



COALEX COMPARISON REPORT - 43

October 4, 1985

TOPIC: CIVIL PENALTY SYSTEMS*

* This Report is based on the most recent documents identified in the COALEX Library. A state may have additional or revised rules or procedures not contained in the COALEX Library.

SEARCH RESULTS:

A COALEX search was conducted to compare the various civil penalty systems adopted by state regulatory authorities with that promulgated by the federal government. Specifically, this search focused upon state regulations equivalent to the Office of Surface Mining (OSM) scheme found at 30 CFR Secs. 845.13 and 845.14. Information was located for all twenty-five state programs listed with COALEX.

Civil Penalty System (See Table 1)

Statutory authority for the imposition of civil penalties is contained in the Surface Mining Control and Reclamation Act of 1977 (SMCRA) at Subsection 518(a), 30 USC Sec. 1268(a). Sec. 518(a) authorizes the assessment of a civil penalty for a violation of any part of SMCRA, with the amount not to exceed \$5,000 per violation. The purpose of such a penalty is to deter violations and ensure maximum compliance with the terms of SMCRA on the part of the coal mining industry. (30 CFR Sec. 845.2)

The corresponding regulations for the permanent program are published at 30 CFR Part 845. The federal civil penalty scheme utilizes a point system for determining the severity of a penalty. The more severe a violation, the more points that are assessed against an operator, resulting in a greater fine. Once the total number of points has been calculated, a dollar amount may be determined by using the chart found in 30 CFR Sec. 845.14. Each notice of violation (NOV) assigned 31 or more points under the system must be assessed a penalty. However, for a NOV of 30 or less points, OSM has discretion as to whether a penalty will be levied. (30 CFR Sec. 845.12) OSM is mandated to assess a penalty for each cessation order (CO). (30 CFR Sec. 845.12(a))

Criteria for assigning penalty points is specified in SMCRA, Sec. 518(a) and 30 CFR Sec. 845.13. Three general categories are examined for determining point assessment: (1) history of previous violations; (2) seriousness of the violation; and (3) negligence of the violator. Additionally, OSM is authorized to reduce the assessed points for an operator's good faith in attempting to achieve rapid compliance.

Up to 30 points may be assigned for a history of previous violations with respect to that particular coal exploration or surface coal mining operation. One point must be assigned for each past violation contained in the NOV, while five points must be assigned for each violation in a CO. (30 CFR Sec. 845.13(b)(1))



A violation will not be counted if the NOV or CO is pending administrative or judicial review or if the time to request such review or to appeal any decision has not expired. (30 CFR Sec. 845.13(b)(1)(I)) Violations cited in vacated NOV's or CO's will not be counted for purposes of penalty assessment based upon an operator's history. (30 CFR Sec. 845.13(b)(1)(ii)) Each violation must be counted regardless of whether it led to a civil penalty assessment. (30 CFR Sec. 845.13(b)(1)(iii))

The second general category for point assessment focuses upon the seriousness of the violation. An operation may be assessed a maximum of 30 points for this category. Based on the probability of the occurrence of the event which a violated standard is designed to prevent, up to 15 points may be assigned according to the following:

Probability: Points

None: 0
Insignificant: 1 - 4
Unlikely: 5 - 9
Likely: 10 - 14
Occurred: 15

Up to 15 additional points may be assigned based on the extent of potential or actual damage. For damage or impact that remains inside the coal exploration or permit area, OSM must assign from 0 - 7 points, while damage or impact outside the area will result in 8 - 15 points. In lieu of probability and damage, OSM may assign up to 15 points for seriousness based upon the violation of an administrative requirement. (30 CFR Sec. 845.13(b)(2)(iii))

Negligence, for which up to 25 points may be assessed, is the final criteria outlined in the point system. If there was no negligence connected with a violation, then no penalty points are assigned. However, a maximum of 12 points are incurred for a violation caused by negligence. If a greater degree of fault than negligence was involved, 13 - 25 points will be assigned. (30 CFR Sec. 845.13(b)(3)(I)) Negligence is defined as:

"...the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of [SMCRA] or [the regulations promulgated therefrom] due to indifference, lack or [sic] diligence, or lack of reasonable care, or the failure to abate any violation of such permit or [SMCRA] due to indifference, lack of diligence, or lack of reasonable care." (30 CFR Sec. 845.13(b)(3)(ii)(B))

