

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: West Virginia Department of Agriculture TITLE NUMBER: 61

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Sale and Distribution of Commerical
Fertilizer

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

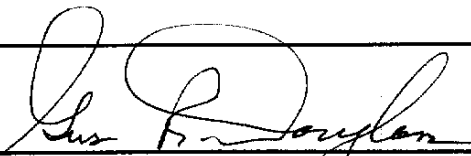
TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB299

SECTION 64-9-2(b), PASSED ON April 13, 2001

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: June 1, 2001


Authorized Signature

TITLE 61
LEGISLATIVE RULES
DEPARTMENT OF AGRICULTURE

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SERIES 6
SALE AND DISTRIBUTION OF FERTILIZER OFFICE WEST VIRGINIA
SECRETARY OF STATE

§61-6-1. General.

1.1. Scope. This legislative rule provides for regulation of fertilizer and fertilizer materials, soil amendments, and horticultural growing media; provides for registration of firms who formulate blends according to consumer specifications and establishes registration fees; provides for labeling requirements; provides for dissemination of sampling and analysis data; provides for guarantees of minor or trace elements; establishes commercial values for plant food ingredients; establishes investigational allowances for secondary and micronutrient element guarantees and requires conformity to terms and definitions as commonly accepted by the Association of American Plant Food Control Officials.

1.2. Authority. W. Va. Code §19-15-12

1.3. Filing Date. May 14, 2001

1.4. Effective Date. June 1, 2001

§61-6-2. Administrative.

2.1. West Virginia Code §19-15-1 et seq. places enforcement of the West Virginia Fertilizer Law with the West Virginia Commissioner of Agriculture and provides that he or she may act through his or her duly authorized agent.

2.2. All persons offering or exposing regulated product for sale, including retailers, wholesalers, jobbers and brokers are equally responsible for full compliance with the fertilizer law and any person who has in his or her possession any unlawful regulated product is responsible for compliance even to registration, payment of the tonnage fee, labeling and any other legal requirements.

2.3. Terms and definitions as used in regard to this rule shall have the impact and meaning as defined in the current publication of the Association of American Plant Food Control Officials.

§61-6-3. Permits, Inspection, Tonnage Reports, and Registration.

3.1. The manufacturer or distributor shall register each brand and grade of fertilizer before it is distributed in this state. The application for registration shall be accompanied by the fee listed in Appendix Number 1 – Fees Of This Rule.

3.2. The manufacturer or distributor shall register each brand of soil amendment, compost, and horticultural growing media before it is distributed in this state. The application for registration shall be accompanied by the fee listed in Appendix Number 1 – Fees Of This Rule.

3.3. Any person who mixes, manipulates or compounds plant food ingredients according to consumer specifications shall apply to the Commissioner for a Fertilizer Formulation Permit. The application shall be accompanied by the fee listed in Appendix Number 1 – Fees Of This Rule. The Fertilizer Formulation Permit expires on the thirtieth day of June of the following year.

3.3.a. Each distributor shall calculate the grade of the consumer formulated fertilizer and shall guarantee the calculated analysis.

3.3.b. The distributor shall clearly indicate the grade of any consumer formulated bulk fertilizer on the invoice and shall include a breakdown of ingredients used in the formulation. The invoice constitutes the distributors guarantee.

3.4. After notification of non-registration of regulated product or manufacturer or distributor of consumer specified regulated product, a person failing to register within the grace period shall pay to the commissioner the penalty fee listed in Appendix Number 1 – Fees Of This Rule.

3.5. An application for registration of any industry by-product as a fertilizer, soil amendment, or horticultural growing media shall be accompanied by laboratory tests and field trial data proving that the product has use and value as a regulated product. Test results from the product shall prove that it presents no hazard to beneficial plant life, animals, humans, aquatic life, soil or water.

3.6. The manufacturer or distributor shall pay to the commissioner for all fertilizers distributed in this state the inspection fee listed in Appendix Number 1 – Fees Of This Rule. Where a person sells the same brand and grade of fertilizer in bulk or packages over ten pounds and in packages ten pounds or less, the inspection fees are paid respectively in each category.

3.6.a. If the manufacturer or distributor fails to file a quarterly tonnage report and pay inspection fees within thirty days after the end of the quarter, the commissioner shall assess the collection fee listed in Appendix Number 1 – Fees Of This Rule, against the registrant, and the amount of fees due the commissioner constitute a debt and become the basis of a judgment against the manufacturer or distributor.

