

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Mining Programs

DOCUMENT NUMBER: 562-4180-306

TITLE: Civil Penalty Assessments for Coal Mining Operations

EFFECTIVE DATE: Upon publication of notice as final in the *Pennsylvania Bulletin*.

AUTHORITY: Section 18.4 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.18d); Section 605(b) of the Clean Streams Law (35 P.S. § 691.605(b)); Section 11 of the Coal Refuse Disposal Control Act (52 P.S. 30.61); Section 17(f) of the Bituminous Mine Subsidence and Land Conservation Act (52 P.S. § 1406.17(f)); 25 Pa. Code §§ 86.191 - 86.203; 25 Pa. Code Chapter 92a.

POLICY: It is the policy of the Department of Environmental Protection (DEP or the Department) to review all violations cited for an assessment of a civil penalty.

PURPOSE: A uniform civil penalty policy is necessary so that all operations are assessed under the same criteria. This policy will allow greater discretion when calculating civil penalties by considering all aspects of the violation.

APPLICABILITY: This guidance applies to violations of the Coal Mining Regulations, 25 Pa. Code Chapters 86 - 90 and the applicable statutes. This guidance does not limit the Department's authority to stipulate to different penalty amounts for any purpose, including for the purposes of a Consent Order and Agreement, Consent Decree, or other settlement of violations.

DISCLAIMER: The policies and procedures outlined in this guidance are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. DEP does not intend to give this guidance that weight or deference. This document establishes the framework, within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

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TECHNICAL GUIDANCE:

I. REGULATORY GUIDELINES AND ASSESSMENT PROCEDURES

Coal – 25 Pa. Code §§ 86.191 - 86.203

II. STATUTORY MAXIMUMS

Section 18.4 of the Surface Mining Conservation and Reclamation Act – \$5,000*

Section 605(b) of the Clean Streams Law – \$10,000*

Section 11 of the Coal Refuse Disposal Control Act – \$5,000*

Section 17(f) of the Bituminous Mine Subsidence and Land Conservation Act – \$5,000*

* Amounts are maximum penalties per day for each violation

III. MANDATORY PENALTIES

DEP must assess a civil penalty for the following:

A. All violations that lead to the issuance of a cessation order. 25 Pa. Code § 86.193(a). The amount of the penalty shall not exceed the appropriate statutory maximum penalty amount referenced in Section II, above.

B. Failure to Abate

DEP will assess Failure to Abate Cessation Order (FTACO) violations at a minimum of \$750 per violation per day for each day of violation in addition to the penalty for the underlying violation(s). Such penalty may be terminated after thirty (30) days provided that alternate enforcement action is initiated in accordance with the Alternate Enforcement technical guidance document (562-4100-307). 25 Pa. Code § 86.194(c).

C. All violations where the calculated penalty amount exceeds the threshold described in 25 Pa. Code § 86.193(b).

IV. DISCRETIONARY PENALTIES

DEP may, at its discretion, assess a civil penalty for the following:

A. Violations that did not result in the issuance of a cessation order and that are calculated in an amount less than the threshold described in § 86.193(b) need not be assessed unless the violation was issued as a result of a pattern of violations. 25 Pa. Code § 86.193(c).

B. Compliance Orders issued solely for the purpose of extending the abatement date of a previously issued Notice of Violation will not be assessed a penalty unless the operator fails to correct the violation by the new date and an FTACO is issued.

V. CALCULATION OF PENALTIES FOR NON-WATER QUALITY VIOLATIONS

Under the mining regulations, DEP considers the following factors in calculating an assessment: the seriousness of the violation, culpability of the operator, speed of compliance, cost to the Commonwealth, savings to the violator, and history of violation on the permit where the violation was issued. See 25 Pa. Code § 86.194. The requirements of each of the controlling environmental statutes will also be relevant to the calculations.

Any violation of Chapters 86-90 that results in the discharge of pollutants to waters of the Commonwealth also constitutes a violation of the Clean Streams Law, in which case Section 605 of the Clean Streams Law controls the calculation of the Clean Streams Law violations. See 35 P.S. § 691.605. The Clean Streams Law is the primary statute relevant to the assessment of penalties for water quality violations. Section VI of this document addresses the assessment of civil penalties for water quality violations.

The amount of the civil penalty should represent a “reasonable fit” between the nature and degree of the violation and the amount calculated. Taylor Land Clearing v. DEP, 2012 EHB 138.

Each day of continuing non-compliance can be considered a separate violation. The cumulative effect of a continuing non-compliance can be considered in assessing the penalty for each day of the violation.

