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**VIRGINIA COAL SURFACE MINING AND RECLAMATION  
 PERMANENT REGULATORY PROGRAM**

**CIVIL PENALTY ASSESSMENT MANUAL**

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## SECTION 1: GENERAL

Statutory Authority - §45.1-246 of the **Code of Virginia** (Act), as amended.  
Regulatory Authority - Part 4 VAC 25-130-845 of the **Virginia Coal Surface Mining Reclamation Regulations**

The Act allows the Division the discretion to assess or not assess a penalty for a notice of violation (NOV), while mandating a penalty for each cessation order (CO).

In determining whether to assess a penalty, four criteria are considered:

- (1) The **seriousness of the violation**.
- (2) The **degree of negligence** exhibited by the permittee.
- (3) The permittee's **good faith** in correcting the violation expeditiously.
- (4) The permittee's **previous history of violations** at the particular coal exploration or surface mining operation.

In addition to the potential civil penalty that may be assessed to a permittee, the Division may assess an individual civil penalty to the officers, directors, or agents of a corporate permittee under Section 45.1-246(F) of the Act and Part 4 VAC 25-130-846 of the regulations. A violation that results in a personal injury or fatality may be assessed a civil penalty up to \$70,000.

## SECTION 2: ASSESSMENT CRITERIA

The Assessments Officer reviews each NOV and CO issued by the Field Inspector or Area Supervisor to determine the proposed civil penalty assessment. The Inspector has first hand knowledge of the violation. Therefore, the Assessments Officer relies upon the Inspector to provide an accurate report that identifies the violation and impact it may have on the environment or public health and safety.

It is essential that the Inspector describe the actual or potential adverse impacts created by each violation cited in the NOV or CO. The Inspector should use the "Violation Effect Guideline" (page 15 when describing violation impacts).

To determine an appropriate assessment amount, the Assessments Officer will review the Inspector's report, the NOV/CO, photograph(s) of the violation, and any information submitted by the permittee (4 VAC 25-130-845.17a). After considering the facts of the violation, the proposed assessment will be rendered based upon the four assessment criteria:

### Seriousness of the Violation

Seriousness of the violation is determined by evaluating the adverse impacts it creates or poses.

- **Has the violation resulted in (or does it have the potential to cause) environmental damage or injury to the public?** Was the actual or potential environmental harm, danger to the public safety or health created as a direct or indirect result of the violation?
- **Does the violation prevent or impede the Inspector's ability to ensure the operation complies with the requirements of the Act, regulations, and the permit's approved plans?**  
A violation of this type may be considered administrative in nature.

The following table provides the scale for **seriousness point** determinations (4 VAC 25-130-845.13a). The Assessments Officer will review this table to determine the applicable points warranted for each specific violation cited by the Inspector. Within each level, the point assignment may be further narrowed when considering any mitigating or compounding circumstances involved with the particular violation.

<b>SERIOUSNESS POINT DETERMINATION</b>			
<b>Points</b>	<b>Damage to the Environment</b>	<b>Danger to the Public Health/Safety</b>	<b>Obstruction to Enforcement</b>
0	No actual/potential	No threat	No
1 to 2	Slight actual/potential	No actual/potential	Violation of administrative requirement that can be quickly corrected.
3 to 4	Moderately significant actual/potential; can be promptly corrected.	Minor actual/potential threat or hazard	Violation of administrative requirement that's correctable after some delay & tends to hamper or obstruct enforcement.
5 to 6	Moderately significant actual/potential; correctable only after substantial effort or time.	Actual/potential moderately significant hazard	
7 to 8	Extremely serious potential; substantial actual/potential; correctable only after substantial effort or time.	Substantial actual/potential hazard	
9 to 10	Extremely serious actual.	Extreme actual/potential hazard.	

**Degree of Negligence**

Negligence points are assessed after considering the degree to which the permittee caused or allowed the violation to occur, either through act or failure to act.

A permittee is charged with an obligation to exercise “reasonable care” in conducting coal exploration or mining operations. The acts of all persons working at the particular operation are attributed to the permittee, unless the permittee establishes that the acts were deliberate sabotage (4 VAC 25-130-845.13(b)(3)).

After reviewing the Inspector’s report, the Assessments Officer may assign up to six (6) points for negligence. The point determination is based upon:

<b>Degree of Operator Negligence</b>	<b>Points</b>
No negligence	0
Negligence	1 to 3
Greater degree of fault than negligence	4 to 6

**No negligence** - constitutes an inadvertent and unavoidable violation that occurred despite the permittee’s exercise of reasonable care, such as from an unpredictable natural event (“act of God” - i.e., earthquake, flood) or from vandalism. While an “act of God” or vandalism cannot be prevented,

the permittee would be negligent if he or she failed to repair the damage caused by such circumstances.

