

405 KAR 7:095. Assessment of civil penalties.

RELATES TO: KRS 350.990(1), 30 C.F.R. Parts 730-733, 735, 845, 917, 30 U.S.C. 1268

STATUTORY AUTHORITY: KRS 350.020, 350.028, 350.465, 350.990(1), 30 C.F.R. Parts 730-733, 735, 845, 917, 30 U.S.C. 1268

NECESSITY, FUNCTION, AND CONFORMITY: KRS 350.990(1) requires the cabinet to promulgate an administrative regulation establishing the method for calculating monetary penalties. This administrative regulation establishes how and when penalties shall be assessed and includes a point system for calculating penalties, rules for assessing continuing violations, and a provision allowing waiver of the point system.

Section 1. How Penalty Assessments Shall Be Made. The cabinet shall review each violation, condition, or practice cited in a notice of noncompliance and order for remedial measures or order of cessation and immediate compliance in accordance with the assessment procedures established in 400 KAR 1:110 and this administrative regulation to determine if a civil penalty shall be assessed, the amount of the penalty, and if each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

Section 2. Conditions for Penalty Assessment. (1) The cabinet shall assess a penalty for each violation, condition, or practice cited in an order of cessation and immediate compliance.

(2) The cabinet shall assess a penalty for each violation cited in a notice of noncompliance and order for remedial measures, if the violation is assigned thirty-one (31) points or more under the point system established in Section 3 of this administrative regulation.

(3) The cabinet may assess a penalty for each violation cited in a notice of noncompliance and order for remedial measures if the violation is assigned thirty (30) points or less under the point system established in Section 3 of this administrative regulation. In determining if a penalty shall be assessed, the cabinet shall consider the factors listed in 400 KAR 1:110, Section 3(2).

Section 3. Point System for Penalties. The cabinet shall use the point system established in this section to determine the amount of any penalty. Points shall be assigned as established in subsections (1) through (4) of this section.

(1) History of previous violations.

(a)1. The cabinet shall assign up to thirty (30) points based on the history of previous violations. One (1) point shall be assigned for each past violation cited in a notice of noncompliance and order for remedial measures.

2. Five (5) points shall be assigned for each violation cited in an order of cessation and immediate compliance.

(b) The history of previous violations, for the purpose of assigning points, shall be determined and the points assigned with respect to a particular coal exploration or surface coal mining operation. Points shall be assigned as established in subparagraphs 1. through 3. of this paragraph.

1. A violation shall not be counted, if the notice or order is the subject of pending administrative or judicial review or if the time to request such review or to appeal any administrative or judicial decision has not expired, and thereafter it shall be counted for only one (1) year.

2. A violation for which the notice or order has been vacated shall not be counted.

3. Each violation shall be counted without regard to whether it led to a civil penalty assessment.

(2) Seriousness. The cabinet shall assign up to thirty (30) points based on the seriousness

of the violation, as established in paragraphs (a) through (c) of this subsection.

(a) Probability of occurrence. The cabinet shall assign up to fifteen (15) points based on the probability of the occurrence of the event that a violated standard is designed to prevent. Points shall be assessed according to the following schedule:

1. No probability of occurrence: zero points;
2. Insignificant probability of occurrence: one (1) to four (4) points;
3. Unlikely probability of occurrence: five (5) to nine (9) points;.
4. Likely probability of occurrence:; ten (10) to fourteen (14) points; and
5. Occurred: fifteen (15) points.

(b) Extent of potential or actual damage. The cabinet shall assign up to fifteen (15) points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as established in subparagraphs 1. and 2. of this paragraph.

1. If the damage or impact that the violated standard is designed to prevent would remain within the coal exploration, permit area, or shadow area, the cabinet shall assign zero to seven (7) points, depending on the duration and extent of the damage or impact.

2. If the damage or impact that the violated standard is designed to prevent would extend outside the coal exploration, permit area, or shadow area, the cabinet shall assign eight (8) to fifteen (15) points, depending on the duration and extent of the damage or impact.

(c) Administrative requirements. In the case of a violation of an administrative requirement, such as a requirement to keep records, the cabinet shall, in lieu of paragraphs (a) and (b) of this subsection, assign up to fifteen (15) points for seriousness, based upon the extent to which enforcement is obstructed by the violation.

(3) Negligence. The cabinet shall assign up to twenty-five (25) points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice that led to the notice or order, either through act or omission. Points shall be assessed as established in paragraphs (a) through (c) of this subsection.

(a) A violation, condition, or practice that occurs through "no negligence" shall not be assigned penalty points for negligence. "No negligence" shall include an inadvertent violation, condition, or practice that was unavoidable by the exercise of reasonable care.

