



**WEST VIRGINIA
SECRETARY OF STATE**

NATALIE E. TENNANT

ADMINISTRATIVE LAW DIVISION

eFILED

8/24/2012 11:12:38 AM

OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

**FORM 3 -- NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE
LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY Waste Management Division Of Water And Waste Management

RULE TYPE Legislative AMENDMENT TO EXISTING RULE No TITLE-SERIES 33-27

RULE NAME Hazardous Waste Administrative Proceedings and Civil Penalty Assessment

CITE AUTHORITY 22-18-17(b)(2)

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.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes

**Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in
accordance with West Virginia Code §29A-3-11 and §39A-3-2.**



Title-Series: 33-27



Rule Id: 8696



Document: 24095



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FORM 10 -- LEGISLATIVE QUESTIONNAIRE (Page 1)

AGENCY **Waste Management Division Of Water And Waste Management**
RULE TYPE **Legislative** **AMENDMENT TO EXISTING RULE** No **TITLE-SERIES 33-27**
RULE NAME **Hazardous Waste Administrative Proceedings and Civil Penalty Assessment**

CITE AUTHORITY **22-18-17(b)(2)**

AUTHORIZING STATUTE(S) CITATION
W. Va. Code §22-18-17(b)(2)

DATE FILED IN STATE REGISTER WITH NOTICE OF HEARING OR PUBLIC COMMENT PERIOD
Friday, June 29, 2012

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?
Class I Legal Ad in the Charleston Gazette on Friday, June 29, 2012.

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED
Tuesday, August 07, 2012

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FORM 10 -- LEGISLATIVE QUESTIONNAIRE (Page 2)

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CITE AUTHORITY **22-18-17(b)(2)**

ATTACH LIST OF PERSONS WHO APPEARED AT HEARING, COMMENTS RECEIVED,
AMENDMENTS, REASONS FOR AMENDMENTS.

Attached

DATE YOU FILED IN STATE REGISTER THE AGENCY APPROVED PROPOSED LEGISLATIVE RULE
FOLLOWING PUBLIC HEARING: (BE EXACT)

Tuesday, August 21, 2012

NAME, TITLE, ADDRESS AND PHONE FAX EMAIL NUMBERS OF AGENCY PERSON(S) TO
RECEIVE ALL WRITTEN CORRESPONDENCE REGARDING THIS RULE

Kristin A. Boggs, Esquire
General Counsel
WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION
601 57th Street
Charleston, West Virginia 25304
(304) 926-0440
(304) 926-0447 (facsimile)

**Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in
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CITE AUTHORITY **22-18-17(b)(2)**

IF DIFFERENT FROM ABOVE, PLEASE GIVE NAME, TITLE, ADDRESS, AND PHONE NUMBER(S) OF AGENCY PERSON(S) WHO WROTE AND OR HAS RESPONSIBILITY FOR THE CONTENTS OF THIS RULE

Same as above.

IF THE STATUTE UNDER WHICH YOU PROMULGATED THE SUBMITTED RULES REQUIRES CERTAIN FINDINGS AND DETERMINATIONS TO BE MADE AS A CONDITION PRECEDENT TO THE PROMULGATION, GIVE THE DATE UPON WHICH YOU FILED IN THE STATE REGISTER A NOTICE OF THE TIME AND PLACE OF A HEARING FOR THE TAKING OF EVIDENCE AND A GENERAL DESCRIPTION OF THE ISSUES TO BE DECIDED.

Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



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RULE NAME **Hazardous Waste Administrative Proceedings and Civil Penalty Assessment**

CITE AUTHORITY **22-18-17(b)(2)**

DATE OF HEARING OR COMMENT PERIOD

ON WHAT DATE DID YOU FILE IN THE STATE REGISTER THE FINDINGS AND DETERMINATIONS
REQUIRED TOGETHER WITH THE REASONS THEREFOR?

