well driller be "on site", but if that site is large, eg. hundreds of acres, it is not sufficient to have the certified driller at one end while drilling proceeds at the other. The certified driller must be on the well site itself.

Section 4.10 Denial, suspension or revocation of a certification is required to be in writing, and is to state specific reasons for the action, but reasons for suspension, etc. are only mentioned in Section 4.5 where incorrect information on an application can lead to suspension, etc.

a) It is not clear if or what other actions on the part of the driller, i.e. failure to act in accordance with the requirements of the law or regulation, falsification of records, deliberate disregard for DEP/DNR/DOH directives, etc., are grounds for revocation or suspension.

b) The Regulations should also include provisions for other enforcement orders, action, fines and/or penalties that can be taken against non-compliant drillers.

Sections 4.12 and 7 I realize that we have a Groundwater law that bends over backwards to encourage interagency cooperation and coordination, but in these Water Resource/DNR/DEP rules there is apparently no accountability to Water/DNR/DEP for the quality or administration of the examination for certification or for the Administrative Due Process afforded persons aggrieved by enforcement of the regulation. Should there not be required some typical contractual agreement, MOU, etc. between Water and Health that spells out expectations, standards, requirements, etc.????

Section 4.12 It is unclear why 70% on the required examination would be sufficient to demonstrate a thorough knowledge of the requirements of the Groundwater Act or regulations. Perhaps the content of the examination or the methods of evaluating the results of that process should/could be clarified in the cooperative agreement suggested in the previous comment.

TITLE ??
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION

SERIES ??
GROUNDWATER PROTECTION ACT PROCEDURES

??-??-1. GENERAL.

1.1 Scope and Purpose. This rule establishes a series of practices which must be followed by any person who owns or operates facilities or conducts activities subject to the provisions of Chapter 20-5M-1 et seq. of the West Virginia Code and is subject to regulations by the Division of Environmental Protection.

1.2 Authority West Virginia Code 20-5M-5(d).

1.3 Filing date

1.4 Effective date

??-??-2. Definitions

2.1 "Practice" means any regulation, rule, policy, permit requirement, or other appropriate regulatory action which is protective of groundwater.

2.2 "Existing facility" means any facility that submitted an application to obtain a Chapter, 20, Article 5A, or a Chapter 22A, Article 3 permit before six months after the effective date of these regulations, and is not defined as a new facility.

2.3 "New facility" means any facility that submits an application to obtain a Chapter 20, Article 5A, or a Chapter 22A, Article 3 permit six months after the effective date of these regulations.

2.4 "Director" means the Director of the Division of Environmental Protection or his duly authorized representative.

??-??-3. Groundwater Protection Practices subject to coal mining activities.

3.1 Groundwater protection practices contained in or created under the authority of Chapter 20, Article 5A, Chapter 22A, Article 3, and the legislative rules promulgated thereunder, were enacted in part to protect groundwater and therefore are incorporated into this rule. In cases where such legislative rules are more restrictive or is in conflict with these legislative rules, the more stringent rule shall apply.

3.2. Each facility shall prepare and submit a groundwater protection plan on the forms prescribed by the Director.

3.2.a. The plan shall detail what groundwater protection practices, procedures, methods, and equipment to be implemented or installed to prevent groundwater contamination from the facility, including the requirements of other statutory programs. The plan shall also detail, but not be limited to, the methods of spill detection, the procedures for timely cleanup, and the method of disposal, or treatment of the spilled material. Each plan shall contain a written commitment of manpower, equipment and materials required to expeditiously control and remove any spilled material. The plan shall designate a spill coordinator. Each plan shall identify and provide an inventory of sources or materials that may impact groundwater quality.

3.2.b. The plan shall also contain a groundwater monitoring program. The groundwater monitoring program shall assure that the facility and the groundwater protection practices are protective of groundwater. The program shall specify the parameters to be monitored, the frequency of monitoring, and the frequency of reporting. All groundwater monitoring reports shall be submitted to the Director.

3.3. Protection practices applicable to new facilities.

3.3.a. New facilities shall be designed to be protective of groundwater.

3.3.b. New facilities shall provide sufficient groundwater information prior to facility operation, to determine representative background groundwater quality.

