



COALEX STATE COMPARISON REPORT - 212

May 1992

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TOPIC: DISCRETION TO WAIVE CIVIL PENALTIES

INQUIRY: According to 30 CFR 845.12(c), a regulatory authority MAY assess a penalty for each NOV assigned 30 points (or \$1,000) or less. At one time Indiana, in practice, automatically waived all penalties below \$1,100. Subsequently, the policy changed and the waiving of civil penalties became discretionary, depending on mitigating circumstances. Do other states waive civil penalties, if so, under what circumstances? Are there any cases that discuss the difference between a policy and a promulgated rule?

SEARCH RESULTS: A telephone survey was conducted of seven IMCC member states (Alabama, Illinois, Kentucky, Maryland, Ohio, Pennsylvania and West Virginia). Research was also conducted using the COALEX Library in LEXIS. The results of the survey and research follow. Copies of the relevant state program sections are attached. Several cases are also attached that address the agency policy versus promulgated rule issue.

STATE REGULATIONS: RESPONSES TO SURVEY

ALABAMA

The language of 880-X-11D-.04 (1982) is identical to 30 CFR 845.12. In practice, civil penalties are not waived.

ILLINOIS

Illinois Administrative Code Sec. 1845.12 (1988) requires payment of a penalty for assessments of \$1,100 or more. In practice, civil penalties less than \$1,100 are waived unless certain circumstances occur, e.g., a second NOV is issued to the operator within a 12 month period.

KENTUCKY



The requirements of 405 KAR 7:095E, Sec. 2 follow 845.12. Kentucky has a penalty assessment manual that outlines the circumstances under which an assessment for a violation assigned under 30 points may or may not be waived, e.g., penalties will always be assessed for off-permit impact or damage no matter what the total of points assigned.

MARYLAND

COMAR Sec. 08.13.09.41 (1982), the corresponding section to 845.12, states that the regulatory authority may assess civil penalties but does not specify a threshold for points or dollar figures above which penalties must be assessed. In practice, penalties totaling less than \$200 may be assessed; anything over \$200 must be assessed.

OHIO

Ohio Administrative Code Sec. 1501:13-14-03 (1987) states that the regulatory authority shall determine whether a penalty shall be assessed but does not specify a threshold for points or dollar figures above which penalties must be assessed. In practice, penalties of \$500 or less are generally waived unless certain circumstances occur, e.g., there is a duplicate violation issued within a 12 month period.

PENNSYLVANIA

Sec. 86.193 (1991) of the Pennsylvania Department of Environmental Resource's regulations states that assessment of a civil penalty is discretionary when the calculated amount is less than \$1,000 per violation. The attached policy statement lists those situations where a penalty assessment is mandatory.

WEST VIRGINIA

Sec. 38-2-20.5 (1991) states that assessment of a penalty for amounts less the \$1,000 is at the discretion of the Commissioner. In practice, penalties under \$1,000 are waived depending on the seriousness of the violation, e.g., penalties are not waived for off-permit damage.

STATE REGULATIONS: REGULATION SECTIONS FROM COALEX

INDIANA

310 IAC 12-6-11 follows 30 CFR 845.12 and allows discretion for violations of 30 points or less.

MISSOURI

10 CSR 40-8.040 (1990) follows 30 CFR 845.12 and allows discretion for violations of 30 points or less.

VIRGINIA



480-03-19.845.12 (1986), the Virginia counterpart to the federal regulation, states that the regulatory authority may assess a penalty for each notice of violation but does not specify a threshold for points or dollar figures above which penalties must be assessed.

PERMANENT PROGRAM PREAMBLE

44 FR 14902 (MARCH 13, 1979). Preamble to the final rules. 30 CFR Part 845 Civil penalties.

The preamble to Part 845 is attached for background. Of particular interest is the following paragraph from Sec. 845.12 When penalty will be assessed.

"One commenter asked that, regardless of whether the notice of violation is assigned 30 points or less, violations caused by conduct characterized as reckless, knowing, or intentional should automatically trigger a fine. As mentioned in 845.12, in determining whether to assess an under-31 point penalty, the Office takes into account the four statutory criteria, including negligence and good faith in compliance. As a matter of policy, the Office currently assesses discretionary penalties in cases of reckless or willful misconduct or lack of good faith in complying."

CASE LAW

PACIFIC GAS AND ELECTRIC COMPANY v FEDERAL POWER COMMISSION (FPC), 506 F 2d 33 (DC Cir 1974).

In this case, affirming the FPC's issuance of an order directing natural gas pipeline companies to file curtailment plans when periods of gas shortage were expected to occur, the court articulated the distinction between substantive rules which must be properly promulgated and an agency's statements of policy which do not require rule-making procedures:

"An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rule-making procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings of adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

...