**Negligence** - the failure of the permittee to prevent the occurrence of (or to correct) the violation due to indifference, lack of diligence, or lack of reasonable care. The permittee fails to exercise the degree of care expected of a careful and reasonable operator.

**A greater degree of fault than negligence** - constitutes reckless, knowing or intentional conduct. A permittee is deemed reckless when it is obvious to a reasonable person that the course of conduct (either an action or failure to act) taken by the permittee was likely to create a serious amount of damage or harm, yet the permittee followed the course anyway.

**“Reckless conduct”** is also attributed to situations that are deemed inherently dangerous; the permittee failed to exercise a greater degree of care warranted to ensure safety. Blasting operations can be recklessly conducted when the permittee does not follow reasonable and accepted operational procedures.

**“Knowing or intentional conduct”** occurs when the permittee is aware of the potential or actual violation, but fails to avoid or correct the violation.

The Assessments Officer will consider any mitigating circumstances prior to assigning negligence points. Some situations could necessitate a lower negligence determination due to the unique circumstances present, for example:

- If the permittee was trying to comply with a condition of the permit, but was doing it wrong.
- The permittee was in the process of attempting to correct the problem, but a NOV was issued before the work was completed.

### **Good Faith Credit**

If a permittee complies with the remedial action required by a NOV or CO (imminent environmental harm) prior to the set abatement date, good faith points (4 VAC 25-130-845.13c) may be awarded. These points would be deducted from the total derived from the seriousness and negligence determinations. The amount of good faith points depends upon the permittee’s compliance effort. The Assessments Officer may award the permittee:

<b>Compliance Efforts by Operator/Permittee</b>	<b>Points</b>
If prompt and diligent efforts were taken and the violation was abated prior to the set abatement date.	-1 to -2
If extraordinary measures were taken to abate the violation in the shortest time possible, prior to the set abatement date.	-3 to -4

A **good faith determination** may be made once the NOV or CO is terminated. Due to the length of the NOV’s or CO’s abatement period, good faith credit is usually determined at the time of a reassessment (4 VAC 25-130-845.17c) or during an assessment conference. **Cessation Orders issued for failure to abate are not eligible for good faith credit.**

The amount of good faith credit that may be awarded is dependent upon the information supplied by the Inspector. If the Inspector feels that “extraordinary efforts” were taken by the permittee to abate the violation, the inspection report must provide a detailed description of those efforts for the Assessments Officer’s consideration.

**Base Penalty Amount**

After determining the respective point values for seriousness, negligence and good faith, a total point amount is calculated, from which the base penalty is derived (4 VAC 25-130-845.13d):

Points	Base Penalty		Points	Base Penalty
1	\$ 50.00		9	\$ 1,050.00
2	\$ 100.00		10	\$ 1,350.00
3	\$ 175.00		11	\$ 1,700.00
4	\$ 250.00		12	\$ 2,050.00
5	\$ 325.00		13	\$ 2,400.00
6	\$ 400.00		14	\$ 2,750.00
7	\$ 475.00		15	\$ 3,100.00
8	\$ 750.00		16	\$ 3,500.00

If the violation cited under the Notice of Violation or Cessation Order resulted in a personal injury or fatality, the base penalty amount shall be multiplied by a factor of twenty (20), not to exceed \$70,000 per injury/fatality.

**Previous History of Violations**

In addition to the base penalty amount, the Assessments Officer must determine if a history of violation penalty will be applicable. A review of the Division files will indicate whether the permittee was issued NOV(s) or CO(s) at the particular operation or permit. Only the NOVs and COs finally resolved in the preceding 12 month period would be considered in the history calculation. The following will not be considered for any NOV/CO:

- subject to pending administrative or judicial review.
- eligible for administrative review (time frame to seek review has not expired).
- that was vacated by the Division.

If the permittee does not have a history of violations, the Assessments Officer will reduce the base penalty amount by ten percent (10%), except for a violation that resulted in personal injury or fatality to any person. In the event that a NOV or CO was issued during the preceding 12 month period and is still subject or eligible for administrative or judicial review, it will not be discounted for the purpose of awarding the 10% penalty reduction.

If a history of previous violations exists, the following will be added to the base penalty:

- (a). **\$20 per violation** of a NOV containing 10 or less violations.
- (b). **\$50 per violation** of a NOV containing more than 10 violations.
- (c). **\$100 per violation** contained in a CO.