A greater degree of fault than negligence means "reckless, knowing, or intentional conduct". (30 CFR Sec. 845.13(b)(3)(ii)(C)) In determining points to be assigned for negligence, the acts of all persons working on the coal exploration or surface coal mining and reclamation site must be attributed to the person to whom the NOV or CO was issued, unless that person can establish that the acts were deliberate sabotage. (30 CFR Sec. 845.13(b)(3)(iii))

An operator may have from 1 - 10 penalty points subtracted depending upon the degree of good faith exhibited in attempting to achieve rapid compliance after notification of the violation. (30 CFR Sec. 845.13(b)(4)(I)) Rapid compliance means that "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." (30 CFR Sec. 845.13(b)(4)(ii)(A)) However, the attempt to achieve compliance may be omitted from



consideration if the length of the abatement period makes it impractical. (30 CFR Sec. 845.13(b)(4)(iii)) Normal compliance, which is "abatement of the violation within is time given", will not result in a point deduction. (30 CFR Sec. 845.13(b)(4)(ii)(B))

Once the total number of penalty points has been calculated, the dollar amount of the penalty may be determined by using the schedule found at 30 CFR Sec. 845.14. For the first 25 points, the penalty increases at a rate of \$20 per point. For points 26 - 70, the amount increases to \$100 per point. The maximum fine is \$5000.

State Civil Penalty Systems

Sec. 518(l) of SMCRA requires that state programs incorporate penalties no less stringent than those found in the Act and shall contain the same or similar procedural requirements relating to civil and criminal penalties. OSM interpreted this section as meaning that states were required to impose a point system which was no less stringent than that found in federal regulations. This interpretation was rejected in *IN RE PERMANENT SURFACE MINING REGULATION LITIGATION*, No 79-1144 (Consolidated), slip op. (DDC February 26, 1980). Judge Flannery noted that while states are required to incorporate the criteria found in the Act, Sec. 518(l) makes no reference to a point system. (Id.) Thus, while states must include the four criteria (history of violations, seriousness, negligence and good faith) found in Sec. 528(a), they are not required to implement a point system.

The COALEX search for state equivalents to the OSM system identified two main approaches by state regulatory authorities: (1) point systems modeled after the federal regulations, and (2) criteria guidelines for penalties without point systems.

A. STATES WHICH USE POINT SYSTEMS.

Nine state programs follow the point system and criteria promulgated by OSM without deviation. These states are: Alabama, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Tennessee, Texas, and Utah. (Note: COALEX indicated that the Utah regulation for civil penalties have been superseded. However, no current regulations appeared in the file.) (See Table 2)

Five state programs were identified as having point systems which deviated from the federal system. (See Table 1) In Kentucky, an operator may reduce his penalty by 6 - 15 points for rapid compliance, while 0 - 5 points may be removed for normal compliance. (405 Ky. Admin. Reg. 7:095 5 3(4)(a),(b))

Two notable deviations were located in the Arkansas program. Under the criteria for probability of occurrence, the following points are assessed: none, insignificant or unlikely, 0 points; likely, 1 - 5 points; and occurred, 6 - 15 points. (Ark. Surface Coal and Reclamation Code, Sec. 845.13(b)(2)(l)) For rapid compliance up to all points assessed may be subtracted from a penalty, with up to one-half the total number of points being removed for normal compliance. (Id. at Sec. 845.13(b)(4)(l))



New Mexico's program limits the prior history and seriousness categories to a maximum of 25 penalty points apiece. (N.M. Coal Surface Min. Regs., Sec. 31-13(b)(1).(2)) Probability of occurrence violations are assigned as follows: none, 0 points; insignificant, 1 - 2 points; unlikely, 3 - 5 points; likely, 6 - 9 points; clearly, 10 points. (Id. at Sec. 31-13(b)(2)(I)) The alternative section is limited to 10 points. (Id. at Sec. 31-13(b)(2)(iii)) Rapid compliance will result in 1 - 15 points being subtracted from the penalty. An operator who uses additional equipment or labor to achieve rapid compliance may have 1 - 25 points removed from the penalty. No points are subtracted for normal compliance. (Id. at Sec. 31-13(b)(4)(I))

