

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

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2005 APR 14 P 1:10

OFFICE WEST VIRGINIA  
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**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: WV Department of Environmental Protection/Secretary TITLE NUMBER: 60

CITE AUTHORITY: W. Va. §22-1-6(d)(3); 22-26-3(m); § 22-26-6(b)

RULE TYPE: PROCEDURAL  INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE \_\_\_\_\_

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW  
\_\_\_\_\_

AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_ NO

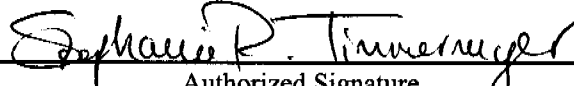
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_  
\_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 6

TITLE OF RULE BEING PROPOSED: Administrative Procedures and Civil Administrative  
Penalty Assessment --Water Resources Protection Act  
\_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS May 16, 2005.

  
Authorized Signature

\$4.00

60CSR6

FILED

2005 APR 14 P 1:10

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**TITLE 60  
PROCEDURAL RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
SECRETARY'S OFFICE**

**SERIES 6  
ADMINISTRATIVE PROCEDURES AND CIVIL ADMINISTRATIVE  
PENALTY ASSESSMENT  
WATER RESOURCES PROTECTION ACT**

**§60-6-1. General.**

1.1. Scope. – This rule establishes administrative procedures related to survey and registration requirements under the Act and a procedure for assessment of a civil administrative penalty for failure to complete the survey or register, providing false or misleading information on the survey or registration, or failure to provide other information as required by the Act.

1.2 Authority. – W. Va. Code § 22-1-6(d)(3); 22-26-3(m); 22-26-6(b).

1.3. Filing Date. – April 14, 2005

1.4. Effective Date. – May 16, 2005

**§60-6-2. Definitions.**

2.1. "Act" means the Water Resources Protection Act, W. Va. Code § 22-26-1 et seq.

2.2. "Person" means an individual, public and private business or industry, public or private water service and governmental entity.

2.3. "Secretary" means the secretary of the department of environmental protection or his or her designee.

**§60-6-3. Applicability.**

3.1. This rule applies to any person required to provide information to the Secretary pursuant to section 3(c) of the Act.

#### **§60-6-4. Survey and Registration Response—Secretary’s Determination.**

4.1. Persons subject to this rule must complete the survey and registration requirements established by the Secretary in accordance with the Act. If a good faith effort has been made to comply, a penalty will not initially be assessed when the Secretary disagrees with any interpretations or calculations made in completing the survey or registration.

4.2. When the Secretary disagrees with any interpretations or calculations submitted in a survey or registration, he or she will issue a written determination explaining why the agency disagrees and establishing the appropriate calculations and interpretations to be used in the survey or registration.

4.3. The written determination will be sent by certified mail and will notify the person of the requirement to correct the information within thirty (30) days. The determination will also inform the person that if the corrected information is not submitted within thirty (30) days of receipt, or some greater time designated by the Secretary, the person will be considered to be in violation and the Secretary will assess a penalty in accordance with this policy.

4.4. A non-confidential version of each written determination issued by the Secretary will be posted on the Water Resources Protection Act web page. These determinations will be the governing documents for interpretations and calculations for all future surveys or registrations.

#### **§60-6-5. Civil Administrative Penalty Assessment.**

5.1. Upon failure of a person to submit the corrected information as required by a written determination within the specified time frame, a notice of violation will be sent to the violator by certified mail. The notice will include the specifics of the violation, a requirement to respond within thirty (30) days, and will assess a civil administrative penalty of \$1,000.

5.2. Any person who fails to complete a survey or registration, provides false or misleading information on the survey or registration, or fails to provide any other information than that required in a written determination under section 4, will be sent a notice of violation by certified mail. The notice of violation will contain the specifics of the violation and provide thirty (30) days from receipt to respond and/or correct the violation. The notice of violation will also inform the violator that civil administrative penalties of up to \$5,000 may be assessed in the future for each thirty (30) days of continuing noncompliance.