The penalty calculation formula is:

$$\text{Penalty Amount} = \text{Seriousness} + \text{Culpability} + \text{Commonwealth's Costs} + \text{Violator's Savings} + \text{Violation History} - \text{Speed of Compliance}$$

The Department will complete a Coal Civil Penalty Worksheet (5600-FM-BMP0106) in order to demonstrate the process of determining the full penalty.

Civil penalty assessments should be finalized (i.e., memorialized in a Consent Assessment or Final Assessment) within 180 days of the enforcement action.

A. Seriousness (25 Pa. Code § 86.194(b)(1))

1. Low (\$0 - \$1,000)

Circumstances that involve a low degree of seriousness may include:

- Blasting violations which do not have the potential to cause damage or injury (e.g., administrative violations regarding blast plan, shot reports, etc.).
- Violations with minimal or no documented environmental impact.
- Violations where none of the below listed criteria apply.

2. High (\$1,001 - Statutory Maximum)

Circumstances that involve a high degree of seriousness may include:

- Diminution of public or private water supply sufficient to cause inconvenience to water users.
- Moderate damage to wildlife or habitat of natural flora or fauna.
- Moderate damage to structures other than occupied dwellings or buildings accessible to the public.
- Moderate damage to public or private property.
- Moderate damage to a wetland.
- Minor loss of topsoil (poor handling or burial of some soils).
- Violations resulting in damage outside of the permit area where the potential for harm to the public was negligible.
- Safety violations with the potential for injury to the public.

Extraordinary Circumstances

If extraordinary circumstances are determined to exist, the Department may assess additional civil penalties up to the applicable statutory maximum. Extraordinary circumstances may include:

- Failure to replace a public or private water supply in the case of a permanent loss or severe degradation.
- Violations resulting in severe physical injury, illness, or death.
- Severe destruction, alteration, or contamination of a wetland or critical land habitat of threatened or endangered species.
- Violations resulting in destruction or severe damage to public or private property or any damage to occupied dwellings or buildings accessible to the public (e.g., school, library, etc.).
- Severe loss of topsoil or destruction of prime farmlands (e.g., failing to save any soils or burial of all soils).
- Affecting areas designated as unsuitable for mining.

- Affecting areas where mining is prohibited or limited.
- Conducting coal mining activities in an area prior to the issuance of an approved permit or bond.

B. Culpability of the Operator (25 Pa. Code § 86.194(b)(2))

For the purposes of civil penalties, DEP expresses culpability in terms consistent with statutory language and legal precedent, which generally articulates the following degrees of culpability (from most culpable to least culpable): (1) willfulness; (2) recklessness; (3) negligence; and (4) no culpability. See Russell v. DEP, 2015 EHB 360, 369-70.

1. Willfulness (\$260 - statutory maximum)

The operator made a conscious choice to engage in certain conduct with knowledge that a violation will result.

In other words, a willful violation is a deliberate predetermined action with prior knowledge that the action constituted a violation of law, regulations, permit conditions, or a deliberate attempt to circumvent or avoid compliance.

2. Recklessness (\$260 - \$1,500)

The operator created a substantial and unjustifiable risk that a violation could result from their conduct and acted in conscious disregard for or indifference to that risk.

In making this determination, DEP will consider whether:

- The situation was previously identified in an inspection report or otherwise known to the operator.
- The situation was previously cited in a Notice of Violation (except for time extensions).
- The operator failed to implement available remedial measures to prevent a violation.
- The operator failed to follow the approved plans and permits which contributed to the violation.
- The operator failed to take corrective actions once a violation becomes known to them.

3. Negligence (\$0 - \$1,200)

The operator's conduct and the circumstances known to them involves a deviation from the standard of conduct that a reasonable person would observe in the operator's situation.

The same standard applies to an operator's failure to perceive a violation or failure to prevent the occurrence of a violation due to indifference, lack of reasonable care, or lack of diligence.

In making this determination, DEP will consider such factors including, but not limited to, whether:

- The operator should have been aware of a potential problem and did not take steps to mitigate the situation before it resulted in a violation.
- The operator was generally unaware of the potential problem.

Relative diligence and care were demonstrated on related aspects of the operation.

4. No Culpability (\$0)

The operator's conduct was consistent with the standard of conduct that a reasonable person would observe in the operator's situation, including taking measures to foresee and prevent occurrences of a violation.