In Virginia, a base penalty is determined by adding the points for seriousness and negligence and then subtracting points for good faith in attempting to achieve compliance. An increment table is specified for seriousness of the violation, ranging from 1 - 2 points for slight actual or potential damage, up to 9 - 10 points for extremely serious actual damage. (Va. Surface Min. Reclamation Regs., Sec. V845.13(b)) Up to 6 points may be assessed for negligent conduct; 3 or less points for negligence and 4 - 6 points for fault greater than negligence. (Id. at Sec. V845.13(c)(I)) Rapid compliance through extraordinary measures will result in a 3 - 4 point reduction, while diligent efforts will earn 1 - 2 points credit. (Id. at Sec. V845.13(d)(1)) A point total is calculated using a table ranging from 1 point at \$25 - \$100 to a maximum of 16 points at \$3000. (Id. at Sec. V845.13(d)(3)) On top of the base, penalties are levied for previous history as follows: \$20 per violation contained in a NOV, up to ten violations; \$100 per violation in a NOV in excess of ten violations; \$250 per violation contained in a CO. (Id. at Sec. V845.13(e)(2)) Finally, the regulatory authority may reduce the base penalty by ten percent if the permittee has had no violations within the preceding twelve month period. (Id. at Sec. V845.13(e)(1))

Montana's program contains two deviations from the OSM's system. Under the criteria for seriousness, up to 15 points may be assessed for a violation which the violated law was designed to prevent. Up to 15 points may be assigned for significance and the amount of actual or potential harm, but no distinction is made as to whether the damage occurred inside or outside the permit area. The alternative section allows assessment of up to 30 points for impairment of administration. (Mont. Strip and Underground Mine Reclamation Rules and Regs., Sec. 26.4.1212 (1984))

Montana's good faith section contains a provision that a reduction of points will not allow waiver of an otherwise unwaiverable penalty. In addition, the dollar per point assessment table deviates from OSM's by assessing \$200 for any number of points below ten. (Id.)

B. STATES WHICH DO NOT USE POINT SYSTEMS.

Two approaches to civil penalties were identified in state regulations which do not use a cumulative point system.

Some states adopted regulations which just outline the criteria which the regulatory authority must consider. The four criteria include that required by SMCRA: (1) history of operator's violations; (2) seriousness; (3) negligence; and (4) good faith in achieving rapid compliance. The regulations limit the civil penalty to \$5000, but do not attempt to break down the process any further. Seven states have adopted this approach: Alaska, Illinois, Indiana, Iowa, Ohio, and Wyoming. (See Table 4) (Note that these states may have administrative rules or



procedures not contained in the COALEX regulations file providing additional guidance on penalty assessment.)

A second group of states substitutes dollar limits for a cumulative point system in determining civil penalties. (See Table 3) For example, in Colorado, up to \$1750 may be assessed for a history of previous violations, with \$50 assessed for each violation in a NOV and \$250 per violation in a CO. (Colo. Mined Land Reclamation Board Regs., Sec. 5.04.5(2)(a)(I)) Seriousness of the violation may result in an assessment of up to \$1750. (Id. at Sec. 5.04.5(2)(b)) Negligence may be assessed \$250 - \$750, but a greater degree of fault than negligence results in a \$750 - \$1500 penalty. (Id. at Sec. 5.04.5(2)(c)) Up to \$1250 may be subtracted for good faith in attempting to achieve compliance. (Id. at Sec. 5.04.5(2)(c))

In Maryland, the maximum amount is specified for each category: (1) history of previous violation, \$1000; (2) seriousness, \$1000; (3) negligence, \$500; (4) good faith in attempting to achieve compliance, \$1000 (reduction). (Md. Admin. Code, Tit. 8, Sec. 08.13.09.41C(I)) A fifth category, "effect on the violation of reclamation", is also evaluated, resulting in a possible maximum fine of \$1000. (Id. at Sec. 08.13.09.41C(I)(e)) In lieu of a civil penalty, Maryland also makes provisions for suspension of mining operations for an appropriate period of time such that the economic impact is equivalent to the amount of the civil penalty which would have been assessed. (Id. at Sec. 08.13.09.41D)

