



**WEST VIRGINIA SECRETARY OF STATE**

**MAC WARNER**

**ADMINISTRATIVE LAW DIVISION**

**eFILED**

10/19/2021 3:48:02 PM

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: Water Resources Division Of Water And Waste Management TITLE-SERIES: 47-30B

RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule:

RULE NAME: 47-30B Administrative Proceedings and Civil Penatly Assessment

**PRIMARY CONTACT**

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CITE STATUTORY AUTHORITY: WVa code 22-11-22a(b) and (d)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

A decision issued by the U.S. District Court for the Southern District of West Virginia (Judge Chambers) on March 22, 2021, in a citizens suit action against Lexington Coal Company related to administrative enforcement actions taken by the West Virginia Department of Environmental Protection (WV DEP) against coal mining NPDES permit holders. Judge Chambers held that because West Virginias NPDES enforcement program does not match the enforcement regulations of the federal Environmental Protection Agency (EPA), federal citizen suits can proceed against permit holders. 47 CSR30B 5.4 that serves as the basis for the March 2021 decision finding the state program is not comparable to the federal enforcement regulations and that state enforcement actions cannot preclude citizen suits against permit holders in federal court: This Courtholds that West Virginias administrative enforcement provisions are not comparable to the CWA because Defendant has the authority to reject the Proposed Consent Order and avoid civil penalties at any point and for any reason. The potential for abuse and manipulation of this authority undermines the purpose of the CWA, which does not require alleged violators to consent to penalties.

To address the decision and restore the ability of state NPDES enforcement actions to shield permit holders from direct actions in federal court, the coal mining NPDES enforcement rule was revised to remove the language regarding termination of enforcement proceedings at any time for any reason at 47 CSR 30B 5.4 and deleted 47 CSR 30B 8.3

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD:

8/19/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 10/15/2021

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: Yes

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

Agency web page

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

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STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

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SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

This change will not have any negative ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

This change will not have any negative ON SPECIAL REVENUE ACCOUNTS

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

This change will not have any negative ECONOMIC IMPACT ON THE STATE OR ITS RESIDENTS

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	0	0	0

<b>Personal Services</b>	0	0	0
<b>Current Expenses</b>	0	0	0
<b>Repairs and Alterations</b>	0	0	0
<b>Assets</b>	0	0	0
<b>Other</b>	0	0	0
<b>2. Estimated Total Revenues</b>	0	0	0

**E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):**

This change will not have any negative impact on the revenue or the resources of the State

**BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.**

**Yes**

**Jason E Wandling -- 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 47  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
WATER RESOURCES

SERIES 30B  
ADMINISTRATIVE PROCEEDINGS AND CIVIL PENALTY ASSESSMENT

**§47-30B-1. General.**

1.1. Scope. – This rule establishes a procedure for the resolution of enforcement actions and the assessment of civil penalties in lieu of the institution of a civil action as provided in W. Va. Code § 22-11-22a(a).

1.2. Authority. – W. Va. Code § 22-11-22a(b) and (d).

1.3. Filing Date. – ~~June 8, 2016~~

1.4. Effective Date. – ~~July 1, 2016~~

1.5. Nothing in this rule shall be construed as limiting or altering the authority of the Secretary to enforce the provisions of the West Virginia Water Pollution Control Act (“the Act”), W. Va. Code § 22-11-1, et seq. This enforcement provision is in addition to any and all other enforcement provisions set forth in the Act.

**§47-30B-2. Definitions.**

2.1. This rule hereby incorporates by reference the definitions of all terms as contained in the Act at W. Va. Code § 22-11-3 and in the *WV/NPDES Rule for Coal Mining Facilities*, 47 CSR 30 (“the Mining NPDES Rule”).

2.2. “Administrative proceedings” means those proceedings undertaken pursuant to this rule by the Secretary upon his or her decision to attempt to resolve alleged violations of the Act and the Mining NPDES Rule.

2.3. “Assessment officer” means a person appointed by the Secretary to carry out the review, assessment, and hearing procedures outlined in this rule. Any person(s) initiating the notice of violation that resulted in the proposed civil administrative penalty is prohibited from being the assessment officer for the violation in question.

2.4. “Base penalty” means that amount assessed for a violation of the Act or the Mining NPDES Rule based solely upon the extent of the permittee’s deviation therefrom and the potential for harm to human health or the environment resulting from the violation.

