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| | U· S· DEPARTMENT OF THE INTERIOR<br>OFFICE OF SURFACE MINING<br>RECLAMATION AND ENFORCEMENT<br>DIRECTIVES SYSTEM | Subject Number: CAA-1<br>Transmittal Number: 410<br>Date: 1/06/88 |

**Subject:** Civil Penalty Assessment Manual

**Approval:** Jed D. Christensen **Title:** Director

1. PURPOSE. This directive provides guidance in the form of a revised assessment manual to the Office of Surface Mining Reclamation and Enforcement (OSMRE) employees concerned with assessing civil penalties for violations of the Surface Mining Control and Reclamation Act (SMCRA) of 1977.

2. DEFINITIONS. All definitions of terms are discussed in the attached manual.

3. POLICIES AND PROCEDURES.

a. Concept. The purpose of this manual is to provide practical, consistent guidelines for implementing the OSMRE civil penalty assessment program. It provides specific information and processes to use in determining whether a civil penalty should be assessed against a mine operator or permittee and, if assessed, the amount of the civil penalty.

b. Responsibilities. The procedures are for internal use only and are the responsibility of the Assessment Policy Officer, Division of Debt Management.

4. REPORTING REQUIREMENTS. None.

5. REFERENCES.

a. The Surface Mining Control and Reclamation Act of 1977.

b. Title 30, CFR, Mineral Resources, Chapter VII, Part 700 to end.

6. EFFECT ON OTHER DOCUMENTS. Supercedes Penalty Assessment Manual, revised March 1984.

7. EFFECTIVE DATE. Upon issuance.

8. CONTACT. Division of Debt Management
(202)653-2927

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

# CIVIL PENALTY ASSESSMENT MANUAL

December 1987

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# CHAPTER 1

## INTRODUCTION

Civil penalties are assessed for violations of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87) to "deter violations of the Act and to ensure maximum compliance with the Act." Title 30, Part 845, of the Code of Federal Regulations (CFR) specifies procedures for the Office of Surface Mining Reclamation and Enforcement (OSMRE) to follow when assessing such penalties.

### PURPOSE OF THE MANUAL

The purpose of this manual is to provide practical, consistent guidelines for implementing the OSMRE civil penalty assessment program. It provides specific information and processes to use in determining whether a civil penalty should be assessed against a mine operator or permittee and, if so, the amount of the penalty.

The main text of this manual is divided into four additional chapters. Chapter 2 defines and describes types of enforcement actions: Notices of Violations (NOV), Imminent Harm Cessation Orders (IHCO), and Failure to Abate Cessation Orders (FTACO). Chapter 3 discusses assessment criteria, while Chapter 4 discusses the specific mechanics of the various assessment types. Chapter 5 presents miscellaneous matters relating to the penalty assessment process. Appendix contents are summarized below:

**Appendix A**: List of violations of SMCRA, the impacts of each violation, and applicable regulations.

**Appendix B**: Specific examples of administrative/obstruction and environmental violations to consider when assessing penalties.

**Appendix C**: Forms used in the penalty assessment process.

**Appendix D**: Conversion table for determining the civil penalty amount.

**Appendix E**: List of initial assessment points.

**Appendix F**: Glossary of technical terms.

## ENFORCEMENT OVERVIEW

The authority to assess civil penalties for violations of the Surface Mining Control and Reclamation Act is stated in Section 518(a):

> ...any permittee who violates any permit condition or who violates any other provision of this title [Title V], may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under Section 521, the civil penalty shall be assessed. [Underscores added.]

This section of the Act indicates that all operators and permittees issued a cessation order must be assessed a civil penalty, while those issued an NOV may be assessed a penalty. The Act includes four criteria to be used in determining whether to assess a penalty; these criteria are described in Chapter 3.

## CHAPTER 2

## TYPES OF ENFORCEMENT ACTIONS

This chapter describes the enforcement actions provided by the Surface Mining Control and Reclamation Act (SMCRA): the Notice of Violation, the Imminent Harm Cessation Order, and the Failure to Abate Cessation Order.

General performance standards for surface coal mining and reclamation operations are prescribed in the Act and the regulations. The intent of these requirements is to ensure that surface coal mining operations are conducted in a manner that minimizes adverse environmental effects and prevents personal injury or property damage. Accordingly, the Act and regulations call for inspections of surface coal mining operations as defined in Section 700.5.

When a violation has occurred and OSMRE is the regulatory authority (RA), a written notice is served to the coal mine operator or permittee that the violation must be corrected. When OSMRE is not the RA and an OSMRE inspector determines that a violation of the RA's approved program has occurred, a Ten-Day Notice (TDN) is issued. When an OSMRE inspector determines that a violation poses imminent danger to the environment or to public health or safety, even though an approved state program exists, an Imminent Harm Cessation Order is issued.

### NOTICE OF VIOLATION

For most violations of the Act, the regulations, or a permit condition, the inspector issues a Notice of Violation. Violations resulting in an NOV usually are less serious than those written for an Imminent Harm Cessation Order. An NOV describes the violation, location, required abatement, and abatement time period.

### IMMINENT HARM CESSATION ORDER

If an inspector determines that a violation, condition, or practice poses imminent danger to the environment or to public health or safety, then an

Imminent Harm Cessation Order is issued. The general distinction between an NOV and an IHCO is one of degree--an IHCO is issued when the violation, condition, or practice:

- Creates an imminent danger to the health or safety of the public

OR

- Is causing or can be expected to cause significant, imminent environmental harm to land, air, or water resources.

Like the NOV, the IHCO describes the violation, location of the violation, required abatement measures, and abatement time period. It states that the operator or permittee is required to immediately cease all operations, or that portion of the operation relevant to the violation, and operations may resume only after abatement is complete.

## FAILURE TO ABATE CESSATION ORDER

The FTACO is issued when an operator or permittee does not comply with a previously issued NOV within the time prescribed for abatement. Like the IHCO, the operator or permittee is required to immediately cease all operations, or that portion of the operation relevant to the violation, and operations may resume only after abatement is complete.