The maximum amounts in the North Dakota program are: (1) history, \$3500; (2) seriousness, \$3500; (3) negligence, \$1500; greater degree of fault than negligence, \$3000; (4) good faith in attempting to achieve rapid compliance, \$1000. (N.D. Admin. Code, Sec. 69-05.2-28-12)

Six categories are evaluated under the Pennsylvania system. Seriousness criteria is subdivided into three degrees: severe, \$2500 - \$5000; significant, \$750 - \$2500; and moderate, \$750 - \$100. "Culpability" is also subdivided: deliberate, \$3500 - \$5000; recklessness, \$2000 - \$4000; negligence, \$100 - \$1500; accidental, \$0. If the penalty is abated within the shortest possible time, a credit of up to \$1000 will be given. (25 Pa. Admin. Code, Sec. 86.194(b); Pa. Bureau of Min. and Reclamation, Civil Penalty Worksheet) The "cost to the Commonwealth" for each violation, including administrative costs, costs of inspection and collection, etc., may be assessed up to \$5000. (25 Pa. Admin. Code Sec. 86.194(b)(4)) Any economic benefit gained by a violator may be assessed up to the statutory maximum of \$5000. (Id. at Sec. 86.194(b)(5)) The subtotal for the first five categories is increased by 5 percent for each previous violation. The total increase in assessment based on history of previous violation will not exceed \$1000. (Id. at Sec. 86.194(b)(6))

West Virginia uses a sliding scale to determine the seriousness, negligence and the operator's good faith. The rating for each category is matched to a predetermined dollar per point amount. For example: a rating of 2 for seriousness will result in a penalty of \$115 per point (\$230), while a rating of 8 results in a penalty of \$265 per point (\$2,120). A penalty of up to \$3500 may be imposed for seriousness, while the maximum amount for negligence is \$1000.



The amount deducted for good faith is determined by a table using the points levied for seriousness and those given for good faith, with the deduction ranging from \$0 - 3496. Previous violations are fined as follows: \$20/violation for 3 - 5 violations; \$40/violation for 6 - 10 violations, \$60/violation for more than 10 violations. (W.VA. Surface Min. Regs, Sec. 14B-02(C)) For notices of violations, a civil penalty may not be assessed if the amount is less than \$1000. (Id. at Sec. 14B-01 (b))

The result of this COALEX search is summarized in the attached Tables 1 - 4.

ATTACHMENTS:

- A. New Mexico Surface Coal Mining Regs., Secs. 31-13, 31-14.
- B. Virginia Surface Coal Mining Reclamation Regs., Sec. 845.13.
- C. Colorado Mined Land Reclamation Board Regs., Sec. 5.04.5.
- D. Maryland Admin. Code, Tit. 8, Sec. 13.09.41.
- E. North Dakota Admin. Code, Sec. 69-05.2-28-12.
- F. 25 Pennsylvania Admin. Code Sec. 86.194.
- G. Pennsylvania Bureau of Mining and Reclamation, Civil Penalty Worksheet
- H. West Virginia Surface Mining Regs., Secs. 14B.01, 14B.02.
- I. 405 Kentucky Admin. Regs. Sec. 7:095.
- J. Arkansas Surface Coal Mining and Reclamation Code, Secs. 845.13, 845.14.
- K. Excerpt, IN RE PERMANENT SURFACE MINING RECLAMATION LITIGATION, No. 70-1144 consolidated), slip op. (DDC February 26, 1980).

Note: Citations in this report appear as found in COALEX documents, and may not reflect the states' proper citation form.



Table 1: OSM & State Civil Penalty Point Systems

(OSM indicates that state program follows federal program)

(Reformatted from original)

OSM	
Regulation	30 CFR Secs. 845.13, 845.15
History/Previous Violations (max. 30pts.)	1 pt. per Violation/NOV 5 pts. per Violation/CO
Seriousness (max. 30 pts.)	(a) Probability None: 0 Insignificant: 1-4 Unlikely: 5-9 Likely: 10-14 Occurred: 15 (b) Extent/Damage Within permit area: 0-7 Outside permit area: 8-15 (c) Alternative Up to 15 pts.
Negligence (max. 25 pts.)	No Negligence: 0 Negligence: 0-12 Greater than negligence: 13-25
Good Faith to Achieve Compliance	Rapid: -1 to -10 Normal: 0
Determination/Dollar Amt	\$20 per pt. for first 25 pts. \$100 per pt. For pts. 26-70