3.7. If any regulated product in the possession of the distributor or retailer is found by the commissioner to be short in weight, the registrant of the regulated product shall within thirty days after official notice from the commissioner pay to the consumer the penalty listed in Appendix Number 1 – Fees Of This Rule. If the consumers cannot be found, the amount of penalty shall be paid to the commissioner and deposited in the department of agriculture's fees account.

§61-6-4. Labeling Requirements.

4.1. The label for fertilizer, soil amendment, compost, or horticultural growing medium shall include the following information:

- 4.1.a. The quantity statement;
- 4.1.b. The brand and/or grade;
- 4.1.c. The purpose of the product;
- 4.1.d. Directions for application; and
- 4.1.e. The name and address of the registrant.

4.2. Additional labeling for fertilizer shall include guaranteed analysis as follows; except zero (0) guarantees should not be made and shall not appear in statement except in nutrient guarantee breakdowns.

4.2.a. Total Nitrogen (N) _____ %.
If chemical forms of N are claimed or required, the form shall be shown.
No implied order of the forms of nitrogen is intended.
% Ammoniacal Nitrogen
% Nitrate Nitrogen
% Water Insoluble Nitrogen
% Urea Nitrogen
% (Other recognized and determinable forms of N)

4.2.b. Available Phosphate (P₂O₅)..... _____ %

4.2.c. Soluble Potash (K₂O)..... _____ %

4.2.d. Other nutrients, elemental basis as prescribed by
subsection 5.2 of this rule..... _____ %

4.2.e. Sources of nutrients, when shown on the label, shall be listed below the completed guaranteed analysis statement.

4.2.f. Directions for use for fertilizer distributed to the end user:

4.2.f.1. For specialty fertilizer, minimum directions for use shall include:

4.2.f.1.a. Recommended application rate or rates in units of weight or volume per unit of area coverage (where application rates are given in volume, the label shall provide sufficient information to calculate the application rates by weight;

4.2.f.1.b. Application timing and minimum intervals to apply the product when plants can utilize nutrients; and

4.2.f.1.c. The statement "Apply Only As Directed" or a statement of similar designation.

4.2.f.2. For all other fertilizers, minimum directions for use shall include at least one of the following;

4.2.f.2.a. A statement such as:
Use in accordance with recommendations of a qualified individual or institution, such as, but not limited to, a certified crop advisor, agronomist, or university crop extension publication, or apply according to recommendations in your approved nutrient management plan; or

4.2.f.2.b. Detailed directions for a specific use.

4.3. Additional labeling for soil amendments shall include the following:

4.3.a. Soil amending ingredients;

4.3.b. "Name of ingredient".....___%, identify and list all ingredients;

4.3.c. Total Other Ingredients.....___%

4.4. Additional labeling for horticultural growing medium shall include:

4.4.a. Physical components, identify and list all components;

4.4.a.1. A listing of all physical components, whether organic or inorganic, shall be listed in order of decreasing amount by volume, if they comprise at least three per cent (3%) or more of total volume of the product;

4.4.b. Physical properties; and

4.4.c. Medium nutrient analysis.

4.5. Slowly Released Plant Nutrients.

4.5.a. No fertilizer label shall bear a statement that connotes or implies that certain plant nutrients contained in a fertilizer are released slowly over a period of time, unless the slow release components are identified and guaranteed at a level of at least 15% of the total guarantee for those nutrients.

4.5.b. Types of products with slow release properties recognized are (1) water insoluble, such as natural organics, ureaform materials, urea-formaldehyde products, isobutylidene diurea, oxamide, etc., (2) coated slow release, such as sulfur coated urea and other encapsulated soluble fertilizers, (3) occluded slow release, where fertilizers or fertilizer materials are mixed with waxes, resins, or other inert materials and formed into particles and (4) products containing water soluble nitrogen such as ureaform materials, urea-formaldehyde products, methylenediurea (MDU), dimethylenetriurea (DMTU), dicyanodiamide (DCD), etc. The terms, "water insoluble", "coated slow release", "slow release", "controlled release", "slowly available water soluble", and "occluded slow release" are accepted as descriptive of these products, provided the manufacturer can show a testing program substantiating the claim (testing under guidance of Experiment Station personnel or a recognized reputable researcher acceptable to the commissioner). A laboratory procedure, acceptable to the commissioner for evaluating the release characteristics of the products shall also be provided by the manufacturer.

