

## **405 KAR 7:097. Reclamation in lieu of cash payment of civil penalties.**

RELATES TO: KRS 350.010, 350.020, 350.028, 350.130, 350.150, 350.151, 350.465, 350.550-350.597, 350.990, 30 C.F.R. Parts 730-733, 735, 845, 846, 917, 30 U.S.C. 1253, 1255, 1268

STATUTORY AUTHORITY: KRS 350.020, 350.028, 350.151, 350.465, 350.990, 30 C.F.R. Parts 730-733, 735, 845, 846, 917, 30 U.S.C. 1253, 1255, 1268

NECESSITY, FUNCTION, AND CONFORMITY: KRS 350.028(1), (5), 350.151(1), and 350.465(2) authorize the cabinet to promulgate administrative regulations relating to surface and underground coal mining operations. KRS 350.990(11) authorizes the cabinet to allow a permittee, person, or operator to perform in-kind reclamation, environmental rehabilitation, or similar action to correct environmental pollution, instead of making cash payment of a civil penalty assessed under KRS 350.990. KRS 350.990(11) authorizes the cabinet to promulgate administrative regulations as necessary to implement and administer its provisions. This administrative regulation establishes criteria and procedures to implement KRS 350.990(11). This administrative regulation differs from federal regulations as follows: There are no corresponding federal regulations that establish specific requirements applicable to state regulatory programs that provide for reclamation in lieu of cash payment of civil penalties. As a condition of federal approval of KRS 350.990(11), 30 CFR 917.16(c)(3) requires the cabinet to obtain federal approval of administrative regulations prior to implementation of KRS 350.990(11). This administrative regulation was submitted to the Office of Surface Mining Reclamation and Enforcement for approval as required by 30 CFR 917.16(c)(3) at 64 FR 3670, January 25, 1999.

Section 1. Applicability and General Provisions. (1) This administrative regulation shall apply to a permittee, person, or operator who has been assessed a civil penalty under KRS 350.990 by a final order of the secretary of the cabinet.

(2) The cabinet may, in accordance with KRS 350.990(11) and this administrative regulation, allow a permittee, person, or operator to perform activities in lieu of cash payment of one (1) or more civil penalties, if the aggregate amount of the civil penalties is \$2,500 or more.

(3) Activities under this administrative regulation shall be authorized under a binding agreement between the cabinet and the person owing the civil penalty. The agreement shall be termed a "Civil Penalty Reclamation Agreement."

(4) A permittee, person, or operator conducting activities authorized under this administrative regulation shall not be deemed an agent, contractor, or employee of the cabinet.

(5) A permittee, person, or operator conducting activities authorized under this administrative regulation shall obtain and maintain the legal right to enter upon the site and conduct the authorized activities.

(6)(a) A permittee, person, or operator conducting activities authorized under this administrative regulation shall obtain and maintain liability insurance coverage in accordance with this subsection.

(b) The permittee, person, or operator shall submit a certificate issued by an insurance company authorized to do business in Kentucky certifying that the permittee, person, or operator has a public liability insurance policy in force for the authorized activities. The policy shall provide for personal injury and property damage protection in an amount adequate to compensate for all personal injury and property damage resulting from the authorized activities, including damage caused by the use of explosives and damage to water wells. Minimum insurance coverage for bodily injury and property damage shall be \$300,000 for each occurrence and \$500,000 aggregate.

(c) The policy shall be maintained in force during the term of the Civil Penalty Reclamation

Agreement, until the cabinet has determined in writing that the terms of the Civil Penalty Reclamation Agreement have been satisfied.

(d) The policy shall include a clause requiring that the insurer notify the cabinet if a substantive change is made in the policy, including a termination or failure to renew.

(e) If the insurer becomes unable to fulfill its obligations under the policy, notice shall be given immediately to the permittee, person, or operator and the cabinet.

(f) Upon the incapacity of an insurer by reason of bankruptcy, insolvency, or suspension or revocation of its license or certificate of authority, the permittee, person, or operator shall be deemed to be without insurance coverage and shall promptly notify the cabinet. Notification shall not relieve the insurer of liability on its policy. The cabinet shall notify the permittee, person, or operator in writing, specifying a reasonable period to replace the coverage, not to exceed ninety (90) days. If adequate insurance coverage is not obtained by the end of the period allowed, the permittee, person, or operator shall cease the authorized activities and the cabinet may terminate the Civil Penalty Reclamation Agreement and require the permittee, person, or operator to pay the assessed civil penalty.

(7) If the activities authorized under this administrative regulation are for reclamation of a mine site, the permittee, person, or operator shall provide a performance bond. For activities other than reclamation of a mine site, the cabinet may require the permittee, person, or operator to provide a performance bond if the cabinet determines that the authorized activities could create a risk of environmental harm. This bond shall be in addition to a bond required by another federal, state, or local law. The cabinet shall determine the amount of the bond based upon site specific conditions. This subsection may be satisfied by a performance bond that meets the requirements of 405 KAR Chapter 10. The cabinet shall release the performance bond promptly after the cabinet has determined that the terms of the Civil Penalty Reclamation Agreement have been fulfilled, and the bond release procedures of 405 KAR 10:040 shall not apply.