Sample NOV and FTACO forms are in Appendix C.

## CHAPTER 3

## ASSESSMENT CRITERIA

For each NOV and IHCO violation, the proposed assessment is based on the four criteria in 30 CFR 845.13, which are:

- History of previous violations at the same coal exploration or surface coal mining operation.
- Seriousness of the violation.
- Degree of negligence.
- Good-faith efforts to abate the violation.

Assessment criteria are not used for proposing a civil penalty for the second type of cessation order--the FTACO. A minimum $750 daily fine is levied against the violator for each day of noncompliance with each underlying violation in the NOV. For additional information concerning assessment of FTACOs, see Chapter 4.

The criteria to consider before issuing a Notice of Proposed Assessment (NOPA) for an NOV, or an IHCO are defined and discussed in the following paragraphs. The criteria are applied in specific examples in Appendix B.

### HISTORY POINTS

The violation being assessed is assigned history points for each past violation that has occurred within one year of the:

- Expiration of the administrative review time for such past violations or
- Completion of the administrative appeal processes for such past violations.

A violation is counted in the assessment of history points regardless of whether it received a penalty or was abated. A violation is not counted if it

is the subject of a pending administrative or judicial appeal or if the time to request administrative or judicial review has not expired.

## SERIOUSNESS

Seriousness is defined as:

- A measure of the probability of potential or actual environmental damage and the extent of the damage or
- The degree to which enforcement is obstructed in the case of an administrative requirement violation.

In assessing the seriousness of a violation, the first consideration must be whether the violation can or did cause damage to the environment or is a violation of an administrative requirement. These are discussed below.

### Environmental Harm Violations

Violations that threaten or actually cause environmental damage, personal injury, or property damage are considered environmental harm violations; assessment of these violations is described in 30 CFR 845.13(b)(2). Environmental harm violations frequently involve topsoil handling, sediment control, effluent limitations, operating without a permit, backfilling and grading, spoil disposal, mishandling of acid or toxic materials, or revegetation.

Assessment procedures are concerned with the impact (e.g., the event) that the regulation is designed to prevent (Appendix A). In the case of the environmental harm violation, the impact is the environental harm, personal injury, or property damage that could or does result from a violation.

The assessment of seriousness for environmental harm violations has two components: the probability of occurrence and the extent of actual or potential damage. The first component is a determination of whether the environmental damage occurred or is likely to occur. The second component is a measure of how much damage has resulted or would result from the violation if the inspector had not cited the operator.

**Probability of Occurrence**. The assessment of probability of occurrence refers to the occurrence of damage that the violated standard was designed to prevent.

In evaluating probability of occurrence, the assessor must first distinguish between the violation involved and the impact or environmental harm it was designed to prevent. Where more than one type of environmental damage could result from a violation, the assessor uses the primary impact for determining probability (the impact that would result in the greatest actual or potential damage).

**Extent of Damage**. The determination of extent of damage is a measure of both actual and potential damage of all types; it is not limited to the damages concerned with the prime impact identified in the probability determination, discussed above.

The extent of damage is assessed after the assessor examines the facts surrounding the damage and the physical evidence of the impacted area. The greater the actual environmental harm or damage to property or people, the more points will be assigned.

Determining the degree of potential damage involves reviewing the information and evaluating how much damage would have occurred under normal climatic and operational conditions if the inspector had not cited the violation. Examples of the assessment of environmental harm violations are in Appendix B.

## Administrative and Obstruction Violations

An administrative violation is one that may prevent the inspector from reviewing the overall operations of the mine to determine compliance with the Act and the regulations; see 30 CFR 845.13(b)(2)(B)(iii). Such violations may also prevent the public from identifying the mine site or exercising its rights under the Act. These violations generally involve the permittee's failure to keep records, thereby obstructing the inspector from evaluating compliance, or

the failure to post a proper permit sign, possibly hindering public or inspector identification of a mine site.

When the violation constitutes an obstruction, the seriousness evaluation is based on the degree to which the violation prevented or impeded enforcement by an inspector or review initiated by the public. The major distinction made in assessing administrative violations is actual versus potential obstruction to the inspector and the public.

## NEGLIGENCE

Assessing this criterion involves a determination of the permittee's degree of fault in committing a violation, either through an act or the failure to act. Negligence is addressed in 30 CFR 845.13(b)(3). Conditions involving degree of fault are discussed below.

### No Negligence

The regulations define no negligence as an inadvertant violation that "was unavoidable by the exercise of reasonable care" [30 CFR 845.13(b)(3)(ii)(A)], such as a violation resulting from vandalism or an act of God. Examples of acts of God include floods, earthquakes, and fires. While the permittee cannot prevent vandalism or acts of God, it would be negligent not to correct a violation resulting from either condition. A non-negligent violation caused by vandalism or an act of God can become negligent if the operator does not correct it promptly.

When no negligence on the part of the permittee (including employees and subcontractors) can be discerned, no points are assessed.

## Negligence

The regulations define negligence as:

> ...the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or this Chapter due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care. [30 CFR 845.13(b)(3)(ii)(B)]

Negligence, therefore, is the failure of a permittee to exercise the degree of care normally expected of a reasonable person. Negligent acts include committing a violation, failing to do something that is required, or not exercising reasonable care in attempting to do that which is required.

Ignorance of the law is not a no-negligence situation; permittees are required to know the regulations.

A permittee is also responsible for all that occurs on the permittee's site, including negligent acts or omissions by an employee or subcontractor working at the site if reasonable care was not exercised.

## A Greater Degree of Fault than Negligence (Higher Negligence)

The regulations define this condition as "reckless, knowing, or intentional conduct" [30 CFR 845.13(b)(3)(ii)(C)]. A permittee is considered reckless when a reasonable person under the same circumstances would have been aware of the potential damage or harm that could result from an action or failure to take an action. Knowing or intentional conduct occurs when the permittee is aware that he or she is or will be in violation and fails to correct or avoid the situation.