5.3. Upon failure to respond to any first notice of violation issued under subsection 5.1 or 5.2, a second notice of violation will be sent by certified mail noting the continuing noncompliance. This second notice of violation will include the specifics of

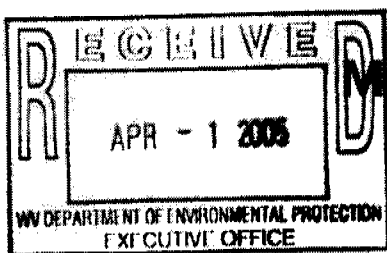
the violation, a requirement to respond within thirty (30) days and will assess a civil administrative penalty of up to \$5,000.

5.4. Every thirty (30) days after the initial imposition of a civil administrative penalty, another penalty may be assessed in an amount up to \$5,000 if the information is not provided.

**§ 60-6-6. Additional Enforcement.**

6.1. If, after issuance of the notices of violation specified in section 5, a person fails or refuses to submit the required information or pay the civil administrative penalty imposed by such notice, the Secretary will issue an order requiring that the information be submitted and the penalty be paid.

6.2. Such order will be sent by certified mail to the person and will include findings of fact upon which the Secretary based his or her determination to issue the order and a specific time limit for the completion of the action.



# WEST VIRGINIA MANUFACTURERS ASSOCIATION

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## Comments of the WEST VIRGINIA MANUFACTURERS ASSOCIATION regarding the Administrative Procedures and Civil Administrative Penalties Assessment - Water Resources Protection Act

60 C.S.R. 6

### I. Introduction

The West Virginia Manufacturers Association ("WVMA") is comprised of over 100 manufacturers and supporting businesses dedicated to the advancement of manufacturing in West Virginia. The WVMA has an interest in, and regularly comments upon, environmental rules that affect its members. Among the rules that could have a significant effect on WVMA members is the Department of Environmental Protection's ("DEP") proposed procedural rule, Administrative Procedures and Civil Administrative Penalties Assessment-Water Resources Protection Act, 60 C.S.R. 6.

### II. Comments

#### A. Applicability of the rule.

The DEP's procedural rule states that it "applies to any person withdrawing 750,000 gallons from the waters of the state in any month during a calendar year, beginning in 2003." 60 C.S.R. 6, §3.1. This extends the reporting requirement beyond the scope of the Water Resources Protection Act, *W.Va. Code* §22-26-1 *et seq.* ("the Act"), which provides that the survey information must be provided by persons "whose withdrawal from a water resource during any month exceeds seven hundred fifty thousand gallons . . ." *W.Va. Code* §22-26-3(c). As the proposed rule is written, any entity whose aggregate withdrawals from anywhere in state equals 750,000 gallons per calendar month would be required to complete the survey. The Act, on the other hand, requires that the 750,000 gallons be withdrawn from a water resource, which might be a section of a river, or a particular aquifer, but would not include all waters of the state, wherever located. Water withdrawals are only aggregated where there are "[m]ultiple withdrawals of water from a particular water resource. . . ." *W.Va. Code* §22-26-3(c) (emphasis added). Furthermore, the rule does not have the limiting language found in the statute that excludes reporting of withdrawals for farm use and private households, or for those who purchased water from a public or private water utility.

#### Board of Directors

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The WVMA suggests that the Section 3.1 of the proposed rule be revised to restate *W. Va. Code* §22-26-3(c), making the scope of the Act and the scope of the proposed rule the same.

**B. Right of appeal or review.**

Section 4 of the proposed rule allows the Secretary to demand additional information from those who are surveyed, but there is no mechanism for appeal in the event that someone disagrees with the Secretary's interpretation of the Act or of the rule. A disagreement over completion of the survey form should not result in a penalty until the survey participant and DEP have had an opportunity to discuss any differences. The alternative is for those who disagree with the Secretary's decisions to bring actions in circuit court, as declaratory judgment actions or otherwise, which might be avoided by an appeal or review process.