KENTUCKY	
Regulation	405 Ky. Admin. Reg. Sec. 7:095
History/Previous Violations (max. 30pts.)	(OSM)
Seriousness (max. 30 pts.)	(a) Probability (OSM) (b) Extent/Damage (OSM) (c) Alternative (OSM)
Negligence (max. 25 pts.)	(OSM)
Good Faith to Achieve Compliance	Rapid: -6 to - 15 Normal: 0 to -5
Determination/Dollar Amt	(OSM)



ARKANSAS	
Regulation	Ark. Surface Coal Mining and Reclamation Code, Secs. 845.13, 845.14
History/Previous Violations (max. 30pts.)	(OSM)
Seriousness (max. 30 pts.)	(a) Probability None: 0 Insignificant: 0 Unlikely: 0 Likely: 1-5 Occurred: 6-15 (b) Extent/Damage (OSM) (c) Alternative (OSM)
Negligence (max. 25 pts.)	(OSM)
Good Faith to Achieve Compliance	Rapid: up to all pts. assessed subtracted Normal: up to one-half pts. assessed subtracted
Determination/Dollar Amt	(OSM)

NEW MEXICO	
Regulation	Surface Mining Regs., Secs. 31-14, 31-14
History/Previous Violations (max. 25 pts.)	1 pt. per Violation/NOV 5 pts. per Violation/CO
Seriousness (max. 30 pts.)	(a) Probability None: 0 Insignificant: 1-2 Unlikely: 3-5 Likely: 6-9 Clearly: 10 (b) Extent/Damage (max. 25 pts.) (OSM) (c) Alternative Up to 10 pts.
Negligence (max. 35 pts.)	(OSM)
Good Faith to Achieve Compliance	Normal: 0 Rapid: -1 to -5 Additional equipment: -1 to -25
Determination/Dollar Amt	(OSM)



VIRGINIA	
Regulation	Surface Mining Reclamation Regs., Sec. V845.13
History/Previous Violations (No points)	\$20 per Violation/NOV for first 10 violations; \$100 per Violation/NOV after 10 violations; \$250 per Violation/CO
Seriousness (max. 10 pts.)	Table which factors potential and actual damage to environment and public health and safety, ranging from 1 to 10 points.
Negligence (max. 35 pts.)	No Negligence: 0 Negligence: 3 or less Greater than Negligence: 4-6
Good Faith to Achieve Compliance	Extraordinary measures: 3-4 Diligent: 1-2
Determination/Dollar Amt	1 pt. \$25-100 to 16 pts. -\$300; Add violation penalty/ 10% credit if no violations in preceding 12 mo. period.
MONTANA	
Regulation	Strip & Underground Reclamation Regs. Sec. 26.4.1212
History/Previous Violations (max. 30pts.)	(OSM)
Seriousness (max. 30 pts.)	(a) Probability Up to 15 pts. (b) Extent/Damage Up to 15 pts. (c) Alternative Up to 30 pts.
Negligence (max. 35 pts.)	(OSM)
Good Faith to Achieve Compliance	(OSM)
Determination/Dollar Amt	\$200 for 1-10 pts. 11 & above: (OSM)

Table 2: States With Point System Which Do Not Deviate From OSM's System
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ALABAMA

Ala. Surface Mining Regs., Secs. 845.13, 845.14

KANSAS

Mined Land Conservation and Reclamation Board, Sec. 47-5-5

LOUISIANA

La. Surface Mining Regs., Statewide Order 29-0-1, Secs. 245.13, 245.14

MISSISSIPPI

Surface Coal Mining and Reclamation Regs., Secs. 245.13, 245.14



MISSOURI

10 CSR Sec. 40-8.040

OKLAHOMA

Okla. Permanent Regs., Surface Coal Mining and Reclamation Operations, Secs. 845.13, 845.14

TENNESSEE

Tenn. Div. Of Surface Mining, Secs. 0400-1-29-.05, 0400-1-29-.06

TEXAS

Chap. IV, Surface Coal Mining Regs., Secs. 051.07.04.691, 051-07.04.692

UTAH

Utah Mining Code, Secs. 845.13, 845.14

(NOTE: COALEX indicated that the Utah section has been superseded. However, no current regulations were located in the file.)

