

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION
Form #4

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

CITE AUTHORITY §20-5M-10

AMENDMENT TO AN EXISTING RULE: YES NO

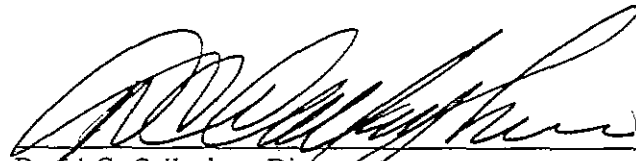
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 56

TITLE OF RULE BEING PROPOSED: Assessment of Civil Administrative Penalties

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



David C. Callaghan, Director
Division of Environmental Protection

4.40

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

SERIES 56
ASSESSMENT OF CIVIL ADMINISTRATIVE PENALTIES

§ 47-56-1. General.

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

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

1.3. Filing Date. -- _____.

1.4. Effective Date. -- _____.

§ 47-56-2. Definitions.

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

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

2.3. "Civil Administrative Penalty Referral" means a written document that shall include the observations made by the inspector or 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~~ this rule, 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 his or her authorized representative(s).

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

2.6. "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~~ for the decision.

§ 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 or she observes.

3.2. Notice Procedures. A notice of violation shall be in writing, shall be signed by the inspector or other authorized representative of the director ~~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 or her 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~~ this rule;

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~~ has twenty (20) calendar days from his or her receipt of the notice of civil administrative penalty within which to request, in writing, an informal hearing before the assessment officer. If a hearing is requested, the assessment officer will hold the hearing to deduce the actual facts and circumstances regarding the violation and, based thereon, will make a final recommendation of civil administrative penalty assessment to the director ~~et al.~~ If no hearing is requested, the notice of civil administrative penalty ~~shall~~ becomes a final order after the expiration of the twenty-day period and the civil administrative penalty ~~shall~~ becomes due and payable.

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

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

5.2.2. The ~~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 the record at the expense of the party requesting ~~such~~ the 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~~ for the decision.

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 this rule.

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~~ this rule, service ~~shall be deemed~~ is considered to be sufficient if it satisfies Rule 4 of the West Virginia Rules of Civil Procedure for service of a summons and complaint. A notice of individual civil administrative penalty assessment shall include:

6.3.1. 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 or her receipt of the notice of individual civil administrative penalty assessment within which to request, in writing, an informal hearing before the assessment officer. If no hearing is requested, the notice of individual civil administrative penalty ~~shall~~ becomes a final order after expiration of the thirty-day period and the individual civil administrative penalty ~~shall~~ becomes 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~~ this rule.

§ 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~~ this rule and a rating for the potential harm which may have resulted from the alleged violation in accordance with Table B of ~~these regulations~~ this rule. 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~~ this rule.

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~~ this rule. The negligence/good faith rating shall be used to determine the multiplying factor to be applied to the base penalty amount through the use of Table E of ~~these regulations~~ this rule.

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 violator during the twenty-four (24) months prior to the violation. Those enforcement actions which were withdrawn, dismissed, or vacated shall not be included in this determination. The number of previous enforcement actions shall be used to determine the dollar amount to be added to the penalty through the use of Table F of ~~these regulations~~ this rule.

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

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	450	550	650	750	850	950	1050	1150	1250
2	600	700	800	900	1000	1100	1200	1300	1400	1500
3	850	950	1050	1150	1250	1350	1450	1550	1650	1750
4	1100	1200	1300	1400	1500	1600	1700	1800	1900	2000
5	1350	1450	1550	1650	1750	1850	1950	2050	2150	2250
6	1600	1700	1800	1900	2000	2100	2200	2300	2400	2500
7	1850	1950	2050	2150	2250	2350	2450	2550	2650	2750
8	2100	2200	2300	2400	2500	2600	2700	2800	2900	3000
9	2350	2450	2550	2650	2750	2850	2950	3050	3150	3250
10	2600	2700	2800	2900	3000	3100	3200	3300	3400	3500
1	<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>
2	<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>
3	<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>
4	<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>
5	<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>
6	<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>
7	<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>
8	<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>
9	<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>
10	<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:		_____



WEST VIRGINIA LEGISLATURE
 LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
 Room M-152, State Capitol
 Charleston, West Virginia 25305
 (304) 340-3286

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OFFICE OF WEST VIRGINIA
 SECRETARY OF STATE

Senator Joe Manchin III, Co-Chair
 Delegate Brian A. Gallagher, Co-Chair

Debra A. Graham, Counsel
 Marie Nickerson, Admr. Assistant

NOTICE OF ACTION TAKEN BY LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

September 28, 1993

TO: Ken Hechler, Secretary of State, State Register

TO: David C. Callaghan, Director
 Division of Environmental Protection
 10 McJunkin Road
 Nitro, WV 25143-2506

FROM: Legislative Rule-Making Review Committee

PROPOSED RULE: Assessment of Civil Administrative Penalties

The Legislative Rule-Making Review Committee recommends that the West Virginia Legislature:

1. Authorize the agency to promulgate the Legislative Rule
 - (a) as originally filed _____
 - (b) as modified by the agency X
2. Authorize the agency to promulgate part of the Legislative rule; a statement of reasons for such recommendation is attached. _____
3. Authorize the agency to promulgate the Legislative rule with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
4. Authorize the agency to promulgate the Legislative rule as modified with certain amendments; amendments and a statement of reasons for such recommendation is attached. _____
5. Recommends that the rule be withdrawn; a statement of reasons for such recommendation is attached. _____

Pursuant to Code 29A-3-11(c), this notice has been filed in the State Register and with the agency proposing the rule.

cc: Eli McCoy, Chief
 Water Resources Section
 Frank Pelurie