C. Speed of Compliance/Compliance Credit (25 Pa. Code § 86.194(b)(3))

DEP may consider a credit up to \$1,000 based on the operator's attempt to achieve rapid compliance after the operator knew or should have known of the violation. DEP may not credit the abatement of a violation within the time period provided in an abatement order unless the violation is abated in the shortest possible time, in which case DEP may consider a credit up to \$1,000.

D. Costs to the Commonwealth (25 Pa. Code § 86.194(b)(4))

A penalty of up to the statutory maximum may be assessed based on the costs expended by the Commonwealth as a result of the violation. The costs may include, but are not limited to, administrative costs, inspection costs sampling and lab costs, and costs of preventive or restorative measures taken to prevent or lessen the threat of damage or injury.

E. Savings to the Violator (25 Pa. Code § 86.194(b)(5))

If the operator who commits the violation gains economic benefit as a result of the violation, a penalty may be assessed in an amount equal to the savings up to the statutory maximum for each violation.

F. History of Violation (25 Pa. Code § 86.194(b)(6))

1. A penalty may be increased by 5% for each violation cited in the order which was issued on the site in question during the previous one-year period and which was included in a previously adjudicated proceeding, agreement, or consent decree.
2. A previous violation shall not be counted if it is the subject of a pending administrative or judicial review or if the period to request such a review or to appeal the administrative or judicial decision determining the previous violation has not expired. 25 Pa. Code § 86.194(b)(6)(i).
3. The increase in an assessment based on history of violation may not exceed \$1,000. 25 Pa. Code § 86.194(b)(6).

VI. CALCULATION OF CIVIL PENALTIES FOR WATER QUALITY VIOLATIONS

Civil penalty assessments for water quality violations are controlled by Section 605 of the Pennsylvania Clean Streams Law (35 P.S. § 691.605), and 25 Pa. Code 92a, in addition to the other applicable rules and regulations. Therefore, these civil penalty assessments are discussed separately.

This section describes a basis for calculating the civil penalties for water quality violations using uniform criteria to provide fair and consistent assessments. DEP imposes civil penalties for those effluent violations of NPDES permit limits identified in Discharge Monitoring Reports (DMRs) or through DEP sampling. Each parameter exceeding a limit constitutes a separate violation.

In determining the amount of the civil penalty, DEP evaluates the seriousness of each parameter in violation as shown by each DMR or DEP sampling that forms the basis of the enforcement action. In other words, if a given sample shows that multiple parameters are exceeded, DEP calculates the “seriousness” portion of the civil penalty individually for each parameter exceeding the effluent limits. DEP may calculate the remaining factors (culpability; willfulness; speed of compliance; history of violation; savings to the violator; and cost to the Commonwealth) individually, or, under appropriate circumstances, DEP may consolidate the other factors across each exceeded parameter.

Water Quality Penalty Calculation

The penalty calculation formula is:

$$\text{Penalty Amount} = \text{Seriousness} + \text{Culpability} + \text{Commonwealth's Costs} + \text{Violator's Savings} + \text{Violation History} - \text{Speed of Compliance}$$

The Department will complete a Coal Civil Penalty Worksheet – Water (5600-FM-BMP0501) in order to demonstrate the process of determining the full penalty.

A. Seriousness

The seriousness of a violation incorporates several factors: the magnitude, the resource component affected, the duration of the violation, the surface water designation as defined in 25 Pa. Code Chapter 93, and the environmental toxicity of the exceeded parameter.

1. Magnitude:

Magnitude of the effluent violation is determined one of two ways.

Method 1: Evidence Based

If the severity of the violation can be determined by physical evidence such as lethal or sub-lethal impacts to the macro invertebrate community or fish mortality, sediment deposition in the receiving stream which impairs its use or impacts to public water supplies; the magnitude of the violation should be considered the highest magnitude. The magnitude of damage to waters of the Commonwealth is rated in one of five categories:

1. Severe

- Destruction or contamination of critical habitat of threatened or endangered species.
- Destruction of significant areas or acreage of state parks, state forests, and/or state game lands.
- Major impact on water or land use (agriculture, recreation, etc.).
- Damage to resources requiring long-term or artificial recovery.

2. Significant

- Limited impact on wildlife or significant habitat.
- Limited impact on areas or acreage of state parks, state forests, and/or state game lands.
- Significant, but limited or short-term impact on water or land use.
- Damage to resources requiring a short-term recovery.

3. Moderate

- Minor damage to the resource or impairment of one or more water or land uses to the extent that there is some inconvenience to water users.

4. Low

- Minimal damage to the resource and minimal inconvenience to water or land users.

5. De Minimis

- Violations that did not result in any detectable damage or inconvenience but are considered because of the preventative intent of the act.