Table 3: States Which Place Dollar Limits On Specific Criteria

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COLORADO	
Regulation	Rules & Regs. of Colo. Mined Land Reclamation Board, Sec. 5.04.5
History/Previous Violations (Max. \$1750)	\$50 per Violation/NOV \$250 per Violation/CO
Seriousness	Max. \$1750
Negligence	Negligence: \$250-750 Greater than Negligence: \$750-1500
Good Faith to Achieve Compliance	Max. \$1250 credit
Other	None
Amount	Max. Total \$5000

MARYLAND	
Regulation	Md. Admin. Code, Tit. 8, Sec. 13.09.41
History/Previous Violations	Max. \$1000
Seriousness	Max. \$1000
Negligence	Max. \$500
Good Faith to Achieve Compliance	Max. \$1000 credit
Other	Effect of Violation on reclamation: Max. \$1000/May suspend mining in lieu of penalty
Amount	Max. Total \$5000



NORTH DAKOTA	
Regulation	ND Admin. Code, Sec. 69-05.2-28-12
History/Previous Violations	Max. \$3500
Seriousness	Max. \$3500
Negligence	Negligence: Max. \$1500 Greater than Negligence: Max. \$3000
Good Faith to Achieve Compliance	Max. \$1000 credit
Other	None
Amount	Max. Total \$10000

PENNSYLVANIA	
Regulation	25 Pa. Admin. Code Sec. 86.194
History/Previous Violations	5% of subtotal of other categories
Seriousness	Moderate: \$750-1000 Significant: \$750-2500 Severe: \$2500-5000
Negligence	Accidental – 0 Negligence: \$100-1500 Recklessness: \$2000-4000 Deliberate: \$3500-5000
Good Faith to Achieve Compliance	Max. \$1000 credit
Other	Cost to Commonwealth: Max. \$5000 Economic benefit gained by violator: Max. \$5000
Amount	Max. Total \$5000



WEST VIRGINIA	
Regulation	W Va Surface Mining Regs., Sec. 14B.02
History/Previous Violations (max. 30 pts.)	\$20: Previous violations 3-5 \$40: Previous violations 6-10 \$60: Previous violations over 10
Seriousness	Penalty Rating 1: Amt. Per Pt. \$100 Penalty Rating 2: Amt. Per Pt. \$115 Penalty Rating 3: Amt. Per Pt. \$132 Penalty Rating 4: Amt. Per Pt. \$152 Penalty Rating 5: Amt. Per Pt. \$175 Penalty Rating 6: Amt. Per Pt. \$201 Penalty Rating 7: Amt. Per Pt. \$231 Penalty Rating 8: Amt. Per Pt. \$265 Penalty Rating 9: Amt. Per Pt. \$305 Penalty Rating 10: Amt. Per Pt. \$350
Negligence	Penalty Rating 1: Amt. Per Pt. \$25 Penalty Rating 2: Amt. Per Pt. \$31 Penalty Rating 3: Amt. Per Pt. \$40 Penalty Rating 4: Amt. Per Pt. \$50 Penalty Rating 5: Amt. Per Pt. \$63 Penalty Rating 6: Amt. Per Pt. \$79 Penalty Rating 7: Amt. Per Pt. \$99 Penalty Rating 8: Amt. Per Pt. \$125
Good Faith to Achieve Compliance	Sliding scale credit from \$0 - \$3496
Other	
Amount	Max. Total \$5000

Table 4: States Which Do Not Specify Dollar Amounts
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ALASKA

11 Alaska Admin. Code Sec. 90.625

ILLINOIS

Surface Coal Mining Land Conservation and Reclamation Act, Reg. Secs. 1845.13, 1845.14

INDIANA

310 Ind. Admin. Code Sec. 12-6-12

IOWA

Iowa Admin. Code, Sec. 4.6(8)

MONTANA

Letter from Leo Berry, Jr. to Brace Hayden, et al., dated 1/04/80

OHIO

Ohio Admin. Code, Sec. 1501:13-14-03



WYOMING

Land Quality Regs., Chap. 17, Sec. 3