### Other Considerations

The Assessments Officer may assess the permittee a penalty for each day the violation (cited in the NOV/CO) continues; however, in no event shall the daily penalty for each separate NOV or CO exceed \$5,000, or \$70,000 in the event of a personal injury or fatality.

If the permittee fails to comply with a NOV's remedial measures, the Inspector may issue a **failure to abate cessation order**. The assessment for this order could range from a minimum of \$750 to maximum of \$5,000 for each day of continuing violation or failure to abate. The daily assessment would not be levied in excess of 30 days.

A penalty derived from the point system may be waived (4 VAC 25-130-845.16) if exceptional factors were present which would make the penalty demonstrably unjust. The waiver may be requested by the permittee or be made upon the Division's initiative.

A waiver will not be awarded on the argument that a reduction in the proposed penalty amount could be used to abate violations of the Act, regulations, or permit condition. An approval or denial of the waiver must be documented in the assessment file.

### SECTION 3: MECHANICS OF AN ASSESSMENT

The Reclamation Services Office Services Specialist will forward the office copy of each issued NOV and CO to the Assessments Officer as soon as possible after the Big Stone Gap office receives it. The Assessment Officer may also print a temporary copy from the DMLR Enforcement system pending receipt of the office copy and any associated attachments (e.g., photographs, lab analyses, etc.).

The assessment file will be set up by permit or DMLR tracking number. Each folder will contain a copy of the NOV or CO, inspection report, and all ancillary documents. The folder contents will be arranged in reverse chronological order (most recent activity first).

The Customer Services Office Services Specialist will enter relevant assessment data into the DMLR Dynaterm computer files.

As the permittee has the right to submit information (4 VAC 25-130-845.17a) for the Division's consideration, the Assessments Officer will wait at least 15 days from issuance of the NOV or CO before rendering an assessment determination on the violation(s).

In determining a proposed penalty amount, the Assessments Officer will:

1. Review the NOV/CO to determine the law or regulation violated. If the Assessments Officer questions the appropriateness of the citation, the appropriate Reclamation Services staff will be contacted for clarification.
2. Determine the relevant facts associated with each violation. Should the permittee submit information (4 VAC 25-130-845.17a) that tends to contradict the inspection report, the Assessments Officer will contact the Inspector for clarification.
3. If the permittee requests a waiver of the penalty point system under 4 VAC 25-130-

845.16, determine if exceptional factors were present that would make a penalty under the point system demonstrably unjust.

4. Determine the values for each of the four assessment criteria. An explanation of how each value was decided will be provided in the proposed assessment letter. If the total points for the “seriousness” and “negligence” criteria total 3 points or less, the civil penalty will be waived.
5. Prepare the notice of proposed assessment, to be sent by certified mail. The notice will inform the permittee of each civil penalty assessment, how each penalty was determined, and the permittee’s right to appeal the penalty in an informal (assessment conference) or formal hearing.

### Reassessment

If good faith credit was not considered during the initial assessment determination, a **reassessment** is conducted (4 VAC 25-130-845.17c) once the NOV/CO is terminated or alternate enforcement action is initiated. A reassessment is not conducted when the permittee requested an assessment conference to review the proposed assessment (good faith would be addressed in the conference determination).

In conducting a reassessment, the Assessments Officer reviews the information supplied by the Inspector to determine whether the initial values for seriousness and negligence should be revised, and whether good faith points should be awarded. The reassessment letter is sent by certified mail to the permittee, explaining the basis for each reassessment and the company’s right to appeal (assessment conference and formal hearing).

### Cessation Orders for Failure to Abate

The minimum penalty for this violation is \$750 for each day of continuing violation or failure to abate (4 VAC 25-130-845.15b). The daily maximum penalty is \$5,000.

The Division will not assess the daily penalty for more than 30 days. Unless circumstances warrant otherwise, the Assessments Officer will assess no more than \$750 per day per violation for this type of CO. The basis for exceeding the \$750 limit would be explained in the Proposed Assessment.

Good faith credit is not applicable for abatement of this type of enforcement order.

### Service of Assessment Letters/Orders

Each assessment determination from proposed assessment through final order will be sent to the permittee by certified mail, return receipt requested (4 VAC 25-130-845.17b).

Service is deemed complete when the material is sent to the address listed on the permit sign or the address provided by the permittee. If the certified mail is returned to the Division unclaimed, it will be checked to ensure that the correct address was listed on the envelope. When the address is correct, the material will be return to the permittee by regular mail. Documentation of when the material was returned as refused or unclaimed and the date it was sent back by regular mail will be placed in the assessment file.