§61-6-5. Secondary And Micronutrient Elements.

5.1. The basicity or acidity of a fertilizer expressed in terms of calcium carbonate equivalent in multiples of one hundred (100) pounds per ton, or percent in multiples of five percent (5%), may be shown on the application for registration and on the label.

5.2. The manufacturer or distributor shall register and guarantee additional plant nutrients besides nitrogen, phosphorus and potassium, when mentioned or claimed on the label or container. Guarantees shall be made on the elemental basis. Source of the elements guaranteed shall be provided to the Commissioner on request. Except guarantees for those water soluble nutrients labeled for hydroponic or continuous liquid feeding programs, when claims for the nutrients are made on the label, container or application for registration, the minimum percentages which shall be accepted for registration are as follows:

ELEMENT	PERCENT
Calcium (Ca)	1.0000
Magnesium (Mg)	0.5000
Sulfur (S)	1.0000
Boron (B)	0.0200
Chlorine (Cl)	0.1000
Cobalt (Co)	0.0005
Copper (Cu)	0.0500
Iron (Fe)	0.1000
Manganese (Mn)	0.0500
Molybdenum (Mo)	0.0005
Sodium (Na)	0.1000
Zinc (Zn)	0.0500

5.3. Manufacturer or distributor guarantees or claims for the additional plant nutrients in subsection 5.2 of this section are the only ones which will be accepted. Proposed labels and directions for use of the fertilizer shall be furnished to the Commissioner with the application for registration upon request.

5.4. Warning or caution statements are required on the label of any product which contains 0.03 percent or more of Boron in a water soluble form, or 0.001 percent or more of Molybdenum. Any of the elements listed in subsection 5.2 of this section which are guaranteed shall appear in the order listed immediately following guarantees for the primary nutrients: nitrogen, available phosphate, and soluble potash.

5.5. Tolerances for determining deficiencies in secondary and micronutrient elements are those recommended by the Association of American Plant Food Control Officials.

§61-6-6. Additional Information Required On Mixed Fertilizers.

6.1. Chlorine content of fertilizers branded for tobacco.

6.1.a. The maximum chlorine in tobacco plant bed fertilizer shall be not more than one percent (1.00%).

6.1.b. The maximum chlorine in regular field crop tobacco fertilizer shall be not more than three percent (3.00%).

6.1.c. The maximum chlorine in tobacco top dresser shall be not more than 5.00%.

6.1.d. All applications for the registration of tobacco fertilizer shall show the maximum percent of chlorine and this information may also be shown on the label.

6.2. Pesticides in fertilizers.

6.2.a. Only pesticides which have prior approval by the United States Environmental Protection Agency and the West Virginia Commissioner of Agriculture may be incorporated into fertilizers.

6.2.b. Directions for proper use shall be shown on the label.

6.2.c. The amount of pesticide present in a fertilizer when used according to directions shall be in a quantity that provides adequate amounts of pesticide to control the pest or pests for which it applies, but shall not be in excessive amounts which would present a hazard to plant life, animals, humans, aquatic life, soil or water when used according to directions.

6.3. Specialty Fertilizer Claims

6.3.a. When claims are made for qualities other than for plant foods and pesticides in specialty fertilizers, experimental evidence shall be submitted with the application for registration substantiating the claim and if requested, a method of analysis to determine the quality claimed shall also be submitted with the application for registration.

6.4. Requirements for 18% or less plant food.

6.4.a. Each application for registration of a mixed fertilizer which has a total of eighteen percent (18%) or less plant food shall show the percentage of nitrogen derived from water insoluble form of plant or animal origin, and the percentage shall be stated on the label.

§61-6-7. Safe Use of Regulated Product

7.1. The consumer shall use all regulated products in a safe manner which follows any written label directions the manufacturer establishes, and which will prevent the products from becoming injurious to beneficial plant life, animals, humans, aquatic life, soil or water.

7.2. The use of the regulated products shall conform to the provisions of The Clean Water Act, approved Nutrient Management Plans, General Groundwater Protection Rules For Fertilizer And Manures, Best Management Practices For Fertilizer And Manures, and other provisions as established by state or federal laws.