2.5. “Responsible party” means the permittee or any person alleged to have violated the Act or the Mining NPDES Rule.

2.6. “Toxicity” means the degree to which any substance is potentially harmful to human health or the environment.

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2.7. "Secretary" means the Secretary of the Department of Environmental Protection or his or her designee.

### §47-30B-3. Applicability of the Rule.

3.1. Upon discovery of a violation, regardless of the means of discovery, of the Act or the Mining NPDES Rule, the Secretary may, at his or her 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 the Mining NPDES Rule 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 not required to institute administrative proceedings prior to taking any other lawful action pursuant to the Act or the Mining NPDES Rule.

### §47-30B-4. Notice.

4.1. The Secretary shall notify any responsible party of his or her decision to institute administrative proceedings pursuant to the Act and this rule by sending written notice of the same to the responsible party by certified mail or personal service.

4.2. Notice shall include a proposed consent order initially containing, at a minimum, findings of fact and conclusions of law outlining the alleged violation(s), any remedial work to be performed by the responsible party, a proposed civil penalty assessment based on the procedure set forth in this rule, and a statement of the responsible party's right to an informal hearing prior to finalization of the proposed consent order.

### §47-30B-5. Administrative Proceedings.

5.1. ~~Should the responsible party agree to participate in an administrative proceeding, The responsible party shall have the opportunity to participate in an administrative hearing. ¶The parties shall schedule an informal hearing to be held within 30 days of the initial notice.~~

5.2. The administrative proceeding may consist of an informal hearing amongst the parties and may continue until the parties reach a satisfactory resolution of the alleged violation(s). If the parties are unable to reach a satisfactory resolution of the alleged violation(s) during the administrative proceeding, the secretary may assess a civil administrative penalty unilaterally in accordance with W. Va. Code §22-11-22A(b).

5.3. If the parties are able to reach an agreement agreed to, resolution of the alleged violation(s) 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.~~

### §47-30B-6. Hearings and Appeals

6.1. Right to an Informal Hearing. – The responsible party has 30 calendar days from receipt of the notice of civil administrative penalty within which to request, in writing, an informal hearing before the assessment officer. If the responsible party requests an informal hearing, the assessment officer will hold

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the hearing to deduce the actual facts and circumstances regarding the violation and, based thereon, will make a final recommendation of a civil administrative assessment to the Secretary. If the responsible party does not request an informal hearing, the notice of civil administrative penalty becomes a final order after the expiration of the 30-day period, and the civil administrative penalty becomes due and payable.

6.2. Notice and Scheduling of Informal Hearing. – If the responsible party requests an informal hearing within the 30-day period, the assessment officer shall schedule the informal hearing and provide written notice of its time, place, and location, at least 15 calendar days in advance, to the responsible party and the inspector or other authorized representative of the Secretary who filed a notice of violation resulting in the proposed consent order. The assessment officer may continue the informal hearing upon request of either party and for good cause shown.

6.3. Informal Hearing Procedures. – An informal hearing, as provided by this rule, is intended to be an informal discussion of the facts that gave rise to the issuance of a notice of violation and shall be conducted in the following manner:

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

6.3.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 a copy.

6.3.c. At any formal review proceedings that may ensue (i.e. appeal to the Environmental Quality Board or the Kanawha County Circuit Court), 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.

6.3.d. During the course of the informal hearing, a responsible party may request that the assessment officer evaluate its ability to pay a civil administrative penalty. The assessment officer can only evaluate the request if the responsible party provides all required financial information within ten calendar days of the date of the informal hearing. The assessment officer shall not consider incomplete information or information received more than ten days after the date of the informal hearing. If the assessment officer receives complete information in a timely manner, he or she shall evaluate it in accordance with United States Environmental Protection Agency guidance.

6.4. Written Decision. – Within 30 calendar days following the informal hearing, the Secretary shall issue and furnish to the responsible party a written decision affirming, modifying or dismissing the proposed consent order or initial civil administrative penalty assessment and giving the reasons for the decision.

6.5. Request for Formal Hearing. – Within 30 calendar days after issuance of the Secretary's written decision, the responsible party may appeal to the Environmental Quality Board in accordance with the provisions of the Act. If the responsible party does not appeal to the Environmental Quality Board within 30 calendar days, the proposed consent order shall become a final order, and the civil administrative penalty shall become due and payable.