The Assessments Officer will consider the date the assessment materials were claimed by the permittee, or were sent back (as unclaimed/refused) to the Division by the U.S. Postal Service, as the initial day administrative appeal could be requested.

#### SECTION 4: INDIVIDUAL CIVIL PENALTY

Section 45.1-246F of the Act and Part 4 VAC 25-130-846 of the regulations provide for the imposition of a civil penalty against an individual of a corporate permittee. The penalty could be assessed if the person willfully and knowingly authorized, ordered, or carried out a violation of a permit condition; or failed or refused to comply with a NOV or CO.

An individual civil penalty is in addition to any assessment issued to the permittee. The Division will utilize this penalty as an alternative enforcement mechanism to promote the immediate compliance of an outstanding failure to abate cessation order. The penalty could equal \$5,000 for each day of continuing violation, except that if the violation resulted in a personal injury or fatality, then the civil penalty determined shall not exceed \$70,000.

Prior to issuing an individual civil penalty, these conditions must be present:

- The permittee must be registered as a corporation with the Virginia State Corporation Commission.
- The individual is an official, director, or agent of the corporation.
- The failure to abate CO and underlying NOV were for a serious violation, in terms of actual or potential harm to the public health or safety or the environment.

The Inspector or Supervisor would initiate the individual civil penalty process by preparing a fact sheet detailing the individual's willful and knowing conduct. This may occur when the permittee fails to comply a failure to abate CO within 30 days. The fact sheet shall:

- (1). Verify the corporate status of the permittee.
- (2). List the individual's status or position with the corporation.
- (3). Explain in detail the basis for issuing an individual civil penalty:
  - a) What did the person do, that could undeniably be classified as willful and knowing?
  - b) What enforcement action did the person fail or refuse to comply?
  - c) When was the CO issued? Was it served upon the individual? Has any work been initiated to comply with the order? If yes, to what extent?

The fact sheet should provide a summary of the discussions (by date) between the individual and Inspector or Supervisor concerning what remedial action was required of the permittee and the individual's response to such.

Once completed, the Inspector/Supervisor would forward the individual civil penalty recommendation and fact sheet to the Reclamation Services Manager (RSM). If the RSM concurs with the recommendation, he will prepare a memo to the Assessments Officer requesting that an individual civil penalty be assessed. The recommendation, fact sheet, and memo will be forwarded to the Assessments Officer for filing and action.

In determining the amount of individual civil penalty, the Assessments Officer shall

consider:

- The individual's **history** of authorizing, ordering, or carrying out previous violations, failures or refusals at the particular permit or operation.
- The **seriousness** of the violation, failure or refusal, including any irreparable harm to the environment and any hazard to the public health and safety. This determination may be based upon the extent of damage or cost of remedial action.
- The demonstrated **good faith** of the individual assessed in attempting to achieve rapid compliance after notice of the violation, failure or refusal to comply.

The penalty assessed may not exceed \$5,000 for each separate violation and each day of continuing violation, except that if the violation resulted in a personal injury or fatality, then the civil penalty determined shall not exceed \$70,000.

The Assessments Officer will prepare the individual civil penalty notice (including the rationale provided by the Reclamation Services Section), mailing it by certified mail to the individual. The assessment explanation will inform the person of the right to request:

- an opportunity to enter into an abatement agreement with the Division to comply the outstanding violation(s), or
- a formal hearing to contest the penalty amount. The person would not have to prepay the civil penalty to be granted a formal hearing.

The request must be in writing and submitted to the Division within 30 days of the person's receipt of the individual civil penalty assessment.

Should the individual fail to request a formal hearing, the Assessments Officer will issue a final order demanding payment of the penalty.

If the person enters and fully complies with an abatement agreement, the Division may withdraw the individual civil penalty. Should the person fail to comply with the agreement, the Assessments Officer shall send the individual a final order demanding payment of the penalty. The person would be given 30 days to submit payment to the Division.

## SECTION 5: ASSESSMENT CONFERENCE PROCEDURES

An assessment conference is an informal hearing to review the civil penalty determination of a NOV or CO. The company assessed a penalty has thirty (30) days from receipt of the proposed assessment or reassessment to request (in writing) an assessment conference (4 VAC 25-130-845.17).

The conference allows the company an opportunity to submit new information about the violation that may have been overlooked in the initial assessment determination.

