

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF MINING PROGRAMS**

DOCUMENT NUMBER: 562-4180-101

TITLE: Noncoal Civil Penalty Assessments

EFFECTIVE DATE:

AUTHORITY: Noncoal Surface Mining Conservation and Reclamation Act
The Clean Streams Law
25 Pa. Code Chapter 77

POLICY: It is the policy of the Department of Environmental Protection (DEP) to review all violations cited in orders at noncoal mine sites for an assessment of civil penalty.

PURPOSE: The purpose of this document is to prescribe a method for determining an amount of civil penalty to be assessed for violations of the regulations and law and if that penalty assessment is mandatory or discretionary. This document also outlines the review process to determine whether a separate penalty shall be assessed for each day the operator fails to abate the violation.

APPLICABILITY: This guidance applies to violations of the noncoal surface mining regulations, 25 Pa. Code Chapter 77, the applicable statutes, and permit conditions. 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. There is no intent on the part of DEP to give the rules in these policies 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: 14 Pages

I. REGULATORY GUIDELINES AND ASSESSMENT PROCEDURES

Noncoal – 25 Pa. Code §§ 77.291-77.303

II. STATUTORY MAXIMUMS

Section 21(a) of the Noncoal Surface Mining Conservation and Reclamation Act – without Cease Order – \$1,000*

Section 21(a) of the Noncoal Surface Mining Conservation and Reclamation Act – with Cease Order - \$5,000*

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

*Amounts are maximum penalties per day for each violation

III. MANDATORY PENALTIES

DEP must assess a civil penalty for the following:

- A. All violations involving a failure to correct within the period prescribed for correction but for which a cessation order or other abatement order was not issued. A civil penalty of at least \$250 will be assessed for each day the violation continues beyond the period prescribed for its correction. 25 Pa. Code 77.293(b)(2).
- B. All violations of the Clean Streams Law that lead to the issuance of a cessation order; a civil penalty not in excess of \$10,000 per day will be assessed for each such violation. 25 Pa. Code § 77.293(a)(2).
- C. All violations of Noncoal SMCRA or any rule, regulation, order of the Department, or condition of any permit issued under Noncoal SMCRA that leads to a cessation order; a civil penalty not in excess of \$5,000 per day will be assessed for each violation. 25 Pa. Code § 77.293(a)(1).
- D. All failures to abate cessation orders. 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). 25 Pa. Code § 77.294(c). Such penalty may be terminated after thirty (30) days provided that an alternate enforcement action is initiated.
- E. All violations where the calculated penalty amount exceeds the statutory maximum as described in 25 Pa. Code § 77.294(d).

IV. DISCRETIONARY PENALTIES

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

- A. The Department may assess a civil penalty of up to \$10,000 per day for each violation of The Clean Streams Law. 25 Pa. Code § 77.293(b)(3).
- B. Violations that did not result in the issuance of a cessation order and that are calculated in an amount less than \$1,000 may be assessed unless the circumstances described in regulation have been met. 25 Pa. Code §§ 77.292 and 77.293(b)(1).
- C. 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 CIVIL PENALTIES FOR NON-WATER QUALITY VIOLATIONS

Under the noncoal 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. 25 Pa. Code § 77.294(b). The requirements of each of the controlling environmental statutes will also be relevant to the calculations.

The Clean Streams Law is the primary statute relevant to the assessment of penalties for water quality violations. Any violation of Chapter 77 or 92a 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. 35 P.S. § 691.605. 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, Inc. 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.

Non-Water Quality Penalty Calculation

The penalty calculation formula is:

$$\begin{aligned}
 & \textit{Penalty Amount} = \\
 & \textit{Seriousness} + \textit{Culpability} + \textit{Commonwealth's Costs} + \textit{Violator's Savings} \\
 & \quad + \textit{Violation History} - \textit{Speed of Compliance}
 \end{aligned}$$

The DEP will complete a Noncoal Civil Penalty Worksheet (5600-FM-BMP0108) 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.

Each violation cited in an order must be reviewed for penalty assessment utilizing the following criteria:

A. Seriousness. (25 Pa. Code § 77.294(b)(1)).

1. High (\$2,501 – Statutory Maximum)

- Violations resulting in, or with a high potential to cause, serious physical injury, illness or death.
- Failure to replace or restore a public or private water supply, whether surface or groundwater, affected by surface mining.
- Destruction, alteration, or contamination of critical habitat of threatened or endangered species.
- Violations resulting in significant damage to private or public property.

2. Medium (\$1,001 - \$2,500)

- Failure to correct diminution or degradation of public or private water supplies that causes inconvenience to water users.
- Limited damage to wildlife or limited destruction of habitat of natural flora or fauna.
- Causing or creating a potential hazard to the health and safety of the public.
- Any verifiable damage to public or private property.