## GOOD-FAITH ABATEMENT EFFORTS

The final criterion provides a method for considering the permittee's demonstrated degree of good faith in attempting to achieve compliance after notification of a violation. While the degree of fault determination concerns behavior before a violation is issued, good-faith determinations are concerned with the permittee's actions following notification of the violation.

Under the regulations, good-faith points are awarded when a permittee abates with rapid compliance using extraordinary measures. Good-faith points are deducted from the total assigned points. As defined by Section 845.13(b)(4)(ii)(A) of the regulations, rapid compliance takes place when:

> ...the person to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.

Several factors should be considered in determining if extraordinary measures were used in addition to rapid abatement:

- Initiative: How quickly the operator started working to abate the violation.
- Continued Abatement Effort: The operator's persistence in eliminating the problem or violation.
- Commitment of Resources: Securing additional equipment or personnel, interrupting coal production, expending extra hours and resources, or taking other measures to quickly remedy the situation.

Good-faith points can be awarded only when a violation has been abated. Because of the length of most abatement periods, good-faith points typically are awarded during the informal conference or appeal process.

The assessor may award good-faith points upon receipt of a termination notice, the recommendation of the inspector, or information submitted by the operator (if the inspector agrees). Good-faith points are not awarded when no remedial action is prescribed or no abatement date is set by the inspector.

## CHAPTER 4

## ASSESSMENT MECHANICS

The mechanics for assessing penalties for NOVs, IHCOs, and FTACOs are presented in this chapter. A penalty must be assessed for all NOVs receiving 31 points or more and for all cessation orders. A penalty may be assessed for NOVs receiving 30 points or less.

### NOTICE OF VIOLATION AND IMMINENT HARM CESSATION ORDERS

NOV violations are assessed in two categories: environmental harm violations or administrative violations.

When the inspector has determined that a violation poses an imminent danger to the health or safety of the public or there is significant imminent environmental harm, an IHCO is issued. The probability of occurrence (seriousness and extent of damage) for IHCOs may result in assignment of more points than for an NOV.

Assessment procedures for an IHCO are the same as for an environmental harm NOV, except that an IHCO will always result in a penalty regardless of the number of total points assigned.

If a violation contained in an IHCO has not been abated within the prescribed abatement period, an FTACO would not be issued; however, a minimum $750 daily fine (for a period not to exceed 30 days) is levied against the violator until abatement is complete.

### Environmental Harm Violations

Penalty points can be assigned based on the number of past violations (history of previous violations), and the seriousness and negligence associated with the violation. Points may also be awarded for good-faith abatement

efforts. The mechanics of assigning points in each category is described below.

1. Violation History. OSMRE can assign up to 30 history points based on the number of past violations related to the particular coal exploration or coal operation that is the subject of the violation being assessed.

In accordance with 30 CFR 845.13(b)(1), the assignment of history points follows a strict formula:

- 1 point per separate NOV violation issued at the same surface coal mining or exploration operation for which the review process has been completed within the previous 12-month period.
- 5 points per separate IHCO or FTACO violation issued at the same surface coal mining or exploration operation for which the review process has been completed within the previous 12-month period.

The regulations preclude assigning history points for violations that are in the review or appeal process; violations are finalized and can be considered for history points only when the entire administrative and judicial review or appeal processes are complete. If a permittee fails to exercise this right of review, the violation is finalized on the expiration date of the permittee's right to review. Violations are then counted for 1 year after the review process has been completed or the time for exercising the right of review has expired.

The milestones to be considered in determining whether a past violation should be used in assigning history points are described below. Use whichever milestone is later.

1. 30 days from the date of service of the Notice of Proposed Assessment (NOPA) or reassessment, unless a hearing or a conference is requested. NOTE: A request for a conference suspends the time clock until the permittee receives a letter concluding the conference.

2. 15 days from the date of service of a conference conclusion letter (Appendix C), unless a hearing is requested.

3. 30 days from the conclusion of an Administrative Law Judge decision or 30 days from an Interior Board of Land Appeals decision unless a judicial appeal is filed.

2. Seriousness. OSMRE may assign up to 30 points for seriousness depending on the degree of environmental harm, public health hazard, or safety hazard. The seriousness is assessed based on (a) probability of occurrence and (b) extent of damage:

(a) Probability of Occurrence: In accordance with 30 CFR 845.13(b)(2)(i), points are assigned based on the probability of occurrence of the impact or environmental harm the violated standard was designed to prevent:

| Situation | Points |
|---|---|
| None (No Chance of Occurrence) | 0 |
| Insignificant Chance of Occurrence | 1-4 |
| Unlikely to Occur | 5-9 |
| Likely to Occur | 10-14 |
| Occurred | 15 |

Based on the facts in the inspector's report and statement, the assessor will determine the appropriate category in which the violation falls. Depending on the mitigating or compounding circumstances provided by the inspector, the assessor will determine how many points to assign within the point range.

(b) Extent of Damage: 30 CFR 845.13(b)(2)(ii)(A) and (B) describe the method for assigning extent of damage points:

| Situation | Points |
|---|---|
| Damage Confined Within the Permit Area | 0-7 |
| Damage Extending Outside the Permit Area | 8-15 |

Based on whether the impact remained within the permit area or extended beyond it and the duration and extent as described in the inspector's report and statement, the assessor will determine the appropriate category and the points to assign within the particular range.

3. Negligence. OSMRE may assign up to 25 points for negligence, depending on the degree of fault of the person to whom the citation was issued or of others for whose conduct the person is legally responsible. Three categories of degree of fault are defined by 30 CFR 845.13(b)(3):

| Situation | Points |
|---|---|
| No Negligence | 0 |
| Negligence | 1-12 |
| Greater Degree of Fault than Negligence | 13-25 |

The regulations further define "greater degree of fault" as reckless, knowing or intentional conduct.