7.3. All provisions of the West Virginia Primary and Secondary Containment of Fertilizers Rule 61CSR6B shall be followed by all persons storing dry and/or fluid fertilizer at their storage facility.

§61-6-8. Methods Of Analysis And Publication Of Results.

8.1. The Commissioner shall use methods of analysis approved by the Association of Official Analytical Chemists, AOAC International. When no official method has been published by AOAC International, the method of analysis shall be one approved by the Commissioner.

8.2. When the Commissioner finds a fertilizer to be deficient and subject to penalty, he or she shall notify the registrant of the deficiency ten (10) days prior to reporting the results to other levels of distribution or use.

8.3. The Commissioner shall, at least annually, publish a summary of the results of sampling and analysis of commercial fertilizers sold in this state and may include data relating to volume and use.

§61-6- 9. Sampling, Analysis Investigational Allowances And Index Value.

9.1. The commissioner shall use investigational allowances and overall index values as printed in the current publication of the Association of American Plant Food Control Officials in determining fertilizer deficiencies and overall index value. A commercial fertilizer shall be considered deficient if the analysis of any nutrient is below the guarantee by an amount exceeding the values in the following schedule, or if the overall index value of the fertilizer is below 98%.

Guarantee, percent	Nitrogen (N)	Avail. Phosphate (P2O5)	Sol. Potash (K2O)
Investigational Allowance, percent			
04 or less	0.49	0.67	0.41
05	0.51	0.67	0.43
06	0.52	0.67	0.47
07	0.54	0.68	0.53
08	0.55	0.68	0.60
09	0.57	0.68	0.65
10	0.58	0.69	0.70
12	0.61	0.69	0.79
14	0.63	0.70	0.87
16	0.67	0.70	0.94
18	0.70	0.71	1.01
20	0.73	0.72	1.08
22	0.75	0.72	1.15
24	0.78	0.73	1.21
26	0.81	0.73	1.27
28	0.83	0.74	1.33
30	0.86	0.75	1.39
32 or more [*]	0.88	0.76	1.44

[*For DAP and MAP the investigational Allowance for Available Phosphate shall be: 0.70; For TSP the Investigational Allowance shall be: 1.53]

For guarantees not listed, calculate the appropriate value by interpolation.

The overall index value is calculated by comparing the commercial value guaranteed with the commercial value found. The values for commercial fertilizer nutrients are derived from the average retail value from a state-wide survey of bulk fertilizer blenders.

Secondary and minor elements shall be considered deficient if any element is below the guarantee by an amount exceeding the values in the following schedule:

Element	Investigational Allowance
Calcium)	0.2 unit + 5% of guarantee
Magnesium)	0.2 unit + 5% of guarantee
Sulfur)	0.2 unit + 5% of guarantee
Boron)	0.003 unit + 15% of guarantee
Cobalt)	0.0001 unit + 30% of guarantee
Chlorine)	0.005 unit + 10% of guarantee
Copper)	0.005 unit + 10% of guarantee
Iron)	0.005 unit + 10% of guarantee
Manganese)	0.005 unit + 10% of guarantee
Molybdenum)	0.0001unit + 30% of guarantee
Sodium)	0.005 unit + 10% of guarantee
Zinc)	0.005 unit + 10% of guarantee

The maximum allowance when calculated in accordance to the above shall be 1 unit (1%).

9.2. The methods of collecting samples and analysis shall be those methods recommended by the Association of American Plant Food Control Officials and the AOAC International respectively.

§61-6-10. Methods For Determining Deficiencies For Soil Amendments and Horticultural Growing Media.

10.1. For the purpose of determining commercial values to be applied under the provisions of this section, the commissioner shall determine from the registrant's sales invoice the values charged for the soil amending ingredients. If no invoice is available or if the invoice fails to provide sufficient information the commissioner may use other methods to determine values. The determined values shall be used in determining and assessing penalties.

10.2. The Commissioner shall penalize the registrant for any deficiencies beyond investigational allowances according to the schedule as published in the AAPFCO Official Publication.

§61-6-11. Deficiency Penalties.

11.1. Penalty for nitrogen, available phosphate and soluble potash. -- If the analysis shows that a fertilizer is deficient in one or more of its guaranteed primary plant nutrients (N-P-K) beyond the "investigational allowances" as established by this rule, or if the overall index value of the fertilizer is below the level established by rule, the Commissioner shall assess a penalty of three times the commercial value of the deficiency.

