



**WEST VIRGINIA
SECRETARY OF STATE**

NATALIE E. TENNANT

ADMINISTRATIVE LAW DIVISION

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OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

**FORM 6 -- NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY **Water Resources Division Of Water And Waste Management**
RULE TYPE **Legislative** AMENDMENT TO EXISTING RULE No **TITLE-SERIES 47-65**
RULE NAME **Aboveground Storage Tank Administrative Proceedings and Civil Penalty Assessment**

CITE AUTHORITY **W. Va. Code § 22-30-16**

HOUSE OR SENATE BILL NUMBER	SECTION	PASSED ON
HB117	§64-3-1(cc)	06/02/2016

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE FOLLOWING DATE

Monday, August 01, 2016

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: 47-65



Rule Id: 9703



Document: 27627

**TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER AND WASTE MANAGEMENT**

**SERIES 65
ABOVEGROUND STORAGE TANK ADMINISTRATIVE PROCEEDINGS AND
CIVIL PENALTY ASSESSMENT**

§47-65-1. 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 Aboveground Storage Tank Act in lieu of the institution of a civil action.

1.2. Authority. -- W. Va. Code § 22-30-16

1.3. Filing Date. -- June 27, 2016

1.4. Effective Date. -- August 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 Aboveground Storage Tank Act (“Act”) or the Aboveground Storage Tank 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.

§ 47-65-2. Definitions.

2.1. This Rule hereby incorporates by reference the definitions of all terms as contained in the Aboveground Storage Tank Act, W. Va. Code §22-30-3, and the Aboveground Storage Tank Rule, 47 CSR 63. 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 Aboveground Storage Tank 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 an owner, operator, permittee or any person alleged to have violated the Act or its Rules.

§ 47-65-3. Applicability of the Rule.

3.1. Upon discovery of a violation, through whatever means, of the Aboveground Storage Tank Act or its Rules, 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 its Rules, should the agency and the responsible party be unable to reach a 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.

§ 47-65-4. Notice.

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

4.2. Notice of the Secretary's decision to commence an administrative proceeding shall be transmitted to the responsible party by certified mail or other transmittal method that offers proof of delivery (i.e. facsimile or electronic mail).

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 or not it will participate in the administrative proceeding. Failure to timely respond shall be considered as refusal to participate in the process.

§47-65-5. 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 violations are 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, for any reason, by any party involved in the proceeding.

§ 47-65-6. 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. The gravity-based penalty amount should be determined by examining two factors: potential for harm to human health or the environment and extent of deviation from the statutory or regulatory requirement.

6.1.a. Potential for harm to human health or the environment.

6.1.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.

6.1.a.2. Emphasis shall be placed on 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.3. 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 analysis.

6.1.b. Extent of Deviation from Requirements.

6.1.b.1. The extent of deviation from the Act or its Rules 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 depending 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 or the environment and the extent of deviation from a regulatory requirement may include, but are not limited to, length of time of violation, actual human and environmental exposure, and resultant effects upon human health and the environment, 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 presented 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.

§ 47-65-7. 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, 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 and 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 may 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 reject the modified Consent Order.

7.4. Penalties collected pursuant to this Rule shall be deposited into the Aboveground Storage Tank Administrative Fund or the Protect our Water Fund, as appropriate, for use in effectuating the purposes of the Act and its Rules.

**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