(b) A violation, condition, or practice that is caused by "negligence" shall be assigned twelve (12) points or less, depending on the degree of negligence. "Negligence" shall include the failure of a permittee to prevent the occurrence of the violation, condition, or practice due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation, condition or practice due to indifference, lack of diligence, or lack of reasonable care.

(c) A violation, condition, or practice that occurs through a greater degree of fault than negligence shall be assigned thirteen (13) to twenty-five (25) points, depending on the degree of fault. A greater degree of fault than negligence means reckless, knowing, or intentional conduct.

(4) Good faith in attempting to achieve compliance. The cabinet shall subtract up to fifteen (15) points based on the degree of good faith of the person to whom the notice or order was issued in attempting to achieve rapid compliance after notification of the violation, condition, or practice. Points shall be subtracted as established in paragraphs (a) and (b) of this subsection.

(a) Rapid compliance. Six (6) to fifteen (15) points shall be subtracted from the total points if the person to whom the notice or order was issued took extraordinary measures to abate the violation, condition, or practice in the shortest possible time and that abatement was achieved before the time set for abatement.

(b) Normal compliance. Zero to five (5) points shall be subtracted from the total points if the person to whom the notice or order was issued abated the violation, condition, or practice by the abatement date.

Section 4. Determination of Amount of Penalty. For each violation, condition, or practice cited in a notice or order, the cabinet shall determine the amount of any civil penalty by converting the total number of points assigned pursuant to Section 3 of this administrative regulation to a dollar amount, according to the schedule established in this section.

Penalty Schedule			
Point	Dollars	Points	Dollars
1	20	36	1,600
2	40	37	1,700
3	60	38	1,800
4	80	39	1,900
5	100	40	2,000
6	120	41	2,100
7	140	42	2,200
8	160	43	2,300
9	180	44	2,400
10	200	45	2,500
11	220	46	2,600
12	240	47	2,700
13	260	48	2,800
14	280	49	2,900
15	300	50	3,000
16	320	51	3,100
17	340	52	3,200
18	360	53	3,300
19	380	54	3,400
20	400	55	3,500
21	420	56	3,600
22	440	57	3,700
23	460	58	3,800
24	480	59	3,900
25	500	60	4,000
26	600	61	4,100
27	700	62	4,200
28	800	63	4,300
29	900	64	4,400
30	1,000	65	4,500
31	1,100	66	4,600
32	1,200	67	4,700
33	1,300	68	4,800
34	1,400	69	4,900
35	1,500	70 and above	5,000

Section 5. Assessment of Separate Violations for Each Day. (1) The cabinet may assess separately a civil penalty for each day from the date of issuance of the notice or order to the date of abatement of the violation.

(a) In determining whether or not to make such an assessment, the cabinet shall consider

the factors established in 400 KAR 1:110, Section 3(2) and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply.

(b) For any violation that continues for two (2) or more days and that is assigned more than seventy (70) points pursuant to Section 3 of this administrative regulation, the cabinet shall assess a civil penalty for a minimum of two (2) separate days.

(2) In addition to the civil penalty process established in subsection (1) of this section, if a violation, condition, or practice contained in a notice of noncompliance and order for remedial measures or order for cessation and immediate compliance has not been abated within the abatement period set in the notice or order, a civil penalty of not less than \$750 shall be assessed for each day during which the failure continues according to the provisions of 400 KAR 1:110, Section 13(2).

Section 6. Waiver of Use of Point System to Determine Civil Penalty. (1) The cabinet upon its own initiative, or upon a written request by the person to whom the notice or order was issued that is received within fifteen (15) days of mailing of the proposed penalty assessment, may waive the use of the point system established in Section 3 of this administrative regulation to set the civil penalty, if the cabinet determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust.

(a) The cabinet shall not waive the use of the point system or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate the violation, condition, or practice.

(b) The basis for every waiver shall be fully explained and documented in the records of the case.

(2)(a) If the cabinet waives the use of the point system, the cabinet shall use the criteria established in 400 KAR 1:110, Section 3(2) to determine the appropriate penalty.

(b) If the cabinet has elected to waive the use of the point system, shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.

Section 7. Incorporation by Reference. (1) "Procedures for Assessment of Civil Penalties", 1995, is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Kentucky Department for Natural Resources, 300 Sower Boulevard, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. (8 Ky.R. 1480; eff. 1-6-1983; 21 Ky.R. 524; 1345; 2119; eff. 2-22-1995; TAm eff. 8-9-2007; TAm eff. 7-6-2016; 44 Ky.R. 585, 1272; eff. 1-5-2018; Crt eff. 7-3-2018.)