3.3.c. Impoundments which receive waste that may impact groundwater quality shall be designed, constructed,

and maintained in such a manner which will prevent contamination of groundwater.

3.3.d. Secondary containment is required for any process or storage activity in which materials are stored, or used that may impact groundwater quality. Such containment structures shall be adequately designed and constructed to contain for a time sufficient to allow removal and disposal without contamination of groundwater.

3.3.e. Submit a groundwater protection plan in accordance with Section 3.2.

3.4. Protection practices applicable to existing facilities.

3.4.a. Existing facilities shall take such action as necessary to prevent groundwater contamination. Each facility shall submit a demonstration to the Director no earlier than six months of the effective date of these regulations, and no later than the mid-term review date or the expiration date, whichever is earlier, of the Chapter 22A, Article 3 Permit.

3.4.b. Where it can be demonstrated, by groundwater monitoring, that an existing facility design is such that no groundwater contamination is occurring, continued groundwater monitoring is all that is required. Provided that if major alterations occur to the facility or if activities change they shall be accomplished in a manner which complies with Section 3.3. Furthermore, notification to the Director must be made in writing, ninety days prior to any operational modifications that may impact the groundwater quality.

3.4.c. Where it can not be demonstrated, by groundwater monitoring, that an existing facility design is such that groundwater contamination is not occurring, the facility shall submit a groundwater protection plan in accordance with Section 3.2. The groundwater protection plan shall be submitted within one hundred twenty days of notification by the Director.

3.4.d. Where it is determined by the Director, that an existing facility is contaminating groundwater the facility must submit a groundwater protection plan, in accordance with Section 3.2, along with a groundwater remediation plan upon notification by the Director. The groundwater remediation plan shall detail improvements to existing systems, activities, or procedures to make them

protective of groundwater. The Director may provide a schedule of compliance for completing the work if necessary. Upon notification from the Director, the facility must begin remedial actions pursuant to Section 4.

4. Remedial actions.

4.1. The division has the authority to take remedial actions or to order persons to conduct remedial actions. The division encourages agreements for investigation and cleanups in appropriate cases. These agreements can be agreed orders or consent decrees.

4.2. Upon a facility being ordered to take remedial action the following guidelines shall be complied with at a minimum;

4.2.a. Treatment shall be used to reduce the levels to the maximum extent practicable.

4.2.b. Groundwater containment, including barriers or hydraulic control through groundwater pumping or both, shall be implemented to the maximum extent practicable to avoid lateral and vertical expansion of the groundwater volume affected by the substance.

4.2.c. Source control measures shall be implemented to prevent or minimize additional releases to the groundwater.

4.2.d. Adequate groundwater monitoring shall be conducted to demonstrate control and containment of the substance.

4.2.e. The potentially liable person shall provide an alternate water supply or treatment for persons with water supplies rendered unusable by the releases.

4.2.f. If sufficient justification is demonstrated, the operator may request, from the director, an evaluation of the practicability of achieving groundwater cleanup levels by the currently employed system at any time.

4.2.g. If background quality cannot be determined on site, and the facility owner/operator can demonstrate beyond a reasonable doubt that certain constituents found in groundwater underlying the site were not used, handled, manufactured or stored on the facility, then the Director

may waive the facility's remediation liability for the
constituents in question.

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July 29, 1992

L. Eli McCoy, Ph.D
Chief, Water Resources Section
West Virginia Division of Natural Resources
1201 Greenbrier Street
Charleston, WV 25311

RECEIVED
JUL 29 1992
WATER RESOURCE SECTION

Re: Civil Administrative Penalties
Regulation 47 C.S.R. 56

Dear Eli:

Enclosed please find the original and three copies of the West Virginia Manufacturers Association's comments on the Division of Environmental Protection's proposed Assessment of Civil Administrative Penalties Regulation, 47 C.S.R. 56.

Please contact me if you have any questions.