6.6. At the request of the responsible party and for good cause shown, the assessment officer may establish a schedule for payment of the civil administrative penalty based on all relevant factors.

**§47-30B-7. Civil Penalty Assessment.**

7.1. Determination of base penalty:

7.1.a. Potential for harm to human health or the environment –

7.1.a.1. The potential for harm to human health or the environment from a violation may be determined by the likelihood and degree of exposure of persons or the environment to pollution, or the degree of adverse effect of noncompliance on statutory or regulatory purposes or procedures for implementing the regulatory program.

7.1.a.2. Emphasis shall be placed on the potential harm posed by a violation rather than the actual harm that occurred. There need not be any showing of actual harm to human health or the environment to support a finding of potential harm.

7.1.a.3. The Secretary shall determine whether the potential for harm was major, moderate or minor depending on factors to be considered on a case-by-case basis.

7.1.b. Extent of Deviation from Requirements –

7.1.b.1. The extent of deviation from the statutory or regulatory requirements may be determined by the degree to which the requirement is violated.

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

7.1.c. Factors the Secretary may consider 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, the amount of pollutants released, the toxicity of the pollutant(s), the sensitivity of the environment potentially affected by the release, the length of time the violation took place, the actual human and environmental exposure and resultant effects upon human health and the environment, and the degree of the permittee's non-compliance.

7.1.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 the civil penalty matrix from which the base penalty is calculated. The selection of the exact penalty amount is within the discretion of the Secretary. In determining the base penalty, the Secretary shall not consider the reasons for the violation, the intent of the responsible party or other factors not listed in this subdivision. The civil penalty matrix is set forth in Appendix A of this rule.

7.2. Penalty Adjustment Factors:

7.2.a. The base penalty may be adjusted at the discretion of the Secretary after consideration of factors presented by the responsible party or by Inspection & Enforcement personnel of the Division of Mining and Reclamation. These adjustments may raise or lower the base civil penalty.

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



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- 7.2.b.1. Degree of or absence of willfulness or negligence;
- 7.2.b.2. Good faith efforts to comply by the permittee both before and after an alleged violation;
- 7.2.b.3. Cooperation with the Secretary;
- 7.2.b.4. History of prior compliance or non-compliance;
- 7.2.b.5. Ability of the responsible party to pay a civil penalty;
- 7.2.b.6. Economic benefits derived by the responsible party;
- 7.2.b.7. Public interest;
- 7.2.b.8. Loss of enjoyment of the environment due to the violations;
- 7.2.b.9. Staff investigative costs; and
- 7.2.b.10. Other factors deemed relevant by the Secretary that may be present on a case-by-case analysis.

7.3. In cases of an ongoing or continuing violation, each day of violation is one distinct violation for which a calculation must be made.

### **§47-30B-8. Entry of Consent Order.**

8.1. Before a responsible party and the Secretary sign any consent order resolving an alleged violation of the Act or the Mining NPDES Rule, the proposed consent order is subject to the public notice and comment requirements of the Mining NPDES Rule at 47 CSR 30 § 15.2 and the public hearing provisions of W. Va. Code § 22-11-22a(b)(4).

8.2. Based upon the public comments or information received during the public hearing, the Secretary may determine either to modify the proposed consent order or to execute it as drafted.

~~8.3. Should the Secretary modify the proposed consent order based on public comments or information received at the public hearing, the responsible party may reject the proposed modifications, thereby rejecting the modified consent order. At that point the agency shall withdraw the proposed consent order.~~

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**APPENDIX A  
CIVIL PENALTY MATRIX**

<b>POTENTIAL FOR HARM TO HUMAN HEALTH OR THE ENVIRONMENT</b>	<b>EXTENT OF DEVIATION FROM REQUIREMENT</b>			
		MAJOR	MODERATE	MINOR
	MAJOR	\$8,000 - \$10,000	\$6,000 - \$8,000	\$5,000 - \$6,000
	MODERATE	\$4,000 - \$5,000	\$3,000 - \$4,000	\$2,000 - \$3,000
	MINOR	\$1,500 - \$2,000	\$1,000 - \$1,500	Up to \$1,000