Method 2: Sample Based

Absent any evidence of the severity, the magnitude will be based on the degree the effluent limit is exceeded by utilizing the formula below and then using the result and Table 1: Magnitude to determine the factor.

$$\text{Degree Exceeded} = \frac{\text{Sample Result}}{\text{Effluent Limit}}$$

In the event that the monthly average is exceeded, the seriousness would be calculated as described above using the average monthly sample results divided by the average monthly effluent limit to determine the degree of effluent exceedance.

Values are selected from within designated ranges. If the limits for toxic pollutants are exceeded the magnitude should be increased by one category on the table since these limits are established to prevent impairment. Toxic pollutants are identified in 25 Pa. Code § 93.8(c) Table 5.

Table 1: Magnitude		
Magnitude	Instantaneous Limit	Standard Units above or below pH limit
Severe	4.01 - >	4.01 - >
Significant	3.01 – 4.0	3.01 – 4.0
Moderate	2.51 – 3.0	2.01 – 3.0
Low	2.01 – 2.5	0.51 – 2.0
De minimis	<1 – 2.0	0 – 0.5

Conventional pollutants include dissolved oxygen, total suspended solids, total dissolved solids, sulfate, total alkalinity, iron, manganese, and temperature. A special scale is used to calculate the values for pH, which is calculated using a logarithmic scale.

Water Quality Based Effluent Limits (WQBEL) are established to prevent impairment to the receiving stream thus violations of those limits are more likely to impact the stream than the scientifically assigned Best Available Technology (BAT) limits. Violations of WQBEL would not be considered “de minimis” and would be assessed as “Low” if the result of the calculation is 2.5 or below.

2. Resource Component Affected:

DEP will evaluate the impact to the applicable uses, the discharge flow relative to stream flow, and with regard to impact to aquatic life and recreation, the geographic extent of the impact. If the receiving stream is effluent dominated the

impact should be categorized as Severe or Significant. If the receiving stream is not effluent dominated the degree of impact would be Moderate, Low, or DeMinimus.

The severity of violations impacting water quality, or with the potential for such impacts, is rated according to protected uses of the stream or water body as described in 25 Pa. Code Chapter 93.

Use categories:

1. **Special Protection:** Surface waters of the Commonwealth, including wetlands, currently with existing or designated uses as “Exceptional Value Waters” or “High Quality Waters” under Chapter 93.
2. **High Use:** Public water supply sources and/or extensive use as private water supplies, game fisheries not identified as special protection, and waters of considerable recreational or economic value.
3. **Moderate Use:** Waters with significant use as private water supplies, non-game fisheries not identified as special protection waters, and waters of considerable recreational or economic value.
4. **Low Use:** No significant water supply use exists, no known recreational or economic use exists, or waters polluted by other sources.
5. **All Other Uses:** DEP will consider the applicable uses of the surface water (aquatic life, water supply, and/or recreational use) under Chapter 93 and will consult, where available, stream reports prepared by DEP, Division of Water Quality Standards.

DEP will consider following factors in determining the degree a resource is impacted by the violation when calculating civil penalties.

For Aquatic Life Impacts – evaluate the level of impact to aquatic life use of the receiving stream as defined under Chapter 93. Aquatic Life includes Cold Water Fishes, Warm Water Fishes, Migratory Fishes, and Trout Stocking. The designation for the particular receiving stream can be found in 25 Pa. Code § 93.9. Violations to Wild Trout streams should be given a higher level of resource impact. The Pennsylvania Fish and Boat Commission website can be a resource to determine the designation of the receiving stream at the address http://fishandboat.com/waters_trout.htm. DEP’s Geographic Information System (GIS) eMAP and WAVE can be resources to determine the aquatic life use designation of the receiving stream.

For Water Supply Impacts – evaluate the level of impact to water supply uses. DEP’s GIS eMAP can be used to determine if any water supply intakes are a critical distance downstream of the discharge. The highest level of resource impact should be considered where there is an exceedance of Maximum

Contaminant Levels (MCLs) at a public water supply intake. Lower levels for resource impact should be considered where a public water supply is affected though MCLs are not exceeded, and where other water supply uses (industrial, livestock, or irrigation uses) are affected as a result of the incident.

For Recreation Impacts – evaluate the level of impact to recreational uses as defined in Chapter 93. DEP’s GIS eMAP and WAVE can be used to determine the recreational uses of the receiving stream. Significant impacts to a fishery or to water contact recreation should be considered the highest level of resource impact.