Sincerely yours,

David Yaussy
David L. Yaussy

DLY:shb

Enclosures

**COMMENTS REGARDING
PROPOSED ASSESSMENT OF CIVIL
ADMINISTRATIVE PENALTIES REGULATIONS**

47 C.S.R. 56

**SUBMITTED ON BEHALF OF
WEST VIRGINIA MANUFACTURERS ASSOCIATION**

Prepared by

**ROBINSON & McELWEE
P. O. Box 1791
Charleston, WV 25326
(304) 344-5800**

**COMMENTS OF THE WEST VIRGINIA MANUFACTURERS
ASSOCIATION ON PROPOSED ASSESSMENT OF CIVIL
ADMINISTRATIVE PENALTIES REGULATION
47 C.S.R. 56**

I. Introduction.

The West Virginia Manufacturer's Association (WVMA) is a statewide trade organization representing approximately 215 businesses and industries in West Virginia. The membership reflects a broad-based constituency from all aspects of the manufacturing sector of the State's economy. The WVMA has been integrally involved for a number of years in commenting on all aspects of state environmental rules and regulations. Based on our review of the proposed civil administrative penalty regulations filed by the former Division of Natural Resources pursuant to the West Virginia Groundwater Protection Act ("the Act"), the WVMA continues its constructive role by offering the comments which are set forth below.

II. Comments.

A. Duplication Of Civil Administrative Penalties.

The Act clearly gives the Director of the Division of Environmental Protection (DEP) the authority to assess administrative penalties, but it is silent as to how other administrative penalty regulations apply. If groundwater contamination occurs at a solid waste facility, is the owner of that facility subject to two penalties and two penalty procedures, once under 47 CSR 4, and again under this rule? The WVMA would strongly oppose any duplicate penalty policy, and urges the DEP to resolve this issue by amending all civil administrative penalty regulations to provide that only one such penalty may be assessed by the DEP for any violation.

B. Section 2.3. - Definition of "Civil Administrative Penalty Referral."

The term "civil administrative penalty referral" is defined by the proposed regulations as follows:

. . .a written document that includes the observations made by the inspector relevant to the seriousness of the alleged violation and any good faith efforts made to comply with the applicable requirements as well as any other appropriate factors established by these regulations.

It is clear from a consideration of this proposed definition that, unless the regulations establish explicit "other appropriate factors," the DNR will be precluded from considering them in assessing civil administrative penalties. One of the factors that should be considered is the alleged violator's ability to pay the penalty assessed by the Director et al. The final regulation should allow the downward adjustment of a proposed civil administrative penalty when the violator either cannot afford to pay the penalty prescribed by the policy or when a payment of all or a portion of the penalty would preclude the violator from achieving compliance or from carrying out remedial measures which were deemed necessary by the Director et al.

C. Section 2.4. - Definition of "Director et al."

The definition of "Director et al." should be changed to reflect the fact that the position of Director of the West Virginia Division of Natural Resources no longer exists and that responsibility for the former Division of Natural Resources now resides with the Director of the Division of Environmental Protection. Furthermore, the words "or their authorized representative(s)" should be deleted, since only a Director is allowed assess administrative penalties under W. Va. Code § 20-5M-10.

D. Section 2.8. - Definition of "Notice of Violation."

Some limit should be placed upon the amount of time that an inspector has to issue a written notification of violation. The WVMA suggests that "Notice of Violation" mean "a written notification provided to an alleged violator by the inspector within 15 calendar days of the date of inspection."

E. Section 2.10. - Definition of Violator.

The Act refers to an "alleged violator," and this term should be used throughout the penalty provision instead of the term "violator." This change is more than a matter of semantics, since there is no violation until it has been established through the appropriate administrative process. Consequently, the WVMA encourages the DEP to refer to "alleged violator" rather than "violator".

F. Section 3.1. - Notices of Violation.

This proposed rule should deal only with the manner in which a civil administrative penalty is assessed after a violation is alleged. The acts or omissions which constitute violations are described in the Act and in other rules which set enforceable standards, authorize inspections and define violations. There is no need for giving an inspector "or other authorized representative of the Director et al." any additional power to issue notices of violation under this rule. Consequently, the WVMA urges that Section 3 be deleted. If it is not eliminated, some provision must be made for an opportunity to appeal the notices of violation which are authorized by this section.

In addition, if Section 3 is retained in the rule, a preassessment conference should be allowed subsequent to the issuance of a Notice of Violation but prior to the issuance of any civil administrative penalty assessment against the violator. Such a provision makes fundamental good sense from the standpoint of efficient enforcement and administrative economy. A preassessment conference, held between the violator, the inspector, and the assessment officer would give all parties concerned a clearer understanding of the issues involved and would allow for more appropriate tailoring of administrative penalties based on the facts of each individual case. Administrative efficiency would be served because fewer assessments would be appealed. The WVMA urges that a preassessment conference provision be included in the final rule.