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

- Blasting violations which do not cause, or do not have potential to cause, damage or injury. (e.g., blast plan problems, blast reports, etc.)
- Violations with minimal environmental impact.
- Violations not described above in “High” or “Medium”.

4. Other Factors

The following factors should be taken into account when calculating the seriousness for mining in an area for which a permit has not been issued:

- Area disturbed.
- Amount of material removed.
- Reclamation requirements.
- Pre-mining condition of the site.
- Offsite environmental impacts.
- Public impact.
- Environmental controls.
- When the violation occurred.

B. Culpability (25 Pa. Code § 77.294(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. 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 (25 Pa. Code § 77.294(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. Cost to the Commonwealth (25 Pa. Code § 77.294(b)(4))

Any and all cost incurred by the Commonwealth as a result of a particular violation. The costs may include, but are not limited to, corrective work, investigation, sample collection, lab costs, contractor and consultant fees, transportation, sample analysis, administrative costs, etc.

E. Savings to the Violator (Optional) (25 Pa. Code §77.294(b)(5))

Any economic gain which is a direct result of a particular violation may be added to the assessment to the maximum allowed by the Act.

F. History of Previous Violations

1. Penalty otherwise assessed is to be increased by a factor of 5% for each order that was issued on the site in question and was included in a previously adjudicated proceeding, agreement or consent decree during the previous two-year period.
2. A previous violation shall not be counted if it is the subject of a pending administrative or judicial review, or if the time to request such review or to appeal the administrative or judicial decision determining the previous violation has not expired.
3. The formula to calculate the history penalty is as follows:

(Serious + culpability + cost to the Commonwealth + savings to the violator - speed of compliance credit) x (0.05 x number of orders issued for the mine site in question in the previous two-year period) = History of Violation Penalty.

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 calculates 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 consolidates these factors across each exceeded parameter.

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. Toxic pollutants include aluminum and are identified in 25 Pa. Code § 93.8c Table 5.

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 DEP will complete a Noncoal Civil Penalty Worksheet – Water (5600-FM-BMPXXXX) in order to demonstrate the process of determining the full penalty.

A. Seriousness for DMR

1. Degree Exceeded:

For DMR submissions the penalty will be based on the degree the effluent limit is exceeded times the minimum penalty as explained below.

The Commonwealth Court of Pennsylvania and the Environmental Hearing Board have both held that DEP's approach to determining civil penalties for effluent violations is reasonable (e.g., see The Pines at West Penn, LLC v. DEP, No. 1109 C.D. 2010). The minimum penalties are as follows:

- \$1,000 per each violation of an average monthly limit; and
- \$100 per each violation of a maximum (e.g., daily maximum or instantaneous maximum) or minimum limit or a geometric mean limit.

The seriousness for all pollutants will be calculated by determining the degree exceeded using the formula:

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

Table 1: pH Degree Exceeded	
Degree Exceeded	Standard Units above or below pH limit
10	4.01 - >
8	3.01 – 4.0
6	2.01 – 3.0
4	0.51 – 2.0
2	0 – 0.5

The degree exceeded will be the multiplying factor of the minimum penalty in the formula:

$$\text{Degree exceeded} \times \text{minimum penalty}$$

2. 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. Seriousness for DEP Sampling

The seriousness of a violation incorporates several factors: the magnitude, the resource component affected, 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.

$$\text{Magnitude} = \frac{\text{Sample Result}}{\text{Effluent Limit}}$$

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 § 93.8c 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

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:

Streams or watersheds having excellent quality waters and environmental or other features that require special water quality protection; or streams or

watersheds that constitute an outstanding national, state or local resources, such as waters of the state, national or county parks, or forests, or waters which are used as a potable water supply, or waters of wildlife refuges or state game lands, or waters which have been characterized by the Pennsylvania Fish and Boat Commission as “Wilderness Trout Streams,” or “Exceptional Value.”

2. High Use:

Refers to public water sources, extensive utilization for private water supplies, waters that have been characterized as “High Quality” or Cold Water Fisheries, and waters of considerable recreational or economic value.

3. Moderate Use:

Refers to waters with significant utilization for private water supplies, warm water fisheries, and waters with some recreational or economic value.

4. Low Use:

Refers to waters where no significant water supply use exists, no fishery except possibly bait fish exists, where there is no known recreational or economic use, and also for waters grossly polluted by other sources.

DEP will consider the 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 damage should be considered where there is an exceedance of Maximum Contaminant Levels (MCLs) at a public water supply intake. Lower levels of damage 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.

		Resource Component			
Magnitude or Damage	Use →	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

VII. CIVIL PENALTY ASSESSMENT PROCEDURE

Procedures to be utilized to process civil penalties are found at 25 Pa. Code § 77.301.

The process is summarized as follows:

1. 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.
2. 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 § 77.301(a). DEP may schedule an assessment conference on its own motion. 25 Pa. Code § 77.301(b).
3. If a settlement is reached, then a consent assessment or consent order is executed.
4. 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 § 77.30.

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