(8) A permittee, person, or operator conducting activities authorized under this administrative regulation shall comply with applicable federal, state, and local laws and regulations.

(9) A permittee, person, or operator conducting activities authorized under this administrative regulation shall not engage in coal removal in connection with the authorized activities.

(10) Activities authorized under this administrative regulation shall be on-ground activities that directly result in reclamation, environmental rehabilitation, or correction of environmental pollution. Educational, promotional, training, and other activities that may indirectly affect the environment, shall not be authorized.

(11) Activities authorized under this administrative regulation shall not constitute government financed construction for the purposes of 405 KAR 7:030, Sections 2 and 3.

(12) The cabinet shall determine the location, scope, and time schedule for activities authorized under this administrative regulation.

(13) The Division of Abandoned Mine Lands shall determine the estimate of the cost of activities authorized or completed under this administrative regulation.

(14) Activities shall not be authorized under this administrative regulation unless their estimated cost exceeds the assessed amount of the civil penalty.

(15) The cost of activities in excess of the civil penalty amount covered in the Civil Penalty Reclamation Agreement shall not be credited or carried forward to satisfy a civil penalty not covered in the Civil Penalty Reclamation Agreement or a future civil penalty.

(16) The cabinet shall maintain appropriate records of activities conducted under this administrative regulation. The Department for Natural Resources shall maintain custody of the records. The cabinet shall request an audit of these records and activities authorized under this administrative regulation, at intervals of not more than five (5) years.

Section 2. Ineligible Permittees, Persons, or Operators. The cabinet shall not authorize a permittee, person, or operator to perform activities under this administrative regulation if the permittee, person, or operator is ineligible to receive a permit under KRS Chapter 350 and 405 KAR Chapters 7-24 for a reason other than nonpayment of a civil penalty.

Section 3. Ineligible Civil Penalties. The cabinet shall not authorize activities in lieu of cash payment of a civil penalty if:

- (1) A violation that led to the civil penalty remains unabated; or
- (2) The permittee, person, or operator owing the civil penalty has:
  - (a) Entered into an agreed order with the cabinet to pay the civil penalty; and
  - (b) Failed to comply with the terms of the agreed order.

Section 4. Ineligible Sites. The cabinet shall not authorize activities at the following sites:

- (1) A site that is under a valid permit under KRS Chapter 350 for which the bond has not been forfeited;
- (2) A site that is under another valid federal, state, or local permit, under which the permit holder has responsibility for environmental conditions at the site; or
- (3) A site for which there is an ongoing enforcement action for violation of federal, state, or local environmental laws, unless the agency pursuing the enforcement action consents.

Section 5. Selection of Sites. (1) For informational and planning purposes, the cabinet may develop and maintain a list of sites that may be suitable for activities under this administrative regulation, and may assign priorities to sites on the list. If the cabinet develops a list of sites, it shall be made available to the public. Authorization of a site for activities under this administrative regulation shall be made on a case-by-case basis and shall not be limited to sites on the list.

(2) The cabinet may consider sites and activities proposed by the permittee, person, or operator owing a civil penalty, but the cabinet shall not have an obligation to authorize, or give preference to, the sites or activities.

(3) The cabinet shall consult with the county fiscal court before authorizing activities on a site in the county. The county fiscal court may recommend sites or activities, but the cabinet shall not have an obligation to authorize, or give preference to, the sites or activities.

(4) The cabinet may consult with other federal, state, and local government agencies and officials, and with private organizations and individuals, regarding selection of sites and activities to be authorized.

(5) The cabinet may seek public input regarding selection of sites and activities to be authorized, through newspaper notice or by other means.

(6) The cabinet may give preference to sites or activities that address environmental impacts resulting from coal mining.

Section 6. Criteria Applicable to Activities and Costs. (1) The following activities shall not be authorized under this administrative regulation:

(a) Activities which the permittee, person, or operator owing the civil penalty has a duty to perform under KRS Chapter 350 or other federal, state, or local law;

(b) Activities which the permittee, person, or operator owing the civil penalty, or other person, has a legal obligation to perform under a valid contract; and

(c) Activities on land or waters in which the permittee, person, or operator owing the penalty has, directly or indirectly, an ownership interest or other financial interest.

(2) The following activities and costs shall not be credited toward the civil penalty:

(a) Activities begun or costs incurred prior to the Civil Penalty Reclamation Agreement;

(b) The cost of labor, equipment, time, materials, or services, donated by persons other than the permittee, person, or operator owing the civil penalty;

(c) Payments or gifts by the permittee, person, or operator owing the civil penalty to government agencies or private organizations in exchange for their participation in planning or carrying out activities;

(d) Purchase or lease of land, easements, rights of way, or other access to property;

(e) Construction, modification or repair of a building or other structure, unless the function of the building or other structure is prevention, control, or abatement of environmental pollution;

(f) Repair of a road, unless the purpose of the repair is abatement and control of environmental pollution;

(g) Transportation costs; and

(h) Administrative costs and overhead.