Extent of Impacts – incidents that cause widespread damage to water of the Commonwealth should be weighted higher than incidents with localized impact only. The extent of the impact should be considered when evaluating the aquatic life and recreation impacts.

Table 2: Resource Component can be used to determine the base penalty assessment for seriousness based on the impact to water use and magnitude of the effluent exceedance for each violation.

Magnitude or Damage	Use →	Resource Component			
		Special Protection	High Use	Moderate Use	Low Use
	Severe	\$10,000	\$7,500	\$5,000	\$2,500
	Significant	\$6,000	\$4,000	\$2,000	\$1,000
	Moderate	\$3,500	\$2,000	\$1,000	\$500
	Low	\$1,250	\$1,000	\$500	\$250
	De minimis	\$750	\$500	\$250	\$100

3. Duration Factor:

The duration of the violation should be assessed when the average monthly limits are exceeded. The required sampling frequency should be used to determine the duration. The factor applied will be the number of non-compliant samples in the period.

4. Failure to Report Factor:

Failure to report violations include three main categories: failure to submit the required DMRs, failure to self-report violations identified by the sample results, and failure to sample each discharge required by the permit. DEP will consider \$500 for a violation of a reporting requirement and \$1,000 per violation for repeatedly failing to report.

B. Savings to the Violator

If the person who commits the violation gains economic benefit as a result of the violation, a penalty may be assessed in an amount equal to the savings up to the statutory maximum for each violation. The assessment should be calculated starting with the date the violation occurred and ending when the violation ends or is corrected.

The savings could include the cost to collect, analyze, and report water sample results, costs to treat mine water in order to meet effluent limits, and the cost to construct and maintain ponds and treatment systems. The software AMDTreat may be a helpful tool for obtaining costs used in calculating the savings to the violator if the actual costs are not available.

All of the factors considered in calculating the savings to the violator should be documented in the civil penalty worksheet.

C. Remaining Factors

DEP will calculate the remaining factors – culpability, speed of compliance/compliance credits, costs to the Commonwealth, and history of violation – consistent with descriptions in Section V, Subparts B-D and F, above.

VII. REVISION OF A CIVIL PENALTY

A. Within 15 days of service of an order, DEP may revise the penalty if DEP determines that the civil penalty is demonstrably unjust. 25 Pa. Code § 86.194(f)(1). DEP may undertake this process:

1. Upon DEP's own initiative.
2. Upon written request received within 15 days of issuance of an order or Cessation Order and detailing any exceptional factors that the requestor wishes DEP to take into consideration.

B. In making its determination, DEP will:

1. Consider exceptional factors present in the particular case.
2. Not reduce the civil penalty based on an argument that a reduction in the civil penalty could be used to abate violations of the acts, the regulations or a condition of the permit. 25 Pa. Code § 86.194(f)(1).

C. If DEP revises the civil penalty, it will:

1. Use the criteria in Subsection (b) to determine the appropriate civil penalty. 25 Pa. Code § 86.194(f)(2).

2. Give a written explanation of the basis for the revised civil penalty to the person to whom the order was issued. 25 Pa. Code § 86.194(f)(2).
3. Document in the records of the case, the basis for the revision to the civil penalty.

VIII. CIVIL PENALTY PROCESS

- A. The initial civil penalty assessment is conducted after the person to whom the order or notice of violation was issued has been given the opportunity to submit written information about the violation to DEP.
- B. DEP will send the Notice of Proposed Assessment (NOPA) by registered or certified mail to the person responsible for the violation. The person is provided an opportunity to request an assessment conference to review the assessment and provide relevant information on the violation and attempt to settle on the amount of the civil penalty. 25 Pa. Code § 86.201(d). DEP may schedule an assessment conference on its own motion. 25 Pa. Code § 86.201(c).
- C. If a settlement is reached, DEP will prepare a Consent Assessment of Civil Penalty which is signed by both DEP and the person responsible for the violation.
- D. If a settlement is not reached, DEP will prepare a Formal Assessment of Civil Penalty for the NOPA amount. DEP will send the Formal Assessment by registered or certified mail to the person responsible for the violation. The person may contest the penalty assessment by filing an appeal with the Environmental Hearing Board. 25 Pa. Code § 86.202.

IX. PENALTIES AGAINST CORPORATE OFFICERS

DEP may assess a civil penalty against a corporate officer who participates in a violation or whose misconduct or intentional neglect causes or allows a violation. 25 Pa. Code § 86.195. This includes all cases in which violations lead to the issuance of a FTACO. Further information about civil penalties is found in the Alternate Enforcement technical guidance document (562-4100-307).