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings.... A properly adopted substantive rule establishes a standard of conduct which has the force of law.... The underlying policy embodied in the rule is not generally subject to challenge before the agency.



"A general statement of policy, on the other hand, does not establish a 'binding norm'.... A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."

Also see:

PENN. HUMAN RELATIONS COMM. V NORRISTOWN AREA SCHOOL DISTRICT, 374 A 2d 671 (Pa 1977).

The court affirmed the Commission's definition of segregated school in its guidelines as "a general statement of policy and not an administrative regulation subject to the publication requirements of the Administrative Agency Law."

LOPATA v UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 493 A 2d 657 (Pa 1985).

The court found that a formula used by the Unemployment Compensation Board of Review to definitely calculate certain credit weeks was an improperly adopted regulation and was invalid because it was "completely and unequivocally determinative" of the issue to which it applied.

DEPT. OF ENVIRONMENTAL RESOURCES (DER) V RUSHTON MINING CO., 591 A 2d 1168 (Commw Ct Pa 1991).

The court affirmed the Environmental Hearing Board's (EHB) ruling that the standard conditions placed on 46 coal mining permits by DER constituted regulations and were therefore invalid. "The EHB found that these standard conditions, which established binding norms of general applicability and future effect, were regulations which should have been promulgated pursuant to the Commonwealth Documents Law." [Cites to the three cases above.]

PRUDENTIAL PROPERTY AND CASUALTY INSURANCE CO. v DEPT. OF INSURANCE, 595 A 2d 649 (Commw Ct Pa 1991).

Citing to the first three cases above, the court found that the Commissioner's use of a 12%-rate-of-return-on-surplus threshold used in evaluating filings for extraordinary circumstances relief did not constitute a regulation: "the 12% threshold is not established, nor is there evidence that it is applied, in a way which precludes any adjustment for individual circumstances through adjudication on a case-by-case basis." However, the matter was remanded to the Commissioner "to take evidence on the issue of the appropriate industry rate of return and the threshold rate of return applicable to this proceeding."

ATTACHMENTS

A. ALABAMA

1. Reg. Sec. 880-X-11D-.04 (1983) When penalty will be assessed.



2. Reg. Sec. 880-X-11D-.08 (1983) Waiver of use of formula
- B. ILLINOIS
1. IAC Sec. 1845.12 (1988) When penalty will be assessed.
 2. IAC Sec. 1845.11 (1988) How assessments are made.
- C. KENTUCKY
1. 405 KAR 7:095E, Sec. 2 (1983) When penalty will be assessed.
 2. 405 KAR 7:095E, Sec. 6 (1983) Waiver of use of point system.
- D. MARYLAND: COMAR 08.13.09.41 (1982) Civil penalties.
- E. OHIO: Ohio Admin. Code 1501:13-14-03 (1987) Civil penalties.
- F. PENNSYLVANIA
1. Reg. Sec. 86.192 (1991) How assessments are made
 2. Reg. Sec. 86.193 (1991) When a penalty will be assessed.
 3. Reg. Sec. 86.194 (1991) System for assessment of penalties.
 4. Policy Statement (1986) Civil penalty program
 5. 54 FR 34168 (AUGUST 18, 1989). Final rule. Approval of amendment. [Excerpt]
- G. WEST VIRGINIA
1. Reg. Sec. 38-2-20.5 (1991) Civil penalty determinations.
 2. Reg. Sec. 38-2-20.6 (1991) Procedure for assessing civil penalties.
- H. INDIANA
1. 310 IAC 12-6-11 (1986) Civil penalties; when assessed.
 2. 310 IAC 12-6-14 (1982) Civil penalties; waiver
- I. MISSOURI: 10 CSR 40-8.040 (1990) Penalty assessment.
- J. VIRGINIA
1. Reg. Sec. 480-03-19.845.12 (1986) When a penalty will be assessed.
 2. 50 FR 28324 (JULY 11, 1985). Final rule. [Excerpt]
- K. 44 FR 14902 (MARCH 13, 1979). Preamble to the final rules. 30 CFR Part 845 Civil penalties.
- L. PACIFIC GAS AND ELECTRIC COMPANY v FEDERAL POWER COMMISSION (FPC), 506 F 2d 33 (DC Cir 1974).
- M. PENN. HUMAN RELATIONS COMM. v NORRISTOWN AREA SCHOOL DISTRICT, 374 A 2d 671 (Pa 1977).
- N. LOPATA v UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 493 A 2d 657 (Pa 1985).
- O. DEPT. OF ENVIRONMENTAL RESOURCES (DER) v RUSHTON MINING CO., 591 A 2d 1168 (Commw Ct Pa 1991).
- P. PRUDENTIAL PROPERTY AND CASUALTY INSURANCE CO. v DEPT. OF INSURANCE, 595 A 2d 649 (Commw Ct Pa 1991).