

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Mining Programs

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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 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) to review all violations cited for an assessment of 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. In cases that are subject to stipulated penalties under a Consent Order and Agreement or Consent Decree, the stipulated penalty amounts apply. Calculation of these stipulated penalties is not subject to this guidance.

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.

PAGE LENGTH: 11 pages

TECHNICAL GUIDANCE:

I. REGULATORY GUIDELINES AND ASSESSMENT PROCEDURES

Coal – 25 Pa. Code §§ 86.191 - 86.203

II. STATUTORY MAXIMUMS

* Amounts are maximum penalties per day for each violation

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 Act – \$5,000

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

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 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 TGD on Alternate Enforcement (562-4100-307). 25 Pa. Code § 86.194(c).

C. All violations where the calculated penalty amount is equal to or greater than \$1,100. 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 \$1,100 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

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 applicability and requirements of each of the applicable statutes may also be relevant to the calculations.

The Clean Streams Law is the primary statute relevant to the assessment of penalties for water quality violations. Section VI, below, addresses the assessment of civil penalties for water effluent violations.

Each day of a continuing violation will be considered a separate violation. The cumulative effect of a continuing violation will be considered in assessing the penalty for each day of the violation.

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. Extraordinary Circumstances - (from \$2,001 to the statutory maximum)

Complete loss or degradation of a public or private water supply, whether surface or ground water.

Violations resulting in serious physical injury, illness, or death.

Destruction, alteration, or contamination of a major wetland or critical land habitat of threatened or endangered species.

Violations resulting in destruction or significant damage to public or private property or occupied dwellings.

Major 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.

Mining an area prior to the issuance of an approved permit or bond.

2. High (\$1,001 - \$2,000)

Diminution of public or private water supply sufficient to cause inconvenience to water users.

Limited damage to wildlife or habitat of natural flora or fauna.

Limited damage to structures other than occupied dwellings.

Limited damage to public or private property.

Limited damage to a minor wetland (< 1 acre; .47 hectare).

Minor loss of topsoil (poor handling or burial of some soils).

Violations resulting in off-site damage where the potential for harm to the public was negligible.

Safety violations with the potential for injury to the public.

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

Blasting violations which do not cause damage or injury (e.g., airblast, blast plan, shot reports, etc.).

Violations with minimal or no documented environmental impact.

Violations where none of the above listed criteria apply.

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 least culpable to most culpable): (1) no culpability; (2) negligence; (3) recklessness; and (4) willfulness. 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 would result from his 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.

The situation was previously cited in a Notice of Violation (except for time extensions).

The operator failed to implement obvious 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 became known.

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

The operator's conduct and the circumstances known involve 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 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.

The violation was the result of a situation on an inactive mine site.

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 person's attempt to achieve rapid compliance after the person 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, each of which may further incorporate, for example, contractor and consulting fees, overhead, travel costs, and equipment costs.

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

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.

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

1. A penalty may be increased by 5% for each 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. 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 method 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 identified in Discharge Monitoring Reports (DMRs) or through DEP sampling.

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 consolidate the other factors (culpability; willfulness; speed of compliance; history of violation; savings to the violator; and cost to the Commonwealth) when calculating the amount of the civil penalty.

A. Seriousness

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

The following table 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 of Violation | Resource Component | | | | |
|------------------------|--------------------|-------------|-----------------|------------|--|
| | Special Protection | High Impact | Moderate Impact | Low Impact | |
| 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 | |
| Deminimus | \$750 | \$500 | \$250 | \$100 | |

1. Resource Impacted by Violation:

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

1. **Aquatic Life Impact** – 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 of the receiving stream.
2. **Water Supply Impact** – evaluate the level of impact to water supply uses. DEP’s GIS eMAP can be used to determine if any water supply intakes are 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.
3. **Recreation Impact** – 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.
4. **Extent of Impact** – 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.

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.

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 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. Based on this evaluation, DEP will categorize the impact as High (reflecting considerable damage), Moderate, or Low (reflecting minimal damage). If the receiving stream is effluent dominated the impact should be categorized as High. If the receiving stream is not effluent dominated the degree of impact would be Moderate or Low.

2. **Magnitude:**

Magnitude of the effluent violation is determined one of two ways. 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 or impacts to public water supplies, the magnitude of the violation should be considered the highest magnitude. Absent any evidence of the severity, the magnitude will be based on the degree the effluent limit is exceeded utilizing the below chart.

Values are selected from within designated ranges, violations of toxic effluent limits are weighted most heavily. Conventional pollutants include dissolved oxygen, total suspended solids, total dissolved solids, sulfur, total alkalinity, iron, and temperature. A special scale is used to calculate the values for pH, which is calculated using a logarithmic scale. Toxic pollutants are identified in 25 Pa. Code § 93.8(c) Table 5.

A couple of factors should be considered when determining the magnitude of the violation. 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.

The impact to the receiving stream should be considered in assessing the civil penalty. Violations of WQBEL would not be considered de minimus. In the absence of physical evidence on the degree of impact to the receiving stream the degree by which the effluent limit was exceeded can be used to determine the degree of impact by dividing the sample result by the effluent limit.

Degree Exceeded = Sample Result/Effluent Limit

The following table should be used to determine the magnitude the effluent limit was exceeded. If the limits for toxic pollutants are exceeded the magnitude should be increased by one category on the table.

| Degree by which effluent limit was exceeded | | |
|--|---------------------|--|
| Magnitude | Instantaneous Limit | Standard Units above or below pH limit |
| Deminimus | >1 – 2 | >0 – 0.5 |
| Low | 2.1 – 2.5 | 0.51 – 2.0 |
| Moderate | 2.6 – 3.0 | 2.01 – 3.0 |
| Significant | 3.1 – 4 | 3.01 – 4.0 |
| Severe | 4 - > | 4.01 - > |

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. Most NPDES permits require a minimum of two samples per month. The duration factor of two times the calculated civil penalty for seriousness would be the standard for most violations.

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.

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 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.

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. Take into account exceptional factors present in the particular case.
2. Not reduce the civil penalty on the basis of 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. The initial assessment is usually conducted after the violation has been corrected.

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. INDIVIDUAL CIVIL PENALTIES

DEP may assess a civil penalty against a corporate officer, director, or agent 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. Individual civil penalties against corporate officers, directors, and agents will be assessed in accordance with the procedures in the guidance titled Alternate Enforcement (562-4100-307).