G. Section 4. - Penalty Assessment Procedure.

The WVMA suggests that sections 4, 5 and 6 be rearranged to describe the penalty assessment process in a less fragmentary manner. When an assessment officer receives a notice of violation, he should review it in the manner provided for in section 4, calculate a recommended penalty, and provide the alleged violator with notice, by certified mail, of that recommendation and the alleged violator's right to an informal hearing. This notice should contain the information required by statute and set out in section 6.3. If the alleged violator does not request an informal hearing, the recommendation would be forwarded to the Director. If an informal hearing is held, as provided for in section 5, the assessment officer can renew or reduce his recommendation. In either event, once the Director receives the

assessment officer's recommendation, he would make a decision to issue, reduce or withdraw the penalty, and should give notice by certified mail of his decision and the alleged violator's right to appeal to the Water Resources Board within 30 days.

The process described above is presumably similar to that intended by the DEP. If so, the WVMA urges the DEP to restructure the rule in the manner described above so that it is easier to follow.

H. Section 4. - Assessment Officers.

The rule does not specify who will be designated the assessment officer. The WVMA does not believe it should be the inspector who issued the original notice of violation. Consequently, we urge the DEP to add the phrase "who shall be some person other than the inspector who issued the notice of violation" after the word "officer" in section 4.1.

I. Section 5. - Hearing and Appeals.

Section 5.1 provides that, assuming no informal hearing is requested by the violator, the notice of civil administrative penalty "shall become a final order" after the expiration of the twenty-day period provided for in the proposed rule and the civil administrative penalty then becomes due and payable. After due consideration of this language, the WVMA believes that this portion of the proposed regulation is contrary to the language of the Act, under which the authorization to assess civil penalties is given solely to the Director of the DEP. No provision is made in the Act for the delegation of this authority. We believe it was intended by this legislation that the DEP Director would expressly approve initial administrative penalty

assessment. By allowing a civil administrative penalty imposed by an assessment officer to become a final order (presuming that the assessment is not appealed through the hearing process by the violator as provided for by statute) without any further review by the Director, the statutory mandate of the Act is circumvented. Accordingly, the WVMA urges that appropriate procedures be grafted onto the final rule to ensure that all notices of violation are appropriately reviewed by the Director prior to their assessment.

J. Section 5.6 - Schedule of Payments.

The WVMA approves of allowing the assessment officer to establish a schedule for paying penalties. This allows flexibility in penalty payment, which may be crucial for smaller companies. The WVMA welcomes this reasonable action.

K. Section 7. - Civil Administrative Penalty Calculation Procedures.

Section 7 of the proposed regulations sets forth the procedures to be used by the Director in calculating a civil administrative penalty. Several factors are listed which are required to be taken into account by the Director in such a review process, including the seriousness of the alleged violation, negligence or good faith on the part of the violator, and any history of noncompliance by the violator. As previously discussed in these comments, the WVMA would urge that an "ability to pay" factor be included as part of the Director's consideration of the appropriateness of a civil penalty assessment.

While we generally agree with the types of factors to be considered in a civil penalty assessment (with the aforementioned request for inclusion of the

additional factor) the WVMA would urge that Section 7.3 relating to history of noncompliance be revised to clarify that past violations are considered on a site-by-site basis. Otherwise, if Company A has facilities at Point A and Point B, two geographically distinct locations, Company A's noncompliance history at its Point 1 facility could be used against Company A's Point 2 facility in a civil administrative penalty assessment. For this reason, the WVMA would urge that noncompliance history be considered only on a "by site" basis for civil administrative penalties to be assessed for that particular site.

