

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

2012 JUL 31 PM 3:36

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: OFFICE OF MINER'S HEALTH, SAFETY AND TRAINING TITLE NUMBER: 56

RULE TYPE: ~~EMERGENCY~~ Legislative CITE AUTHORITY: W. Va. Code 22A-1-6 and 22A-1-21

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 12

TITLE OF RULE BEING AMENDED: RULES GOVERNING ASSESSING HEALTH AND SAFETY VIOLATION
PENALTIES

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON AUGUST 30, 2012 AT 4:00 P.M. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

OFFICE OF MINER'S HEALTH, SAFETY AND
TRAINING
7 PLAYERS CLUB DRIVE
CHARLESTON, WV 25311

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

RULES GOVERNING ASSESSING HEALTH AND SAFETY VIOLATION PENALTIES

Rule Title: _____

Type of Rule: Legislative Interpretive Procedural

Agency: OFFICE OF MINER'S HEALTH, SAFETY AND TRAINING

Address: 7 PLAYERS CLUB DRIVE, SUITE 2
CHARLESTON, WV 25311

BLK@WVAGO.GOV

Phone Number: 304-558-1425 Email: SHEILA.A.PROPST@WV.GOV

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

It is expected the amendment to W.Va. CSR 56-12, Table 1 will have no impact on the costs of state government and will have minimal impact on the revenues generated.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "--")	Next Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

RULES GOVERNING ASSESSING HEALTH AND SAFETY VIOLATION PENALTIES

Rule Title: _____

Rule Title: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

It is expected that the increase in the maximum civil penalty available for operators contained in W.Va. CSR 56-12, Table 1 will result in minimal impact on revenues because the maximum penalty was increased from \$3,000 to \$5,000 which is not a dramatic increase over the previous maximum civil penalty. Additionally, while an increase in the maximum civil penalty does result in corresponding increases in the civil penalties for lesser violations (based upon Table 1's civil penalty point conversion) it is not expected that the increases will have a significant impact on revenue because again they are relatively minor.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

None identified.

Date: 7-31-12

Signature of Agency Head or Authorized Representative

C.A. Phillips

SUMMARY OF LEGISLATIVE RULE

The amendments to W.Va. CSR §56-12, Table 1 Civil Penalty Point Conversion Table for Coal Mine Operators, track changes made by the 2012 West Virginia Legislature through the enactment of House Bill 4351 set to take effect June 4, 2012 which amended W.Va. Code §22A-1-21(a)(1) increasing the maximum civil penalty for the violation of any health or safety rule or any other violation of Chapter 22A from \$3,000 to \$5,000. W.Va. CSR §56-12 is the rule governing the method to assess the penalty for violating Chapter 22A. The amendment to W.Va. CSR §56-12, Table 1 is necessary in order to bring the rule into compliance and provide the penalty increase stated in W.Va. Code §22A-1-21(a)(1) as provided by the 2012 West Virginia Legislature.

**TITLE 56
LEGISLATIVE RULE
OFFICE OF MINER'S HEALTH, SAFETY AND TRAINING**

**SERIES 12
RULES GOVERNING ASSESSING HEALTH
AND SAFETY VIOLATION PENALTIES**

§56-12-1. General.

1.1 Scope. -- These rules establish the procedure whereby the Office of Miners' Health, Safety and Training assesses civil monetary penalties, pursuant to W. Va. Code §22A-1-21, to those having violated the state's mine health and safety laws.

1.2 Authority. -- W. Va. Code §22A-1-21.

1.3 Filing Date. --

1.4 Effective Date. --

§56-12-2. Definitions.

2.1. Unless herein defined, all terms used in this rule shall have the same meaning as they are defined in W. Va. Code §22A-1-2.

2.2. "Director" means the director of the State of West Virginia Office of Miners' Health, Safety and Training.