ATTACH FINDINGS AND DETERMINATIONS AND REASONS
None

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes

**Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in
accordance with West Virginia Code §29A-3-11 and §39A-3-2.**



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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 1)

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CITE AUTHORITY **22-18-17(b)(2)**

SUMMARIZE IN A CLEAR AND CONCISE MANNER WHAT IMPACT THIS MEASURE WILL HAVE ON COSTS AND REVENUES OF STATE GOVERNMENT.

This proposed Legislative Rule will not have an impact on the costs and revenues of state government.

Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



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RULE NAME **Hazardous Waste Administrative Proceedings and Civil Penalty Assessment**

CITE AUTHORITY **22-18-17(b)(2)**

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.

Effect Of Proposal	Current Increase/Decrease (use ' - ')	Next Increase/Decrease (use ' - ')	Fiscal Year (Upon Full Implementation)
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 AND ALTERATIONS	0.00	0.00	0.00
ASSETS	0.00	0.00	0.00
OTHER	0.00	0.00	0.00
ESTIMATED TOTAL REVENUES	0.00	0.00	0.00

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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 3)

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RULE NAME **Hazardous Waste Administrative Proceedings and Civil Penalty Assessment**

CITE AUTHORITY **22-18-17(b)(2)**

3. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT). PLEASE INCLUDE ANY INCREASE OR DECREASE IN FEES IN YOUR ESTIMATED TOTAL REVENUES.

It is anticipated that the rule will have an increase in process efficiency.

Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



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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.

While this rule will offer an alternative mechanism for the settlement of violations of the Hazardous Waste Management Act and Rules, it is not anticipated that it will have an impact on costs and revenues of state government. The intent of this proposed rule is to create a more efficient system to administratively settle violations of the act and rules.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



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FORM 12 -- BRIEF SUMMARY AND STATEMENT OF CIRCUMSTANCES (Page 1)

AGENCY **Waste Management Division Of Water And Waste Management**
RULE TYPE **Legislative** **AMENDMENT TO EXISTING RULE** **No** **TITLE-SERIES** **33-27**
RULE NAME **Hazardous Waste Administrative Proceedings and Civil Penalty Assessment**

CITE AUTHORITY **22-18-17(b)(2)**

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN RULE AND STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE.

This is a new rule, necessitated by the passage of House Bill 4320 on March 10, 2012, which amended and reenacted W. Va. Code § 22-18-17 to grant the Secretary the authority to enter into consent agreements settling violations of the Hazardous Waste Management Act. This rule provides a mechanism for the consent agreements to include appropriate penalty calculations and corrective action orders, which will allow for the timely and effective administrative settlement of hazardous waste violations in this State while lessening the burden on the circuit courts.

West Virginia Code § 22-18-17(b)(2) requires the Secretary to propose for promulgation Legislative rules to establish a mechanism for the administrative resolution of violations of the Hazardous Waste Management Act through consent order or agreement as an alternative to instituting a civil action.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT.

Yes

Kristin A Boggs -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



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**TITLE 33
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT**

**SERIES 27
HAZARDOUS WASTE ADMINISTRATIVE PROCEEDINGS AND CIVIL
PENALTY ASSESSMENT**

§33-27-1. General.

1.1. Scope. -- This rule establishes a procedure for the resolution of enforcement actions and the assessment of civil penalties for violations of the Hazardous Waste Management Act in lieu of the institution of a civil action.

1.2. Authority. -- W. Va. Code §22-18-17(b)(2).

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Nothing in this rule shall be construed as limiting or altering the authority of the Secretary to enforce the provisions of the Hazardous Waste Management Act ("Act") or the Hazardous Waste Management Rule(s) ("Rules") as set forth therein. This enforcement provision is in addition to any and all other enforcement provisions set forth in the Act or Rules.

§33-27-2. Definitions.

2.1. This Rule hereby incorporates by reference the definitions of all terms as contained in the Hazardous Waste Management Act, W. Va. Code § 22-18-1 et seq., and the Hazardous Waste Management Rule, 33 CSR 20. In addition, for the purpose of this Rule, the following definitions apply:

2.2. "Administrative Proceedings" means those proceedings undertaken pursuant to this Rule by the Secretary upon the Secretary's decision to attempt to resolve alleged violations of the Hazardous Waste Management Act and its rules.