The initial assessment points for seriousness and negligence are in Appendix E.

4. Good-Faith. OSMRE can deduct up to 10 penalty points for good faith based on the degree of rapid abatement and extraordinary measures [30 CFR 845.13(b)(4)]. To be awarded good-faith points, evidence must exist that the operator took extraordinary measures to abate the violation in the shortest possible time and abatement was achieved before the abatement date.

Examples of extraordinary measures include: initiative, continued effort, use of extra equipment and/or personnel, interrupted coal production, and working beyond normal hours.

Consideration of good faith may not be practical at the time the violation is assessed because of the length of the abatement period. In this case, the violation may be reassessed for good faith after violation abatement.

## Administrative and Obstruction Violations

As with environmental harm violations, penalty points are assigned for the number of past violations (history of violations), seriousness of the

violation, and negligence. Points can also be awarded for good-faith abatement efforts.

1. History. History points are assigned in the same manner described for environmental violations.

2. Seriousness. OSMRE can assign up to 15 points for seriousness based on the extent that enforcement of the Act and regulations was obstructed by the violation. Extent of damage and probability of occurrence are not assessed for administrative violations.

| Situation | Points |
|---|---|
| Slight Obstruction | 0-4 |
| Moderate Obstruction | 5-11 |
| Significant Obstruction | 12-15 |

3. Negligence. Negligence is the failure of a permittee to exercise the degree of care normally expected of a reasonable person. Negligent acts include committing a violation, failing to do something that is required, or not exercising reasonable care in attempting to do that which is required.

Ignorance of the law is not a no-negligence situation; permittees are required to know the regulations.

A permittee is also responsible for all that occurs on the permittee's site, including negligent acts or omissions by an employee or subcontractor working at the site if reasonable care was not exercised.

4. Good Faith. Good faith points are assigned in the same manner described for environmental harm violations.

FAILURE TO ABATE CESSATION ORDER

If an operator is served a written citation and fails to abate the violation within the prescribed time, an FTACO penalty of $750 per day is levied

(beginning on the date of reinspection) for no more than 30 days. If the violation is abated, the day of abatement is not counted in the computation of the penalty amount.



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## CHAPTER 5

## MISCELLANEOUS INFORMATION

This chapter discusses miscellaneous information related to the penalty assessment process.

### CONTINUING VIOLATIONS

Procedures for assessing a civil penalty for each day that a NOV or IHCO goes unabated are found in 30 CFR 845.15. The factors listed in 30 CFR 845.13 must be considered in making an assessment. The assessor may consider any economic benefit gained by the operator as a result of the failure to comply. If the violation continues for 2 or more days and is assigned more than 70 points, OSMRE must assess a penalty for a minimum of 2 separate days.

The per-day penalty is computed by applying the amount of the original one-time assessment (determined by assessing history, seriousness, negligence, and good faith) multiplied by the number of days that the violation continues unabated; the maximum penalty to be assessed for continuing violations is $5,000 per violation per day.

### PENALTY AMOUNT DETERMINATIONS

The amount of the civil penalty per violation is determined by converting the number of points assigned for the violation to a dollar amount based on the schedule shown in Appendix D.

### CIVIL PENALTY FORMULA WAIVER

The OSMRE Director may waive the use of the formula set forth in 30 CFR 845.13 in computing the penalty if, upon considering exceptional factors present in the particular case, the penalty is demonstrably unjust. The basis for every waiver must be fully documented in the case record. If the director waives the use of the formula, the criteria set forth in 30 CFR 845.13(b) are used to determine the appropriate penalty.

## OPERATOR SUBMISSION OF ADDITIONAL INFORMATION

An operator has the option of submitting additional information concerning a violation up to 15 days after service of the NOV or CO (30 CFR 845.17), which will be considered in the penalty assessment process.

## SERVICE OF NOTICE OF PROPOSED ASSESSMENT (NOPA)

Both a copy of the NOPA and the assessment worksheet are sent to the operator or permittee by certified mail within 30 days of the issuance of the notice or order.

## TEN-DAY NOTICES

Where there is an OSMRE-approved State program and a violation of the State program or any condition of an exploration approval or permit imposed under a State program is observed, OSMRE issues Ten-Day Notices to the appropriate State regulatory authority (RA) and to the permittee notifying them of the violation. The RA has 10 days after notification in which to take appropriate action to cause the violation to be corrected or to show good cause for such failure.

If the RA does not take appropriate action or show good cause for such failure, the site will be reinspected. If the violation continues to exist, an NOV will be issued. If the violation is not abated within the prescribed time, an FTACO will be issued unless an IHCO is required at the time of reinspection. The citation will list the State regulations violated. The assessor then assesses the violation in the same manner as any other citation would be assessed.

## SERVICE OF DOCUMENTS

Before sending the NOPA, the assessor must be certain that an NOV was received by an operator. The NOV is served either in person to the operator

at the mine site or at his or her office or is sent by certified mail (return receipt requested).

The inspector's Field Office forwards a copy of the NOV to the appropriate assessment office. The manner in which the NOV was served must be noted on the document. If the violation was sent by mail, it should be marked "SENT BY CERTIFIED MAIL", and should show the date it was mailed. It is important to remember that this does not mean that service was accomplished. Proof of service is established by receipt of the green return card signed and dated by the operator or agent. Also, if the green card or the document envelope is marked as "refused", service is considered to have been accomplished.

If the document envelope is returned as "unclaimed" or "undeliverable" (e.g., because the operator moved and left no forwarding address), service is not accomplished. In either instance, the assessor transfers the document package to the service contractor for personal service.

Once service of the NOV or IHCO has been accomplished, the NOPA can be mailed (to the same address where service was accomplished). If the service contractor will be delivering the citation, the NOPA should be included; service of both documents at the same time is valid.