2.3. "Knowing violation" means a violation occurring when:

2.3.1. An operator (or miner, for an individual violation) causes a violative condition or practice by exercising reckless and willful disregard of mandatory health and safety standards, or recklessly and willfully failed to correct an unsafe condition or practice which was known to exist; or

2.3.2. An operator refuses to comply with any order issued under W. Va. Code §§22A-1-14 or 15; or

2.3.3. An operator refuses to comply with

any order issued in a final decision under Chapter 22A, article 1, of the W. Va. Code §22A-1-1, except for an order incorporated in a decision under W. Va. Code §§22A-1-21(a) or 22(b).

2.4. "Good faith" means that, in the judgment of the inspector, the operator has demonstrated extraordinary effort above and beyond that which would normally be expected to abate the violation.

2.5. "Mine health and safety laws" means the provisions of articles one, two, five and six of chapter twenty-two-a, and chapter twenty-two of the West Virginia Code, and any rule promulgated thereunder, relating to health and safety standards.

2.6. "Independent contractor" has the same meaning as that term is defined at 36 CSR 20.

2.7. "Annual tonnage" means tonnage produced in the previous calendar year, or, in the case of a mine opened or owned less than one full calendar year, the tonnage thus far produced multiplied to an annual amount based on months of operation.

§56-12-3. Assessment Procedure For Operators.

3.1. Civil monetary penalty assessments are mandatory.

3.2. The amount of a civil monetary penalty assessments will be determined based upon consideration of the following five criteria:

3.2.1. Gravity of the violation;

3.2.2. History of previous violations;

3.2.3. Size of the business charged with a violation; and

3.2.4. Demonstrated good faith in achieving compliance after notification of the violation.

3.2.5. Whether the operator was negligent.

3.3. Gravity of the violation will be evaluated by the inspector or representative of the director, and points allocated accordingly.

3.3.1. Points will be allocated in the following four categories:

a. Likelihood of an occurrence of an event which the health and safety laws are intended to prevent;

b. The severity of the injury which might be expected to result from such an occurrence; and

c. The number of persons potentially affected by such an occurrence.

d. Whether the operator was negligent.

3.3.2. Points will be allocated in the following manner:

a. Likelihood of occurrence

Unlikely	0 points
Reasonably likely	10 points
Occurred	20 points

b. Severity of injury expected

None	0 points
No lost work days	6 points
Lost/restricted work days	11 points
Permanently disabling	15 points
Fatal	20 points

c. Number of persons potentially affected

0	0 points
1	1 points
2	2 points
3	4 points
4 to 5	6 points
6 to 9	8 points
More than 9	10 points

d. Negligence

No negligence	0 points
Low negligence	10 points
Moderate negligence	15 points
High negligence	20 points

3.4. The operator's history of violations over the previous 24 months will be evaluated by the inspector or representative of the director and points allocated accordingly.

3.4.1. For mine operators, points will be calculated based upon the average number of violations per inspection day over the previous 24 months.

3.4.2. For independent contractors, points will be calculated based upon the total number of violations during the previous 24 months.

3.4.3. Points will be allocated in the following manner:

a. Mine operators:

Average number violations/ inspection day

0	0 points
Over 0 to 0.3	2 points
Over 0.3 to 0.5	5 points
Over 0.5 to 0.7	8 points
Over 0.7 to 0.9	11 points
Over 0.9 to 1.1	14 points
Over 1.1 to 1.3	17 points
Over 1.3 to 1.5	20 points
Over 1.5 to 1.7	22 points
Over 1.7 to 1.9	23 points
Over 1.9 to 2.1	24 points

Over 2.1 25 points

b. Independent contractors:

Total number of violations

1 to 5	2 points
6 to 10	5 points
11 to 15	8 points
16 to 20	11 points
21 to 25	14 points
26 to 30	17 points
31 to 35	20 points
36 to 40	22 points
41 to 45	23 points
46 to 50	24 points
More than 50	25 points

3.5. Size of the business charged with a violation will be evaluated by the inspector or representative of the director, and points allocated accordingly. Size of the mine will be calculated by considering the annual tonnage of the mine. Mines which have not submitted tonnage reports by the dates required by W. Va. Code §22A-2-77 will be assessed the maximum amount of five (5) points.