2.3. "Base Penalty" means that amount assessed for a violation of the Act or its Rules based solely upon the extent of the deviation from the Act and the potential for harm to the public or the environment resulting from the violation.

2.4. "Responsible Party" may be a permittee, a hazardous waste generator or transporter, or any person alleged to have violated the Act or its Rules.

2.5. "Secretary" means the Secretary of the Department of Environmental Protection.

§33-27-3. Applicability of the Rule.

3.1. Upon discovery of a violation, through whatever means, of the Hazardous Waste Management Act or its Rules, the Secretary may, at the Secretary's discretion, choose to institute administrative proceedings pursuant to the Act and this Rule to resolve the alleged violation.

3.2. Not a Waiver. -- Nothing in this rule shall be construed as limiting the ability of the Secretary to pursue a civil action for any violation of the Act or its Rules should the agency and the responsible party be unable to reach settlement of the alleged violations pursuant to the procedures set forth in this Rule. The Secretary is under no requirement to institute administrative proceedings prior to taking any other lawful action pursuant to the Act or its Rules.

§33-27-4. Notice.

4.1. The Secretary shall notify any responsible party of the Secretary's decision to institute administrative proceedings pursuant to the Act and this Rule.

4.2. Notice of the Secretary's decision to commence an administrative proceeding in an attempt to resolve an alleged violation of the Act or its Rules shall be by certified mail to the responsible party.

4.3. Notice shall include a proposed Consent Order initially containing, at a minimum, findings of fact and conclusions of law outlining the alleged violations, any remedial work to be performed by the responsible party, and a proposed civil penalty assessment that shall be based on the procedures set forth in this Rule.

4.4. The responsible party shall respond to the Secretary's Notice within ten days of receipt thereof, indicating whether it will participate or refuses to participate in the administrative proceeding. Failure to timely respond shall be considered refusal to participate in the process.

§33-27-5. Administrative Proceedings.

5.1. Should the responsible party agree to participate in an administrative proceeding, the parties shall set a meeting to be held within thirty days of the initial Notice, if possible.

5.2. The administrative proceeding may consist of multiple meetings amongst the parties and may continue until a satisfactory resolution of the alleged violation is agreed to.

5.3. If agreed to, resolution of the alleged violations contained in the Notice shall be by Consent Order entered into by the responsible party and the Secretary.

5.4. The administrative proceeding may be terminated at any time and for any reason by any party involved in the proceeding.

§33-27-6. Civil Penalty Assessment.

6.1. Determination of Base Penalty – the seriousness (gravity) of a violation must be taken into account in assessing a penalty for a violation. This gravity based penalty amount should be determined by examining two factors: potential for harm and extent of deviation from the statutory or regulatory requirement.

6.1.a. Potential for harm to human health and the environment. --

6.1.a.1. The potential for harm to human health or the environment from a violation is based on two factors: the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and the adverse effect noncompliance may have on the statutory or regulatory purposes or procedures for implementing the Resource Conservation and Recovery Act (RCRA) program.

6.1.a.2. Risk of exposure may be evaluated by considering the probability of exposure and the potential seriousness of contamination.

6.1.a.3. Violations of the Act or Rules may be evaluated by considering how the violation directly increases threat of harm to human health and the environment, how the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA Program and how the violation impairs the overall goals of RCRA to handle wastes in a safe and responsible manner. Examples include but are not limited to:

6.1.a.3.A. Failure to notify the Department that you are a generator or transporter of hazardous waste or an owner or operator of a hazardous waste facility

6.1.a.3.B. Failure to submit a timely or adequate Part B application.

6.1.a.3.C. Failure to respond to a formal information request.

6.1.a.3.D. Operating without a permit.

6.1.a.3.E. Failure to prepare or maintain a manifest.

6.1.a.3.F. Failure to maintain groundwater monitoring results.