**C. Internet postings.**

The Secretary proposes placing a non-confidential version of each written determination on the DEP's web page, to provide guidance to persons who are required to fill out the survey forms. The WVMA is not sure what is meant by the word "non-confidential," but assumes that it means that all confidential information has been stripped from the written determination. The WVMA supports providing interpretations on the DEP's website as long as confidential information is not revealed.

**D. Civil penalties.**

Section 5.1 of the proposed rule specifies a \$1,000.00 civil administrative penalty for certain violations, and Section 5.3 states that in some situations a penalty will be assessed. The Secretary should reserve to herself more flexibility to assess a lesser penalty or no penalty at all, depending upon the severity of the violation. In addition, any a penalty assessment should be appealable or subject to internal review upon request of a survey participant.

**III. Conclusion**

The WVMA appreciates this opportunity to comment of 60 C.S.R. 6, and hopes that its positions will be given careful consideration.



John Hill  
WVMA Water Team



West Virginia Oil and Natural Gas Association

**COMMENTS OF THE WEST VIRGINIA OIL AND NATURAL  
GAS ASSOCIATION REGARDING  
60 C.S.R. 6  
ADMINISTRATIVE PROCEDURES AND  
CIVIL ADMINISTRATIVE PENALTIES ASSESSMENT -  
WATER RESOURCES PROTECTION ACT**

**I. Introduction**

The West Virginia Oil and Natural Gas Association (WVONGA) is the oldest oil and gas industry association in West Virginia. Its members include oil and gas well drillers and operators, natural gas transporters and sellers, and affiliated businesses, all of whom share a common interest in enhancing the oil and gas industry in West Virginia. Because some of WVONGA's members may be affected by the Department of Environmental Protection's (DEP) proposed procedural rule, *Administrative Procedures and Civil Administrative Penalties Assessment - Water Resources Protection Act, 60 C.S.R. 6*, WVONGA offers the following comments.

**II. Comments**

**A. Applicability of the rule.**

The scope of the proposed procedural rule is broader than the scope of the Water Resources Protection Act (the Act), which requires persons to complete a water resources inventory survey in the event that they have withdrawn 750,000 gallons from a particular water resource during a calendar month, and allows exceptions for withdrawals for farm use and private households and for those who purchase water from a utility. *W. Va. Code §22-26-3(c)*. The proposed rule, on the other hand, states that it applies to any person withdrawing 750,000 gallons from waters of the state. 60 C.S.R. 6, Section 3.1. The term "waters of the state" usually refers collectively to all waters found in the state. The difference between the Act and the rule is crucial for WVONGA's members, who have operations throughout the state. It is possible that the total state-wide water withdrawals by a company with many wells might exceed 750,000 gallons in a month, but those withdrawals would not be from the same water resource.

They would likely be from different streams or aquifers, usually located many miles apart, and should not be subject to aggregation.

We believe the foregoing is consistent with the DEP's statements in a February 14, 2005 letter from Joseph Dawley that water use for individual wells need not be reported unless it exceeds 750,000 gallons. To make certain that position is clearly understood, we urge the DEP to clarify that the rule does not apply to all those who withdraw 750,000 from waters of the state, but only those who withdraw such amounts from "a particular water resource." *W. Va. Code, §22-26-3(c)*. In addition, the exceptions for farm use, private households and utility purchases should be added to the proposed rule.

**B. Right of Review.**

As stated in the proposed procedural rule, the Secretary's decisions with regard to the sufficiency of data submitted on the water surveys, and her assessment of penalties, are final. WVONGA encourages the DEP to consider some sort of appeal or review process so that those who believe the Secretary has made a mistake regarding the interpretation of the Act would have an opportunity to speak with one of the Secretary's representatives before penalties are assessed or additional data are required. This might reduce the need for appeals to the circuit court of the Secretary's decisions.

**C. Civil Penalties.**

Section 5.1 of the proposed rule specifies a penalty of \$1,000.00 for certain violations, while Section 5.3 mandates a penalty in certain circumstances. We would encourage the Secretary to allow for lesser penalties, and to leave herself an option to assess no penalty where appropriate.