L. Table A. Ratings for Deviation.

The subjective wording of Table A renders it nearly impossible for the violator to understand, with any degree of certainty, the meaning behind a facility's rating. It is unclear what is meant by the following phrases: "completed nearly all requirements," "some aspects of the requirements which were clearly not accomplished," and "requirements were completed in most, but not all, areas of the facility." Put simply, it is difficult, if not impossible, to translate the subjective adjectives "nearly all" "some" "clearly not" and "most, but not all" into objective, unbiased numerical ratings. There is clearly no way to translate this subjective verbiage into a numerical system. Tables B, D and E suffer from similar handicaps. Therefore, the WVMA strongly urges the creation of an enforcement checklist, with each discrete item of noncompliance to be assigned a numerical rating for such noncompliance. Based on the sum of the point totals for areas of noncompliance, a numerical rating could then be established. The same enforcement purposes would

be served and the regulated community would have a better understanding of the reason why civil penalties would or would not be assessed if this system was adopted.

M. Table C - Seriousness of Groundwater Protection Act Violation.

The Table C matrix would impose greater penalties for minor violations of the Act than are provided under similar matrices established for minor solid waste or hazardous waste violations. The WVMA urges starting out with smaller figures, such as a \$100 penalty for violation with no potential for harm and an insignificant deviation for requirements.

N. Table D. - Ratings for Negligence/Good Faith.

We urge the addition of a new criterion under Table E that allows consideration of the fact that the violator may have gone beyond the minimum requirements in bringing the facility into compliance. The WVMA believes that this is one of the best ways a regulated entity can demonstrate its good faith and desire to correct an improper situation that has been brought to its attention by the agency.

In addition, it is unclear, under Table D, how the assessment officer will know whether the violator "has or has not completed all actions to correct the violation". Furthermore, it is not clear at what point in time this consideration is to be taken into account. Does this anticipate a follow-up inspection of the facility before the assessment is made? Will notification by the violator that corrective action has been taken be sufficient to satisfy this demonstration? Some clarification of this point should be made in the regulations.

Table E. Negligence/Good Faith

With respect to Table E "Negligence/Good Faith", we note that the tables would arbitrarily allow no more than a 50% decrease in the penalty where there is an absence of negligence and the violator has expended "all possible effort to comply", whereas the tables would allow a 100% increase in the penalty where the violator has been negligent or failed to respond to a previous enforcement action. We submit that the DEP should take into account any good faith efforts to comply with the Act and allow a greater reduction of the penalty where there has not been egregious violations.

IV. CONCLUSION.

The West Virginia Manufacturers Association welcomes the opportunity to present these comments on the proposed Assessment of Civil Administrative Penalty regulations. The WVMA recognizes that these regulations contain several improvements over the civil administrative penalties imposed under the Solid Waste and Hazardous Waste Acts, and encourages this continuing evolution. We trust that our comments will be viewed as constructive in nature and directed toward the end of improving the enforcement programs under the Act.

Submitted this 29th day of July, 1992.

WEST VIRGINIA MANUFACTURERS ASSOCIATION

JUL 29 1992

Laidley Eli McCoy, Chief
Water Resources Section
WV Division of Environmental Protection
1201 Greenbrier Street
Charleston, West Virginia 25311

July 28, 1992

Attn: Patrick Campbell

Subject: JOINT COMMENTS OF THE WEST VIRGINIA COAL ASSOCIATION AND WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION TO PROPOSED GROUNDWATER REGULATIONS: ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES, C.S.R. §47-56-1 et seq.

Dear Mr. McCoy:

The West Virginia Coal Association and West Virginia Mining and Reclamation Association (the "Associations") are pleased to submit comments on the proposed regulations governing the assessment of civil administrative penalties promulgated pursuant to the West Virginia Groundwater Protection Act, W. Va. Code §20-5M-10. Although we are submitting a number of substantive and editorial comments to the proposed regulations, the Associations wish to congratulate the agency on the development of these regulations. It is the opinion of the Associations that, with modification, these regulations will form an equitable and effective groundwater protection program which is both protective of the environment and acceptable to industry, and the coal industry in particular.

With regard to the Associations' comments, the underlined language represents the Associations' proposed modifications and/or additions to the proposed regulations.

C.S.R. §47-56-2 Definitions

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 and any good faith efforts made to comply with applicable requirements as well as any other appropriate factors established by these regulations.

Comment: The proposed definition does not fully reflect the fact that the Groundwater Protection Act, W. Va. Code §20-5M-10(c), imposes a mandatory (i.e., "shall") duty to take into account the seriousness of the violation, any good faith efforts to comply, and

Mr. Laidley Eli McCoy, Chief
July 28, 1992
Page 2

other appropriate factors upon the official assessing any civil administrative penalty. The proposed definition should therefore be modified to make clear that the inspector must take these factors into account and must include them in the civil administrative penalty referral.