The operator may take certain actions that clearly indicate his or her knowledge of the citation or NOPA. Such actions include requesting a conference, which would indicate knowledge of the NOPA; filing for an "R" hearing (fact of the violation), which would indicate knowledge of the citation; filing for expedited review, which would indicate knowledge of the FTACO or IHCO citation; or filing for temporary relief, which would indicate knowledge of the citation. These actions are interpreted as service being accomplished, even though service was not achieved by the routine methods discussed above.

## PETITIONS FOR REVIEW OF PROPOSED CIVIL PENALTY ASSESSMENTS

Summarized in this section are the applicable regulations found at 43 CFR 4.1150 through 4.1158 that address the review procedures for filing a petition

for review of a proposed civil penalty assessment. This summary should be used along with the regulations to ensure that the permittee complies with the legal requirements for requesting such a review.

## Procedures for Filing

A person or entity charged with a civil penalty may file a petition for review of the proposed assessment in the following manner:

A. The petition for review (the request for a formal hearing, accompanied by a check in the full amount of the proposed civil penalty assessment) must be filed within 30 days of service of the NOPA with the:

Hearings Division
Office of Hearings and Appeals
U.S. Department of the Interior
4015 Wilson Boulevard
Arlington, Virginia 22203
(703)235-3800

OR

B. If a request for an informal assessment conference with OSMRE has been filed in a timely manner, pursuant to 30 CFR 845.18, and such conference was held, a petition for review of the proposed civil penalty assessment must be filed within 15 days of the receipt of the conference officer's results. This petition must be filed with the:

Hearings Division
Office of Hearings and Appeals
U.S. Department of the Interior
4015 Wilson Boulevard
Arlington, Virginia 22203
(703)235-3800

If there is no petition for review of the proposed civil penalty assessment filed in a timely manner (such as described in A and B, above) and there is no application for review pending on the validity of the NOV or FTACO under Section 525 of SMCRA, the appropriateness of the civil penalty amount will be deemed to be admitted and the civil penalty assessment will become final.

Contents

If a petition for review is filed with the Office of Hearings and Appeals, the following rules apply:

1. To be complete, the petition for review must be accompanied by full payment of the proposed civil penalty (cashier's check or bank money order made payable to the Assessment Office, OSMRE, with the violation numbers noted on the check); this check will be placed in an escrow account pending the assessment determination.

2. The petition must contain a short statement of the reasons the amount of the civil penalty is being contested.

3. The petition must identify all violations being contested.

4. The petition is not considered complete unless accompanied by full payment for the proposed assessment; no time extension will be granted for making full payment. Failure to submit a complete petition at the time of filing will result in a waiver of all rights to contest the violations or the amount of the penalty.

# APPENDIX A

## IMPACT EXAMPLES

## EXAMPLES OF IMPACTS THE VIOLATED STANDARDS WERE DESIGNED TO PREVENT

This list of impacts, formerly known as the events-to-prevent list, is to be used as a guide for identifying environmental and administrative impacts associated with particular violations. While not all-inclusive, this list contains those violations listed on the second page of the Mine Site Evaluation Inspection Report (MEIR) form. The user should select the most severe impact associated with the violation, although the impact may not be listed or may not be listed with the particular violation.

| Permanent Regulations[1] | Interim Regulations[1] | Violation[2] | Impacts[3] |
|---|---|---|---|
| | 715.11<br>717.11 UG[4] | Authorizations to Operate | Obstruction to Enforcement |
| 816.11<br>817.11UG | 715.12<br>717.12UG | Signs and Markers | Inability of Public or Inspector to Identify for Enforcement Purpose<br>Public Health and Safety<br>Mining Outside Permit Area<br>Damage to Property |
| 816.102<br>817.102UG | 715.14<br>717.14UG | Backfilling and Grading | Delay or Failure of Planned Land Use<br>Private Property Damage |

1 The regulations shown indicate only the section of the rule in which the violated standard appears. The user should consult the regulations to determine the appropriate subsection when issuing a violation.

2 Categories that appear on Page 2 of the MEIR.

3 The impact is the environmental harm, personal injury, or property damage that could or does result from a violation of a regulation or permit condition.

4 Denotes the section of the underground regulations.

| Permanent Regulations[1] | Interim Regulations[1] | Violation[2] | Impacts[3] |
|---|---|---|---|
| 816.102<br>817.102UG | 715.14<br>717.12UG | Highwall Elimination | Public Health and Safety<br><br>Delay or Failure of Planned Land Use |
| 816.84<br>817.84UG | 715.18<br>717.18UG | Dams | Erosion<br><br>Water Pollution<br><br>Public Health and Safety<br><br>Sediment Deposition<br><br>Floods |
| 816.61<br>817.61UG<br>816.62<br>817.62UG<br>816.64<br>817.64UG<br>816.66<br>817.66UG<br>816.67<br>817.67UG | 715.19 | Blasting | Public Health and Safety<br><br>Property Damage<br><br>Adverse Effects on Ground Water Aquifers |
| 816.111<br>817.111UG<br>816.113<br>817.113UG<br>816.114<br>817.114UG<br>816.116<br>817.116UG<br>816.95<br>817.95UG | 715.20<br>717.20UG | Revegetation | Erosion<br><br>Delay or Failure of Post Mine Land Use<br><br>Water Pollution<br><br>Sediment Deposition<br><br>Loss of Topsoil |
| 816.71<br>817.71UG<br>816.72<br>817.72UG<br>816.73<br>817.73UG<br>816.74<br>817.74UG | 716.2 | Spoil on the Downslope | Public Health and Safety<br><br>Delay or Failure of Post Mine Land Use<br><br>Property Damage<br><br>Water Pollution<br><br>Sediment Deposition |