**III. Conclusion**

WVONGA and its members are available to discuss these comments if that would be helpful to the DEP.

  
Nicholas R. DeMarco, Executive Director

## RESPONSE TO COMMENTS -- 60CSR6

The comment period for the Administrative Procedures and Civil Administrative Penalties Assessment rule, 60CSR6, closed March 31, 2005. Comments were received from the West Virginia Oil and Natural Gas Association (WVONGA) and the West Virginia Manufacturers Association (WVMA).

### **COMMENT A:**

*Both WVONGA and WVMA commented on the applicability of the rule, stating the rule was broader in scope than allowed by the Water Resources Protection Act ("Act").*

### **RESPONSE A:**

The West Virginia Department of Environmental Protection ("DEP") agrees with the comment and will revise the rule to reference the applicability language under the Act.

### **COMMENT B:**

*Both WVONGA and WVMA commented on the right of review, specifically section 4 of the proposed rule. Both argued for an appeal process that might alleviate the need for disputes involving determinations to be decided in circuit court.*

### **RESPONSE B:**

The DEP anticipates that prior to issuance of a written determination pursuant to §4.2, there will be ongoing discussions with the affected person(s) to understand the reasoning behind their interpretation or calculation. This discussion should allow a sufficient opportunity for each party to adequately state its position. Moreover, as there is a need to maintain consistency in administering the rule, the DEP will compare the person's claim to other determinations and calculations for similar situations submitted by other survey respondents.

Once the DEP has considered the claim(s) and issued a determination, the affected person will have thirty (30) days to provide the corrected information, a sufficient time to comply. It is the DEP's hope that all of these procedures and time periods will obviate the need for litigation. Where it does not, however, the agency is not free to create appeal rights where none presently exist. Unlike some other laws passed by the Legislature, the Water Resources Protection Act does not contain any right of appeal, other than that related to confidentiality determinations under W.Va. Code §22-26-4(h). Under the State's case law, appeal rights must be provided by statute or legislative rule. See, State ex rel. Board of Education v. Perry, 189 W. Va. 662, 434 S.E. 2d 22 (1993). This being only a procedural rule, the DEP cannot include appeal language.

**COMMENT C:**

WVMA commented that with regard to internet postings, it "...assumes that it means that all confidential information has been stripped from the written determination."

**RESPONSE C:**

The DEP affirms this is what was intended by the word "non-confidential" in §4.4.

**COMMENT D:**

Both WVMA and WVONGA commented on civil penalties. Both suggested that the Secretary allow lesser, or no penalty assessment, where warranted. WVMA stated that the penalty assessment should be appealable or subject to internal review upon request by an affected person.

**RESPONSE D:**

The purpose of this procedural rule is to provide the regulated community and general public guidance and clarification as to how the relatively broad administrative penalty provisions of the statute will be implemented. To be useful, the rule needs to set forth procedures and amounts that are somewhat more specific than the statutory language (all violations subject to a penalty of up to \$5000), but still consistent with the terms of the statute.

With this in mind, the proposed rule states that for one particular type of violation, a penalty will always be assessed and it will be assessed in the amount of \$1000, significantly less than the statutory maximum. This particular violation involves the situation where a person fails or refuses to resubmit data conforming to the DEP's written determination, issued thirty (30) days before the assessment. With respect to this violation, the DEP believes that all situations will be sufficiently similar that a \$1000 penalty will always be appropriate and no further discretion or flexibility on the part of the agency is necessary. This approach ensures consistency in the imposition of penalties and helps to avoid unnecessary litigation or negotiation over the issue of how water withdrawals will be measured.

Similarly, those who fail to register or respond as detailed in section 5.2 will have thirty (30) days to respond without the assessment of a penalty. Only the second notice of violation carries a penalty, which can be any amount "up to \$5,000." For this type of violation, a wide range of flexibility in the amount of penalty is appropriate due to the varying circumstances that can result in the violation. However, the agency believes that some amount of penalty is warranted in any case where a person refuses to comply with a second notice of violation. Therefore, no changes will be made to section 5.