2.8 "Notice of Violation" means a written notification provided to an alleged violator by the Inspector within fifteen (15) calendar days of the date of inspection and/or determination of non-compliance with applicable statutes, rules, regulations, orders, or permit conditions of facilities or activities regulated under the Act.

Comment: The proposed definition of "Notice of Violation" contains no time frame within which the alleged violator should be given notice it is considered to be in violation of the Act by the inspector. The Federal and State Constitutions provide that a person shall not be deprived of life, liberty, or property, without due process of law. One of the rights implied by the due process clause is the right to timely notice of a determination that a person has allegedly violated the law and recitation of the charges against the person. Moreover, the proposed definition's lack of a time frame within which a notice of violation must be provided an alleged violator could allow an inspector to make a determination that a person is in violation of the Act and, by failing to promptly provide notice to the alleged violator, allow the alleged violation to continue unabated and also increase the possibility that evidence in the possession of either the agency and/or the alleged violator may become stale with the passage of time. Therefore, the term "Notice of Violation" should include a time frame within which the alleged violator must be provided with written notice of the violation. Fifteen calendar days is suggested since that is the time frame proposed by DNR in its regulations for the assessment of civil penalties under the West Virginia Hazardous Waste Management Act, W. Va. Code §20-5E-16 and the West Virginia Solid Waste Management Act, W. Va. Code §20-5F-6, to be codified at C.S.R. §47-4-1 et seq.

2.10 "Alleged 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.

Comment: The proposed definition is, in actuality, the definition of an alleged violator. No violation has yet been proven to exist.

Mr. Laidley Eli McCoy, Chief
July 28, 1992
Page 3

The Constitution states that a person is innocent until proven guilty. While a person may be accused of a violation, that accusation, in and of itself, does not constitute proof of a violation. Therefore, the proposed definition should be modified to clarify that point. If it is determined that a definition is still required for the term "violation" then the definition must be modified so that only those persons against whom a violation has been proven or who have admitted responsibility for a violation are included within that term.

C.S.R. §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 an alleged violator, or any other person, who the Director, et al., finds knowingly directed, authorized, ordered, or carried out a violation of the statute, rule, regulation, rule, or permit condition or who knowingly fails or refuses to follow an order from the Director, et al.

Comment: As an initial matter, the Associations believe §6 should be deleted from the proposed regulations in their entirety because the Groundwater Protection Act does not specifically authorize the director or other agency official to assess a civil administrative penalty upon individuals in addition to the civil administrative penalty assessed upon the actual violator itself. Rather the Act merely provides that:

Any person who violates any provision of this article . . . shall be subject to a civil administrative penalty to be levied by the director . . . Any administrative civil penalty assessed pursuant to this section shall be in lieu of any other civil penalty which may be assessed under any provision of this code for the same violation. No combination of assessments against any violator under this section may exceed \$25,000.00 per day of each such violation.

Mr. Laidley Eli McCoy, Chief
July 28, 1992
Page 4

W. Va. Code §20-5M-10(c). As defined, the term "person" clearly includes individuals. W. Va. Code §20-5M-3(h). However, the civil administrative penalty assessment provision in §10(c) seems to contemplate one civil penalty assessment of up to \$5,000.00 per violation per day against a violation (singular) and this assessment is in lieu of any other civil penalty which may be assessed for the same violation. This language in §10(c) suggests that there be only one violator per violation.

Furthermore, the legal authority in West Virginia indicates assessment of individual civil administrative penalties is not authorized under the Act. On this point, the West Virginia Supreme Court of Appeals stated the following in State ex rel. Haden v. Calco Awning and Window Corp., 170 S.E.2d. 362 (W. Va. 1969):

The position of an officer of a corporation, relative to his individual liability for the debts of the corporation, is not sacrosanct. While officers ordinarily are not held responsible for corporate debts, it is well established that where a statute so provides directors or officers may be required to account personally for certain obligations of the corporation . . . and so long as the statute is afforded a fair and reasonable interpretation so as to give effect to the legislative intent as indicated by the language used, it is valid.