Size of Business (annual tonnage)

0 - 100,000 tons	1 point
100,001 - 500,000 tons	2 points
500,001 - 1,000,000 tons	3 points
1,000,001 - 2,000,000 tons	4 points
Over 2,000,000 tons	5 points

3.6. The points allocated in the manner set forth in Sections 3.3, 3.4 and 3.5, above, will be totaled, and the total number converted to a dollar amount, as per Table 1, infra.

3.7. Demonstrated good faith by the operator in achieving compliance after notification of the violation will be evaluated by the inspector or representative of the director, and the total dollar amount of the penalty may be modified accordingly.

3.7.1. If the operator fails to abate the violation within the time prescribed, and there are, in the opinion of the inspector or representative of

the director, extenuating circumstances beyond the operator's control which prevent the abatement of the violation within such time, the amount of the assessment will not be affected.

3.7.2. If the operator fails to abate the violation within the prescribed time, and an order is issued pursuant to W. Va. Code §22A-1-15(b), the total dollar amount of the assessment will be increased by fifteen percent (15%).

3.7.3. If the operator was already working to correct the violation when discovered, or, in the judgment of the inspector, the operator has demonstrated extraordinary effort above and beyond that which would normally be expected to abate the violation, the total dollar amount of the assessment will be decreased by fifteen percent (15%), if the original assessment is greater than sixty dollars (\$60).

§56-12-4. Assessment Procedure For Knowing Violations.

4.1. In addition to any monetary assessment determined under section 3 of these rules, any operator issued a knowing violation shall be assessed one (1) knowing point for every twenty (20) civil penalty points accrued. Knowing points are converted to a monetary amount, as per the following table:

Knowing Civil Penalty Conversion Table

Civil Points	Penalty Points	Knowing Penalty
0-20	1	\$1,000
21-40	2	\$2,000
41-60	3	\$3,000
61-80	4	\$4,000
81-100	5	\$5,000

4.2. In addition to any assessment determined under section 3 of these rules, a subsequent knowing violation, issued to the same operator at the same operation during the same inspection within the same quarter, shall result in the assessment of two (2) knowing points for every twenty (20) civil penalty points accrued.

Subsequent knowing points are converted to a monetary amount as per the following table:

Subsequent Knowing Civil Penalty Conversion Table

Civil Points	Penalty Points	Knowing Penalty
0-20	2	\$2,000
21-40	4	\$4,000
41-60	6	\$6,000
61-80	8	\$8,000
81-100	10	\$10,000

§56-12-5. Assessment Procedure For Individuals.

5.1. Any miner who knowingly violates the mine health and safety laws shall be assessed a civil penalty not to exceed two hundred fifty dollars (\$250) for each such occurrence.

5.2. The amount of civil monetary penalty assessments will be determined based upon consideration of two criteria:

5.2.1. Gravity of the violation; and

5.2.2. History of prior violations.

5.3. Gravity of the violation will be evaluated by the inspector or representative of the director, and points allocated accordingly.

5.3.1. Points will be allocated in the following three categories:

a. Likelihood of an occurrence of an event, which the health and safety laws are intended to prevent;

b. The severity of the injury which might be expected to result from such an occurrence; and

c. The number of persons potentially affected by such an occurrence.