(3) Activities may be authorized in conjunction with an abandoned mine land reclamation project of the cabinet under KRS 350.550 through 350.597.

(4) Activities may be authorized in conjunction with reclamation of a bond forfeiture site by the cabinet under KRS 350.150, if the permittee, person, or operator owing the civil penalty:

(a) Did not own or control the site under KRS Chapter 350;

(b) Was not an operator or agent on the site under KRS Chapter 350; and

(c) Has no direct or indirect ownership or other interest in the land.

Section 7. Request. (1) A permittee, person, or operator desiring to perform in-kind reclamation, environmental rehabilitation, or similar action to correct environmental pollution in lieu of cash payment of a civil penalty shall make a written request to the Commissioner of the Department for Natural Resources. The request shall not be made contingent upon any particular proposed site or activities.

(2) The request shall identify:

(a) The permittee and permit number associated with the civil penalty;

(b) The identifying number of the noncompliance or cessation order that resulted in the civil penalty;

(c) The assessed civil penalty amount and the amount that remains unpaid;

(d) The name, mailing address, and telephone number of the permittee, operator or person making the request; and

(e) The date of the request.

(3) If the civil penalty is owed by an individual, the request shall bear the signature of the individual.

(4) If the civil penalty is owed by a business entity, the request shall bear the signature and title of an authorized officer or agent of the business entity.

(5)(a) For a civil penalty assessed by final order of the secretary on or after July 1, 1999, the request shall be filed within thirty (30) days after the date of the final order.

(b) For a civil penalty assessed by final order of the secretary prior to July 1, 1999, the request shall be filed not later than June 30, 2000.

(c) The filing of the request shall not stay the collection of the civil penalty.

(6) Within fifteen (15) days after receiving a request under this section, the cabinet shall notify the permittee, person, or operator, in writing, of whether the cabinet intends to pursue a Civil Penalty Reclamation Agreement with the permittee, person, or operator. The cabinet may require additional information relevant to the request.

(7) The permittee, person, or operator may withdraw the request at any time prior to entering into a Civil Penalty Reclamation Agreement, by providing written notice to the Commissioner of the Department for Natural Resources.

Section 8. Civil Penalty Reclamation Agreement. (1) The Civil Penalty Reclamation Agreement shall specify:

- (a) The effective date of the Civil Penalty Reclamation Agreement;
- (b) The names of the parties to the Civil Penalty Reclamation Agreement;
- (c) The civil penalty amount;
- (d) The identifying number of the noncompliance or cessation order that resulted in the civil penalty;
- (e) The permit number and name of the permittee associated with the violation that led to the civil penalty;
- (f) The activities authorized;
- (g) The time span within which the authorized activities shall be completed;
- (h) The site of the authorized activities;
- (i) The requirements for legal right of entry, liability insurance, and performance bonding;
- (j) The conditions under which the Civil Penalty Reclamation Agreement may be modified or terminated;
- (k) The consequences of failure to satisfy the terms of the Civil Penalty Reclamation Agreement; and
- (l) The effect of successful satisfaction of the terms of the Civil Penalty Reclamation Agreement.

(2) A Civil Penalty Reclamation Agreement may cover multiple civil penalties and sites:

- (a) Multiple civil penalties may be covered at a single site; and
- (b) A single civil penalty may be covered at multiple sites.

(3) The cabinet and the permittee, person, or operator owing the civil penalty shall be parties to the Civil Penalty Reclamation Agreement. Other parties may be included if the cabinet determines they are necessary parties to the Civil Penalty Reclamation Agreement.

(4) Except as provided in subsection (5) of this section, the Civil Penalty Reclamation Agreement may be modified or terminated at any time if approved in writing by all parties in accordance with the provisions established in the Civil Penalty Reclamation Agreement as required by subsection (1)(j) of this section.

(5) The cabinet may terminate the Civil Penalty Reclamation Agreement at any time if the permittee, person, or operator owing the civil penalty fails to satisfactorily fulfill the terms of the Civil Penalty Reclamation Agreement.

(6) The cabinet shall conduct field inspections as necessary to monitor progress under the Civil Penalty Reclamation Agreement.

(7) The civil penalty shall remain due and payable until the cabinet has determined in writing that the permittee, person, or operator owing the civil penalty has satisfactorily fulfilled the terms of the Civil Penalty Reclamation Agreement.

(8) The full assessed civil penalty shall be due and payable if the Civil Penalty Reclamation Agreement is breached. (25 Ky.R. 2048; 2594; 2861; eff. 6-9-1999; TAm eff. 8-9-2007; Crt eff. 7-3-2018.)