170 S.E.2d. at 364 (emphasis added).

The Groundwater Protection Act does not expressly provide that individual corporate officers, directors, etc. are to be held individually liable for civil administrative penalty assessments. In the absence of clear statutory language or a strong indication of legislative intent, such an interpretation is unwarranted. Therefore, we would recommend that the entire regulation dealing with the assessment of individual civil administrative penalties be withdrawn from the regulations.

However, assuming that the Act authorizes the assessment of individual civil administrative penalties, the proposed regulations

Mr. Laidley Eli McCoy, Chief
July 28, 1992
Page 5

should be modified to specify the circumstances under which corporate officers, etc. may be personally assessed civil administrative penalties for violations of the Act by the corporation. Even if individual corporate officers, directors, etc. can be assessed an individual civil administrative penalty based upon corporate violations of the Act, assessment of such an individual penalty should not follow as a matter of course. The law is clear that the corporate entity acts as a shield to prevent the imposition of individual liability upon corporate shareholders, officers, directors, etc. acting within the scope of their employment and on behalf of the corporation. Only under certain circumstances do courts pierce the "corporate veil" to impose individual liability upon corporate shareholders or officers, etc. for the torts and other wrongdoings of the corporation.

Modifying the proposed regulation to reflect that the assessment of an individual civil administrative penalty is warranted only in those circumstances where the corporate officer, etc. knowingly directs, authorizes, orders or carries out a violation of the Act or knowingly fails or refuses to follow an order from the Director et al. is consistent with holding of the West Virginia Supreme Court of Appeals set forth in Mullins v. Venable, 297 S.E.2d. 866, 870 (W. Va. 1982). In Venable, the Court held that an officer in the management of a corporation who knowingly permits the corporation to violate the provisions of the Wage Payment and Collection Act, W. Va. Code §21-5-1 et seq., may be held personally liable for unpaid wages, fringe benefits, and liquidated damages under §4 of that statute. Thus, if the Groundwater Protection Act provides that corporate directors or officers may be required to account personally for violations of the Act by the corporation, which as previously discussed is open to debate, such individuals should only be assessed civil administrative penalties in circumstances where the corporate officer, etc. knowingly directs, authorizes, orders or carries out a violation of the Act or knowingly fails or refuses to follow an order from the Director, et al.

Additional Comments

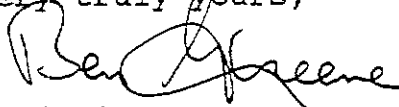
In addition to the above-suggested modifications to the proposed regulations, the Associations would also suggest that §5 of the regulations, entitled Hearings and Appeals, be modified to allow alleged violators to formally waive their right to an informal hearing within twenty (20) calendar days from the alleged

Mr. Laidley Eli McCoy, Chief
July 28, 1992
Page 6

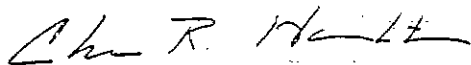
violator's receipt of the notice of civil administrative penalty, and to request that the matter proceed directly to a formal hearing before the Water Resources Board held in accordance with C.S.R. §47-56-5.5. Although the Act does not provide for such a procedure, it does not preclude waiver of the informal hearing and proceeding directly to a formal hearing before the Water Resources Board either. The Associations believe that the alleged violator should have the option, if it feels the circumstances warrant, to avoid the intermediary step of holding an informal hearing and to seek a more expeditious, final ruling by the Water Resources Board so as to avoid delay in resolving any disputes. The fact that the informal hearing is intended to be merely an informal discussion of facts, to which no rules of procedure or evidence apply and in which a record is not required to be made, as well as the fact that no statements made at the informal hearing may be introduced as evidence at formal review proceedings which may ensue following the informal hearing, indicates that the informal hearing should not be deemed a mandatory prerequisite to seeking formal review of the notice of violation and penalty calculation before the Water Resources Board.

The Associations and their members appreciate having the opportunity to submit these comments to the proposed regulations governing the assessment of civil administrative penalties and to be promulgated at C.S.R. §47-56-1 et seq. Thank you for your kind attention to these comments.

Very truly yours,



Benjamin C. Greene
President
West Virginia Mining and Reclamation Association



Chris R. Hamilton
Vice President
West Virginia Coal Association

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