| Permanent Regulations[1] | Interim Regulations[1] | Violation[2] | Impacts[3] |
|---|---|---|---|
| 816.42<br>817.42UG | 715.17<br>717.17UG | Effluent Limits | Water Pollution<br>Sediment Deposition<br>Fish Kills<br>Failure to Protect the Hydrologic Balance |
| 816.41<br>817.41UG | 715.17<br>717.17UG | Water Monitoring | Water Pollution<br>Sediment Deposition<br>Fish Kills<br>Failure to Protect the Hydrologic Balance |
| 816.57<br>817.57UG | 715.17 | Buffer Zones | Erosion<br>Water Pollution<br>Failure to Protect the Hydrologic Balance |
| 816.150<br>817.150UG<br>816.151<br>817.151UG | 715.17(L)<br>717.17(J)UG | Roads | Water Pollution<br>Erosion<br>Offsite Sediment Deposition<br>Public Health and Safety |
| 816.95<br>817.95UG | 715.14(i)<br>717.14(d) | Rills and Gullies | Erosion<br>Sediment Deposition<br>Failure or Delay of Revegetation<br>Delay or Failure of Post Mine Land Use<br>Failure to Protect the Hydrologic Balance |

| Permanent Regulations[1] | Interim Regulations[1] | Violation[2] | Impacts[3] |
|---|---|---|---|
| 816.71<br>817.71UG<br>816.72<br>817.72UG<br>816.73<br>817.73UG<br>816.74<br>817.74UG | 715.15<br>717.15UG | Disposal of Excess Spoil | Erosion<br><br>Sediment Deposition<br><br>Delay or Failure of Post Mine Land Use<br><br>Public Health and Safety |
| 816.22<br>817.22UG | 715.16<br>717.20UG | Topsoil Handling | Contamination by Spoil Materials<br><br>Delay or Failure of Re-vegetation<br><br>Delay or Failure of Post Mine Land Use |
| 816.43<br>817.43UG<br>816.45<br>817.45UG<br>816.46<br>817.46UG<br>816.47<br>817.47UG<br>816.49<br>817.49UG | 715.17<br>717.17UG | Sediment Ponds | Erosion<br><br>Sediment Deposition<br><br>Water Pollution<br><br>Public Health and Safety<br><br>Failure to Protect the Hydrologic Balance |
| 843.11 | 722.11 | Mining Without a Permit | Environmental Harm Such As: Water Pollution, Erosion, Loss of Top-soil, Sediment Deposi-tion; and Public Health and Safety |
| 843.11<br>843.12UG | 722.11<br>722.12UG | Exceeding Permit Limits | Environmental Harm Such As: Water Pollution, Erosion, Loss of Top-soil, Sediment Deposi-tion; and Public Health and Safety |
| 816.57<br>817.57UG<br>522(e)Act | 715.17<br><br>522(e)Act | Distance Prohibitions | Erosion<br><br>Water Pollution<br><br>Public Health and Safety<br><br>Property Damage |

| Permanent Regulations[1] | Interim Regulations[1] | Violation[2] | Impacts[3] |
|---|---|---|---|
| 816.102<br>817.102UG | 715.14<br>717.14UG | Toxic Materials | Water Pollution<br><br>Destruction of Vegetation<br><br>Failure to Protect the Hydrologic Balance |

## OTHER FREQUENTLY-CITED VIOLATIONS THAT DO NOT APPEAR ON PAGE 2 OF THE MEIR FORM

| Permanent Regulations[1] | Interim Regulations[1] | Violation[2] | Impacts[3] |
|---|---|---|---|
| 773.11(d) | 773.11(d) | Failure to Respond to Permit Deficiency Letter [Deficiencies Identified in the 504(d) Review Process] | Delay or Failure of Post Mine Land Use |
| 942.800(b)<br>800.11(a) | 942.800(b)<br>800.11(a) | Failure to Submit to the Regulatory Authority an Adequate Performance Bond | Delay or Failure of Post Mine Land Use |
| 816.131<br>817.131UG | 816.131<br>817.131UG | Temporary Cessation | Delay or Failure of Post Mine Land Use |

# APPENDIX B

## ASSESSMENT EXAMPLES

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# ASSESSMENT EXAMPLES
# ENVIRONMENTAL HARM VIOLATIONS

## BLASTING

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness

Probability of Occurrence. Regulations pertaining to blasting (other than records violations) are designed to prevent injury to the public and damage to property. If personal injury or property damage has occurred, 15 points may be assigned. If the event has not occurred, likelihood is determined based on whether the event would have been likely at the time of the violation, resulting in a point range of 10-14.

When blasting is taking place at a mine in a sparsely populated area where the probability of off-site effects is unlikely, 5-9 points should be assigned. Where blasting is taking place at an isolated mine and the probability of off-site effects is insignificant, 0-4 points should be assigned.

To assess likelihood, the assessor must reconstruct the circumstances surrounding the particular violation. Attention should be paid to whether persons were nearby and to the nature and proximity of property. Potential damage should be assessed based on the probability of injury to the public or property in light of these facts. The assessor must also determine how careful the operator was. Each of these considerations may have an effect on the appropriate range of points assigned for probability.

The regulation requiring a permittee to publish the blasting schedule in the newspaper is designed to prevent injury to the public. The failure to publish the schedule is the violation, but the event is injury to the public.

**Extent of Damage**. When blasting takes place and the probability of injury to public or damage to property is high, the potential (the possibility of property damage, serious injury, or death) will be high. In these situations, the assessor would assign points in the 8 to 15 range. In cases where the possibility of property or personal damage is limited, points will be assigned in the 0-7 range.

For failure to publish the blasting schedule in the newspaper, while actual damage may not have occurred, the potential damage or injury might be estimated. Again, factors to consider include the number of people in the area, the proximity of houses to the permit area, the population density, the likelihood of small children being in the area, and whether the area is fenced or guarded. The assessor must examine information provided by the inspector on the overall blasting techniques employed by the permittee. A record of diligence and responsibility in blasting methods will lower the potential damage assigned for the failure to publish the blasting schedule.

