

47CSR56

**Division Environmental Protection
Office of Water Resources**

“Beginning on page 1, and continuing throughout the text of the rule, by replacing text breakdown numbering to conform with Secretary of State’s rule 153CSR6, Table 153-A;

On page 1, in the title, add ‘Bureau of Environment’, and strike the words ‘Department of Commerce, Labor, and Environmental Resources,’ and insert ‘Office of’ in front of ‘Water Resources’ and by striking ‘Waste Management’;

Beginning on page 1, and throughout the rule, by striking the code reference ‘§20-5M-10’, and inserting in lieu thereof ‘§22-12-10’;

On page 1, subsection 2.1, by striking the code reference ‘§20-5M-1 et seq.’, and inserting in lieu thereof ‘§22-12-1 et seq.’;

On page 1, subsection 2.4, by inserting ‘of the Bureau of Environment’;

On page 3, subsection 5.5, by striking ‘State Water Resources Board’ and inserting in lieu thereof ‘Environmental Quality Board’;

On page 3, subsection 6.3, by striking ‘section’ and inserting in lieu thereof ‘subsection’;

AND

On page 4, subsection 7.4, by striking the letter ‘S’ in the word ‘Subsection’ and inserting in lieu thereof ‘s’ ;”

TITLE 47
LEGISLATIVE RULES
DIVISION OF ENVIRONMENTAL PROTECTION
~~DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES~~
BUREAU OF ENVIRONMENT
OFFICE OF WATER RESOURCES-WASTE MANAGEMENT

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~~ W. Va. Code §22-12-10.

1.2. Authority. -- ~~W. Va. Code § 20-5M-10~~ W. Va. Code §22-12-10.

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

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

§ 47-56-2. Definitions.

2.1. "Act" means the West Virginia Groundwater Protection Act (~~W. Va. Code § 20-5M-1, et seq.~~) (W. Va. Code §22-12-1, et seq.).

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

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

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

2.5. "Inspector" means an authorized representative of the director 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.a. A reference to the section of the statute, rule, regulation, order, or permit condition allegedly violated;

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

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

2.6.d. 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 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 final decision regarding the assessment of a civil administrative penalty and the reasons for the decision.

§ 47-56-3. Notice of Violations.

3.1. General. An inspector or other authorized representative of the director 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 and shall set forth with reasonable specificity:

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

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

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

§ 47-56-4. Penalty Assessment Procedures.

4.1. Review of Notice of Violation and Penalty Calculation. The assessment officer shall review each notice of violation referred to him or her for civil administrative penalty assessment to determine:

4.1.a. The appropriateness of a civil administrative penalty;

4.1.b. The initial amount of penalty, if any, based upon the rates and methods given in this rule;

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

4.1.d. The total initial civil administrative penalty assessment; and

4.1.e. The appropriateness of assessing a civil administrative penalty against an individual.

4.2. Notice of Civil Administrative Penalty. The assessment officer shall provide the violator with:

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

4.2.b. A notice of dismissal.

§ 47-56-5. Hearings and Appeals.

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

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

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

5.2.b. The communication shall be provided at least fifteen (15) calendar days prior to the time of the hearing.

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

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

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

5.3.b. A record of the informal hearing is not required but may be made by any party to the hearing at that party's expense. Any other party to the hearing may obtain copies of the record at the expense of the party requesting the copy.

5.3.c. At formal review proceedings which may ensue, no evidence as to any statement made by one party at the informal hearing may be introduced as evidence by another party, nor may any statement be used to impeach a witness, unless the statement is or was available as competent evidence independent of its introduction during the informal hearing.

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

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

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

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

6.1. The director 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.

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 this rule.

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

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

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

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

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

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

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

6.5. The informal hearing, if requested, will be scheduled and conducted pursuant to §section 5 of this rule.

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

The director 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 shall take into account the seriousness of the violation by assigning a rating for the extent of deviation from the requirement of the statute, rule, regulation, order, or permit condition in accordance with Table A of this rule and a rating for the potential harm which may have resulted from the alleged violation in accordance with Table B of this rule. These seriousness of violation ratings shall be used to determine the base penalty amount of the civil administrative penalty assessment through the use of Table C of this rule.

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

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

7.4. 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 this rule) by the multiplying factor (established from the negligence/good faith ratings pursuant to §subsection 7.2 of this rule), and then adding to that product a dollar amount (established from the history of noncompliance pursuant to §subsection 7.3 of this rule) through the use of Table G of 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	100	140	190	250	320	400	490	590	700	725
2	200	240	290	350	420	500	590	690	800	825
3	400	440	490	550	620	700	790	890	1000	1125
4	700	740	790	850	920	1000	1090	1190	1300	1425
5	1025	1065	1115	1175	1245	1325	1415	1515	1625	1750
6	1375	1415	1465	1525	1595	1675	1765	1865	1975	2100
7	1725	1765	1815	1875	1945	2025	2115	2215	2325	2450
8	2075	2115	2165	2225	2295	2375	2465	2565	2675	2800
9	2425	2465	2515	2575	2645	2725	2815	2915	3025	3150
10	2775	2815	2865	2925	2995	3075	3165	3265	3375	3500

TABLE D

Ratings for Negligence/Good Faith

1 -- The violation is not the result of negligence and the violator expended all possible effort to comply with the requirement in question or the violator has completed all actions to correct the violation.

2 to 4 -- The violation is the result of an oversight by the violator and could have been avoided if a more conscientious effort had been made in the operation of the facility or the violator has begun but not completed current actions to correct the violation.

5 to 7 -- The violation is obvious and a result of a lack of reasonable care by the violator or the violator has taken inadequate action to prevent the violation.

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

TABLE E

Negligence/Good Faith

Negligence/Good	Multiplying Factor
1	0.5
2	0.6
3	0.7
4	0.8
5	1.0
6	1.2
7	1.4
8	1.6
9	1.8
10	2.0

TABLE F

History of Groundwater Protection Act Noncompliance

Number of Previous Enforcement Actions	Dollar Amount
1	\$100.00
2	\$200.00
3	\$350.00
4	\$550.00
5	\$850.00
6	\$1250.00
7	\$1650.00
8	\$2150.00
9	\$2750.00
10 and greater	\$3350.00

TABLE G

Calculation of Civil Administrative Penalty Assessment

Seriousness of Violation		_____
Negligence/Good Faith	X	_____
Subtotal:		_____
History of Noncompliance	+	_____
Total Assessment:		_____

Technical Changes

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(Plus all the volunteer help we can get)

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE
SEP 8 9 50 AM '97
FILED

TO: CARRIE CHAMBERS

AGENCY: DEP - OFFICE OF WATER RESOURCES

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: August 7, 1997

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 56 TITLE: 47 DEP - OFFICE OF WATER RESOURCES

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: [Signature]

TITLE OF PERSON SIGNING: Ground Water Program Leader

DATE: 8-25-97

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.