11.2. Penalty for soil amendment. If the analysis shows that any soil amendment falls short of the guaranteed analysis in any one soil amending ingredient or in total soil amending ingredients, the Commissioner shall assess a penalty. A penalty of three times the value of the total soil amending ingredient deficiency shall be assessed when the total deficiency is more than 2% under the calculated total soil amending ingredient guarantee.

11.3. Penalty for secondary and minor elements. If the analysis shows that any secondary and minor element falls short of the guaranteed analysis in one or more secondary and minor elements, the Commissioner shall assess a penalty. A penalty of three times the value of the total secondary and minor element deficiency shall be assessed when the total deficiency exceeds investigational allowances as established by this rule.

11.4. Penalty for excessive chlorine in tobacco fertilizers. If the analysis shows chlorine exceeds the guaranteed analysis, the Commissioner shall assess a penalty of three times the value of the chlorine excess when the excess exceeds investigational allowances as established by this rule.

§61-6-12. Commercial Value

12.1. For the purpose of determining the commercial values to be applied under the provisions of this section of this rule, the commissioner shall determine and publish annually the values per unit of nitrogen, available phosphate and soluble potash in fertilizers in this state.

12.2. The value per pound of nitrogen, available phosphate and soluble potash for specialty fertilizers shall be based upon the retail price of the fertilizer. The relative value of nitrogen, phosphoric acid and potash shall be in the following ratio:

Nitrogen (water soluble)	2
Nitrogen (water insoluble)	6
Phosphoric Acid	1
Potash	1

12.3. The commissioner shall determine from the registrant's sales invoice the values charged for the soil amending ingredients. If no invoice is available or if the invoice fails to provide sufficient information the commissioner may use other methods to determine values. The determined and published value shall be used in determining and assessing penalty payments.

12.4. When a manufacturer wishes to return to his or her plant a lot of regulated product which has been found deficient, the manufacturer shall, within thirty (30) days of the notice of deficiency, give written notice to the Commissioner to that effect, and shall furnish the Commissioner with reasonable evidence that the regulated product was returned to the plant.

§61-6-13. Hearings, penalties and prosecutions.

13.1. Any person, registrant, distributor, or possessor from whom a violative sample was collected has the right to a hearing within fifteen (15) days from the date of receipt of certified mail of the sample report.

13.2. Criminal penalties. – Any person violating any of the provisions of this rule is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than two hundred dollars for the first offense, and for each subsequent offense, shall be fined not less than two hundred nor more than five hundred dollars, or imprisoned in the county jail not more than six months, or both fined and imprisoned. Magistrates have concurrent jurisdiction with circuit courts to enforce the provisions of this article.

13.3. Notwithstanding any other provision of law to the contrary, the commissioner may propose for promulgation and adopt rules which permit consent agreements or negotiated settlements for the civil penalties assessed as a result of a violation of the provisions of this article.

13.4. Nothing in this rule may be construed as to require the commissioner to report minor violations of this article when the commissioner believes that the public interest will be best served by a written notice.

13.5. No state court may allow the recovery of damages for administrative action taken if the court finds that there was probable cause for the action.

APPENDIX NUMBER 1
FEES OF THIS RULE

TYPE OF FEE	SECTION REFERENCE	FEE	DESCRIPTION
Fertilizer Registration	3.1	\$ 4.00	Per brand & grade; bulk, or packages >10#
Fertilizer Registration	3.1	\$30.00	Per brand & grade; packages 10# or less
Soil Amendment Registration	3.2	\$75.00	Per brand
Compost Registration	3.2	\$75.00	Per brand
Horticultural Growing Media Registration	3.2	\$75.00	Per brand
Fertilizer Formulation Permit	3.3	\$35.00	Per year & location
Late Registration Penalty Fee	3.4	\$100.00	Per year and in addition to registration fee
Fertilizer Inspection Fee	3.6	\$ 0.40	Per ton per quarter; bulk, or packages >10#
Fertilizer Inspection Fee	3.6	\$ 15.00	Per brand & grade; Packages 10# or less
Late Tonnage Report/Inspection Fee Collection Fee	3.6.a	10%	Additional to Inspection Fee
Short In Weight	3.7	4 times	Value of shortage