## C. Negligence

While blasting is a dangerous activity, it has been refined to the point that a careful operator should have very little chance of causing personal injury or property damage. Because operators do not always exercise sufficient care, however, the inspector must provide enough information for the assessor to assess negligence accurately. The example of failure to publish blasting schedules cited above demonstrates the difference between negligence (0-12 points) and recklessness (13-20 points). If the operator failed to publish the schedule as required but exhibited other precautionary techniques, such as posting a guard to keep people at a safe distance from blasting and sounding warning signals, he would probably not be considered reckless. In such cases, negligence would be assigned in the 0-12 point range.

## D. Good Faith

If a blasting violation has already occurred, good-faith points will normally not be awarded, because no remedial action is normally available to the operator. Therefore, good faith would seldom be a factor in the assessment of blasting violations.



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## TOPSOIL

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness

**Probability of Occurrence.** Important considerations in assessing probability of occurrence for a delay in revegetation are the:

- Actual amount of topsoil lost or potentially lost in relation to the total surface area disturbed, and the
- Quality of the remaining topsoil and substrata.

If the loss is 1/2 acre of topsoil over a large permit area, it is insignificant or unlikely revegetation will be delayed or may not occur, 1-9 points should be assigned. If the loss represents a significant portion of the total area, then the violation should be assigned 10-14 points.

If the topsoil has not been saved and other suitable growing medium is not available, then the damage has occurred and 15 points should be assigned.

**Extent of Damage.** If topsoil is lost from only a small portion of the disturbed area, the damage would remain within the permit area; 0-7 points should be assigned. In the instances where large areas are affected or actual failure of revegetation is noted and drainage control structures are not in place, damage is considered to extend outside the permit area, because erosion from unvegetated areas would affect land and water outside the permit area.

In estimating the extent of damage, the assessor will be concerned with how much of an area is or might be impacted and the likely duration of the event. The magnitude and duration of the event would always be key factors in the assessment. Additionally, areas where revegetation is not successful can easily erode, leading to a potential or actual loss of growing medium; 8-15 points should be assigned.

## C. Negligence

The assessment for degree of fault depends on the specifics of the violation. An operator who uses reasonable care in salvaging topsoil prior to mining on the major part of his permit area, but who is not diligent in salvaging the topsoil for the entire permit area, is negligent; 0-12 points are assigned. On the other hand, a bulldozer operator pushing topsoil along with spoil into a pit is committing a violation that a careful operator would not have committed. This is considered a reckless act; 13-20 points are assigned. An operator previously cited for not salvaging all available topsoil at this site is considered to have committed a knowing violation; 21-25 points are assigned.

## D. Good Faith

The procedures for assigning good-faith points are described in Chapter 4.

## FAILURE TO POST PERIMETER MARKERS

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness

Probability of Occurrence. The requirement for perimeter markers is to ensure that the permittee knows where the permit boundaries are, thereby avoiding any activity outside the approved permit area. In addition, perimeter markers assist inspectors and citizens in determining if the permittee is remaining within the permitted area.

The event has occurred if the disturbance extends outside the permitted area; 15 points are assigned. Where the site is inactive, the probability of mining activity occurring off the permit area is low; 0-9 points are assigned. If the permit boundary is unmarked and mining activity is continuing, the inspector must determine how close the operation is to the permit boundary and the potential for the operator to mine beyond the permit boundary; 10-14 points are assigned.

Extent of Damage. If mining has taken place off the permit area, 8-15 points should be assigned depending on the amount of damage. If the permittee has not disturbed the area beyond the permit boundaries, the extent of damage should be assigned 0-7 points.

### C. Negligence

A no-negligence situation would be one in which the perimeter markers were removed through an act of vandalism. However, if the operator failed to replace the perimeter markers promptly and did not disturb the area outside the permit area, then the violation would be considered negligent and 1-12 points should be assigned. If the operator failed to promptly replace the markers and disturbed off the permit area, then negligence should be assigned 13-25 points.

## D. Good Faith

The procedures for assigning good-faith points are described in Chapter 4.

## MINING WITHOUT A PERMIT

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness/Administrative

**Probability of Occurrence.** The most serious situations are when an operator purposely mines outside the permit, operates without a permit (wildcatting), and mines with an expired permit. In each case, the operator has not applied for a permit, permit amendment, or renewal. In these instances, the event that the violated standard is designed to prevent is doing specific acts without an approval. Because the event has occurred in all cases, 15 points should be assigned.

**Extent of Damage.** An operator that purposely mines outside the permit or is a wildcatter will not have posted a reclamation bond for the disturbance and is likely to use improper mining techniques. Therefore, the extent of damage should be assigned 15 points. When the operator is mining within the expired permit area and has not applied for a new permit, 8-14 points should be assigned.

### C. Negligence

Operating without a permit (wildcatting) should be assigned 25 points. When the operator purposely mines outside the permit area or mines within the expired permit area but has not applied for a new permit, negligence should be considered knowing and willful and assigned 21-25 points.

### D. Good Faith

The procedures for assigning good-faith points are described in Chapter 4.

## DISCHARGE STRUCTURES

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness

**Probability of Occurrence**. Conditions that this standard are designed to prevent are erosion, water pollution, stream channel enlargement, and disturbance of the hydrologic balance. Should any of these events actually occur, 15 points should be assigned.

As with other violations of this type, topographic and vegetative considerations as well as proximity to the stream or other water sources and climatic factors should be considered in determining the likelihood of the event happening. For example, if the discharge structure was not constructed or shows evidence of excessive erosion and a stream is in proximity to the structure, stream channel enlargement or sedimentation would be likely to occur, and points in the likely range of 10-14 should be assigned.

Conversely, if the violation was cited during a period of low rainfall and a vegetative cover was sufficient to filter sediment from the discharge structure before leaving the permit area, the probability of the events happening would be unlikely or insignificant; 0-9 points should be assigned.