5.3.2. Points will be allocated in the

following manner:

a. Likelihood of occurrence

Unlikely	0 points
Reasonably likely	10 points
Occurred	20 points

b. Severity of injury expected

None	0 points
No lost work days	5 points
Lost/restricted work days	10 points
Permanently disabling	15 points
Fatal	20 points

c. Number of persons potentially affected

0	0 points
1	5 points
2	10 points
3	15 points
4 to 5	20 points
6 to 9	25 points
More than 9	30 points

5.4. The miner's history of prior violations over the previous thirty-six (36) months will be evaluated by the inspector or representative of the director, and points allocated accordingly. Points will be allocated in the following manner:

1 violation	15 points
2 or more violations	30 points

5.5. The points allocated in the manner set forth in 5.3 and 5.4, above, will be totaled, and the total number converted to a dollar amount by using the following table:

Civil Penalty Point Conversion Table For
Individuals

Points	Penalty
1 to 10	\$50.00
11 to 20	100.00
21 to 30	150.00
31 to 40	175.00
41 to 50	200.00
51 to 60	225.00
61 to 70	240.00
71 to 100	250.00

Table 1

Civil Penalty Point Conversion Table For Operators

Points	Penalty (\$)		Points	Penalty (\$)	
0 - 15	60.00	<u>100.00</u>	66	504.00	<u>840.00</u>
16 - 31	96.00	<u>160.00</u>	67	528.00	<u>880.00</u>
32	100.00	<u>167.00</u>	68	556.00	<u>927.00</u>
33	104.00	<u>173.00</u>	69	576.00	<u>960.00</u>
34	108.00	<u>180.00</u>	70	600.00	<u>1000.00</u>
35	114.00	<u>190.00</u>	71	630.00	<u>1050.00</u>
36	120.00	<u>200.00</u>	72	660.00	<u>1100.00</u>
37	126.00	<u>210.00</u>	73	690.00	<u>1150.00</u>
38	132.00	<u>220.00</u>	74	800.00	<u>1333.00</u>
39	138.00	<u>230.00</u>	75	1000.00	<u>1667.00</u>
40	144.00	<u>240.00</u>	76	1080.00	<u>1800.00</u>
41	152.00	<u>253.00</u>	77	1160.00	<u>1933.00</u>
42	160.00	<u>267.00</u>	78	1240.00	<u>2067.00</u>
43	168.00	<u>280.00</u>	79	1320.00	<u>2200.00</u>
44	176.00	<u>293.00</u>	80	1400.00	<u>2333.00</u>
45	184.00	<u>307.00</u>	81	1480.00	<u>2467.00</u>
46	194.00	<u>323.00</u>	82	1560.00	<u>2600.00</u>
47	204.00	<u>340.00</u>	83	1640.00	<u>2733.00</u>
48	214.00	<u>357.00</u>	84	1720.00	<u>2867.00</u>
49	224.00	<u>373.00</u>	85	1800.00	<u>3000.00</u>
50	234.00	<u>390.00</u>	86	1880.00	<u>3133.00</u>
51	246.00	<u>410.00</u>	87	1960.00	<u>3267.00</u>
52	256.00	<u>427.00</u>	88	2040.00	<u>3400.00</u>
53	266.00	<u>443.00</u>	89	2120.00	<u>3533.00</u>
54	276.00	<u>460.00</u>	90	2200.00	<u>3667.00</u>
55	286.00	<u>477.00</u>	91	2280.00	<u>3800.00</u>
56	300.00	<u>500.00</u>	92	2360.00	<u>3933.00</u>
57	318.00	<u>530.00</u>	93	2440.00	<u>4067.00</u>
58	336.00	<u>560.00</u>	94	2520.00	<u>4200.00</u>
59	354.00	<u>590.00</u>	95	2600.00	<u>4333.00</u>
60	372.00	<u>620.00</u>	96	2680.00	<u>4467.00</u>
61	392.00	<u>653.00</u>	97	2760.00	<u>4600.00</u>
62	412.00	<u>687.00</u>	98	2840.00	<u>4733.00</u>
63	434.00	<u>723.00</u>	99	2920.00	<u>4867.00</u>
64	456.00	<u>760.00</u>	100	3000.00	<u>5000.00</u>
65	480.00	<u>800.00</u>			