6.1.a.4. Consideration shall be given to the potential harm posed by a violation rather than the actual harm which occurred. There need not be any showing of actual harm to human health or the environment to support a finding of potential harm.

6.1.a.5. Emphasis shall be placed on evidence of an actual release to the environment and harm to human health and/or actual exposure of humans or other environmental receptors to hazardous waste or constituents.

6.1.a.6. The Secretary shall determine whether the potential for harm was major, moderate or minor depending upon factors to be considered on a case-by case basis.

6.1.b. Extent of Deviation from Requirements. --

6.1.b.1. The extent of deviation from RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirements violated.

6.1.b.2. The Secretary shall determine whether the extent of deviation from the statutory or regulatory requirement was major, moderate or minor dependent upon factors to be considered on a case-by-case basis.

6.1.c. Factors that may be considered in determining potential for harm to human health and the environment and the extent of deviation from a regulatory requirement may include, but are not limited to, harm to the RCRA Program, probability of exposure, potential seriousness of contamination, and degree of non-compliance.

6.1.d. Civil Penalty Matrix. -- Each of the above factors - potential for harm and extent of deviation from a requirement - forms one of the axes of a civil penalty matrix from which the base penalty is calculated. The matrix shall have nine cells, each containing a penalty range. The selection of

the exact penalty amount is within the discretion of the Secretary. The seriousness of the violation is considered in determining the base penalty. The reason the violation was committed, the intent of the responsible party or other factors related to the violator are not considered. The complete matrix is illustrated in Appendix A.

6.2. Penalty Adjustment Factors. --

6.2.a. The base penalty may be adjusted at the discretion of the Secretary after consideration of factors presented by the responsible party. The adjustment may raise or lower the base civil penalty.

6.2.b. The Secretary may consider the following factors in determining whether an adjustment in the base civil penalty assessment is justified;

6.2.b.1. Good faith efforts to comply or lack of good faith;

6.2.b.2. Degree of willfulness or negligence;

6.2.b.3. Cooperation with the Secretary

6.2.b.4. History of noncompliance;

6.2.b.5. Ability to pay a civil penalty;

6.2.b.6. Economic benefits derived by the responsible party;

6.2.b.7. Staff investigative costs; and

6.2.b.8. Other factors deemed relevant by the Secretary that may be present on a case-by-case basis.

6.3. Multi-Day Penalties. – In cases of an ongoing or continuing violation, each day of violation is one distinct violation for which a calculation must be made.

§33-27-7. Entry of Consent Order

7.1. Prior to a responsible party and the Secretary signing any Consent Order resolving an alleged violation of the Act or its Rules pursuant to this Rule, the Secretary shall publish notice in the form of a Class I Legal Advertisement in accordance with W. Va. Code § 59-3-1 et. seq. in a newspaper of general circulation in the county that the facility subject to the action is located at least thirty (30) days prior to the final settlement of any consent order. This notice will identify the facility found to be in violation, the specific enforcement action to be taken, and the name and address where information about the proposed settlement can be obtained. The Secretary shall consider all comments received during the thirty (30) day period.

7.2. The Secretary, based upon the public comments, may determine to either modify the Consent Order based upon the public comments or execute the Consent Order as proposed.

7.3. Should the Secretary modify the Consent Order as a result of public comments, the responsible party may reject the proposed modifications and thereby may reject the modified Consent Order.

7.4. Penalties collected pursuant to this Rule shall be deposited into the Hazardous Waste

Management Fund within the Department of Environmental Protection for uses related to permitting, inspection, environmental remediation or any other activity deemed appropriate by the Secretary.

**APPENDIX A
CIVIL PENALTY MATRIX**

		Extent of Deviation from Requirement		
		MAJOR	MODERATE	MINOR
Potential for Harm to Human Health or the Environment	MAJOR	\$8,000 to \$10,000	\$6,000 to \$8,000	\$5,000 to \$6,000
	MODERATE	\$4,000 to \$5,000	\$3,000 to \$4,000	\$2,000 to \$3,000
	MINOR	\$1,500 to \$2,000	\$1,000 to \$1,500	Up to \$1,000