**Extent of Damage**. First, the inspector should determine whether the actual or potential damage that the violation was designed to prevent would remain within the permit or would extend outside the permit area. If the discharge structure was not constructed and heavy rains could be expected, the extent of damage, such as sedimentation of a stream in proximity to the structure, should be determined. If flooding or sedimentation of the stream were likely, the damage could extend off permit, and points in the range of 8-15 should be assigned.

If sediment from a pond failure could be contained on the permit by other drainage controls, heavy vegetation, or land topography and no stream was nearby, the damage could be assigned in the 0-7 point range.

C. Negligence

Failure to construct a discharge structure in accordance with the approved plan may be assessed as a greater degree of fault than negligence particularly when plans for the discharge structure are detailed in the permit. Accordingly, 13-25 points should be assigned.

If the discharge structure was constructed but had deteriorated and no immediate danger of pond failure exists, negligence should be assigned in the lower range of 0-12 points.

D. Good Faith

The procedures for assigning good-faith points are described in Chapter 4.

## EFFLUENT LIMITS

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness

**Probability of Occurrence**. This standard is designed to prevent events that are much the same as the events for the failure-to-pass violation (water pollution, sedimentation of streams, and fish kills). As with the failure-to-pass violation, several water samples or field tests are usually acceptable as documentation that the violation has taken place. To determine if the event the violation is designed to prevent has taken place, reports and other documentation must be reviewed.

The event of water pollution will be considered to have occurred only if water samples show that the receiving stream was impacted by the effluent. This generally requires four samples:

- An upstream sample to establish the background or existing condition of the receiving stream.
- A sample of the effluent before it enters the receiving stream.
- A sample of the mixing zone where the effluent meets and blends into the receiving stream.
- A sample downstream of the mixing zone.

If water pollution has occurred and can be shown graphically, the maximum number of points (15) will be assigned. If an inspector observes black water being discharged, samples only the effluent, and finds that it exceeds the limit, the probability of pollution can only be considered as likely. The stream must be sampled in all four locations before the inspector can be certain that a mining operation is the source of the pollution.

If the drainage not meeting effluent limitations fails to reach an off-permit stream or other water source, the event will be considered not to have

occurred. In this case, the proximity to the stream and related topographic and climatological features should be evaluated to determine how likely the event is to occur. If the discharge is dissipated by a vegetative cover on a relatively flat area and the nearest stream is a mile away, the probability of occurrence would be assigned in the insignificant (1-4) or unlikely (5-9) range of points. However, should the discharge travel down a steep, unvegetated slope with the stream in proximity to the toe of the slope, the probability of occurrence would be likely and assigned in the range of 10-14 points.

Extent of Damage. As with the failure to pass all surface drainage through a sedimentation pond violation, the first question to answer for the extent of damage is whether the impact the violated standard is designed to prevent remains on the permit or extends outside the permit area. Should the discharge extend outside the permit, 8-15 points must be assigned. The extent of damage will most likely be defined through water sample results and volume estimations of the discharge as well as characteristics of the receiving stream. A low volume discharge that only marginally exceeds effluent limitations flowing into an already polluted stream of limited usage would result in an assignment in the lower end of the 8-15 point range. Conversely, a high volume discharge of poor quality flowing into a native trout stream could cause severe environmental harm as established by water samples; this condition should be assigned at the maximum end of the range.

## C. Negligence

In the event an operator has been cited for pumping water that does not meet the effluent limitations into a stream, a greater degree of fault than negligence is exhibited and the assessor should assign points in the high range of 13-25 to exhibit the reckless or willful conduct.

Should an automatic treatment system malfunction, resulting in an unapproved discharge, the degree of fault may be considered to be a lack of reasonable care, and an assignment of 0-12 points may be made depending on the degree to which the operator's responsibility was compromised. Adjustment of point totals within the ranges will be influenced by the operator's awareness of possible effects of his actions. If the permit specifically indicates that a

high-quality stream is in proximity to treatment facilities, the operator should exercise extra care in assuring that no discharges exceeding effluent limitations do occur.

### D. Good Faith

The procedures for assigning good-faith points are described in Chapter 4.

## HANDLING ACID OR TOXIC FORMING MATERIALS

### A. History of Previous Violations

Refer to Chapter 4 for the formula to determine history points.

### B. Seriousness

**Probability of Occurrence**. This standard is designed to prevent such events as water pollution and destruction of vegetation. Topographical features, proximity of vegetation and water sources, amount of toxic material, and drainage and climatological factors must be taken into account to determine the likelihood of the event occurring; 10-14 points should be assigned. If water samples indicate that pollution has occurred or a visual inspection indicates vegetation has been destroyed as a result of drainage from acid or toxic-forming materials, the event can be considered to have occurred and 15 points should be assigned.

Should the drainage be collected in a basin that will overtop with a rainfall and a stream or vegetated area is nearby, the event will be likely to happen and 10-14 points should be assigned.

If drainage from such materials remains on the permit due to flat topography, and no vegetation has been destroyed, the event may be unlikely or insignificant and 0-9 points should be assigned accordingly.

**Extent of Potential or Actual Damage**. If the actual or potential damage would remain on the permit and the vegetation on the permitted area was destroyed but there was no potential for damage extending outside the permit area, points within the 0-7 range would be assigned.

Should vegetation off the permit be destroyed or streams or other water sources polluted, points in the 8-15 range should be assigned. If the stream was high quality and the drainage caused a detectable change in quality, points

near the maximum should be assigned. If only a small volume of drainage entered the stream and caused no detectable water quality change, points in the lower range for off-site damage should be assigned.

### C. Negligence

If an operator expects to encounter significant amounts of toxic materials, the permit should contain conditions for the safe handling of such material. If this is the case, and affected drainage enters a high-quality stream, the operator may have acted in a reckless manner, and points in the range of 13-25 may be assigned to reflect this behavior.

If drainage and treatment controls are in place and a short-term lapse in treatment occurs, ordinary negligence may apply, and points in the 0-12 range may be assigned.

### D. Good Faith

The procedures for assigning good-faith points are described in Chapter 4.