Usually, the conference will dwell strictly on the civil penalty assessment; however, at times it may be combined with an informal hearing to review the issuance of a NOV or CO (4 VAC 25-130-843.15) to save all concerned parties time.

Upon receipt of a conference request, the Assessments Officer will determine if the request was timely submitted. The company will be notified in writing as to whether its request is denied or a

conference is being scheduled. If a conference is granted, it will be held at the minesite, unless the company requests otherwise. The conference will be scheduled within 60 days from the Division's receipt of the appeal or from the NOV/CO's abatement date, whichever is later.

Public notice of the conference will be posted at the Division's Big Stone Gap or Keen Mountain office.

The Assessments Officer will assign the Conference Officer, and will provide that person with a copy of the pertinent enforcement and assessment documents. The information will be sent by electronic mail to the Conference Officer.

Prior to accepting testimony at the hearing, the Conference Officer will explain that the company or any other persons present may introduce any information pertinent to the penalty determination. Testimony should be directed toward the appropriateness of each penalty's seriousness, negligence, history, and good faith determinations.

The Conference Officer must maintain control of the proceedings. If tempers begin to flare, the Conference Officer may adjourn the hearing until rational discussions can be resumed.

The Conference Officer will review the assessment criterion for each penalty determination. Good faith will be reviewed if it was not considered in the original assessment (due to the NOV/CO's abatement period). Good faith credit, however, shall not be awarded for a failure to abate cessation order.

If the conference was scheduled to solely review the penalty(ies), the Conference Officer may not rule on the validity of the NOV/CO's issuance. Should questions arise concerning a NOV/CO's issuance, the Conference Officer must accept the Inspector's version; however, he should also bring any concerns to the Inspector's or Area Supervisor's attention after the conference concludes.

The Conference Officer will inform the conference participants that no decision will be made until after a thorough review of the facts and consideration of the information presented at the hearing.

The Conference Officer has the authority to affirm, reduce, or increase a civil penalty based upon the evidence supplied at the conference. The Conference Officer's written decision will summarize the discussion and final conclusion reached from the conference.

The decision will be forwarded to the Assessments Officer within 25 days from the close of the conference. The Assessments Officer will review the decision for accuracy and adherence to assessment policy. The Assessments Officer must approve any modification of the pre-conference penalty that exceeds \$500 and 25 per cent. If the penalty revision is disapproved, the Assessments Officer must explain in writing the basis for the disapproval in the assessment conference decision.

The Assessments Officer will ensure the decision is sent by certified mail to the company within 28 days from the close of the conference. The cover letter shall explain the company's rights of administrative appeal.

The company may appeal the conference decision by requesting formal review to contest the penalty and issuance of the NOV/CO (if such was not subject to an appeal under 4 VAC 25-130-

843.16 of the regulations). The hearing request must include penalty payment (4 VAC 25-130-845.19), and be received by the Division no later than 30 days from the company's receipt of the conference decision.

#### SECTION 6: FINAL ORDERS / LIENS

Unless a company timely requests an assessment conference, a **final order** of civil penalty assessment will be sent to the company within 15 to 25 days from service of the proposed assessment or reassessment (whenever all 4 assessment criteria considered). The final order will demand penalty payment, and state the final date that an assessment conference or formal hearing (4 VAC 25-130-845.19) may be requested.

When the company fails to timely request administrative appeal, the Assessments Officer will send a final order (by certified mail) demanding payment. However, for companies and individuals known to be in bankruptcy, the Assessments Officer must determine if the violation notice/order was issued prior to or after the company or person filed for bankruptcy protection.

For those companies assessed final penalties and in bankruptcy, the Assessments Officer will consult with the Attorney General's office to determine whether a claim should be submitted to the U.S. Bankruptcy Court or a lien filed.

In the event the person fails to remit the penalty and is not in bankruptcy, a **lien** will be prepared by the Assessments Officer for the Customer Services Manager's signature.

The Assessments Section will prepare the necessary support documents that will accompany the lien request. The lien will be placed against the corporation. If the company is not a valid corporation, the lien will be sought against both the operator and company. The State Corporation Commission's records will be viewed to verify a company's corporate status.

Once signed by the Customer Services Manager, the lien request will be sent by the Assessments Section to the Circuit Court Clerk of each county and city where the mining operation is located or where the company or person owns property.

Upon receipt of the lien recordation, the appropriate information will be entered into the DMLR assessment computer records.

If the penalty is subsequently paid, the Assessments Section will send an affidavit of payment and release of lien to the respective Circuit Court Clerk(s). The DMLR computer records will be updated.

#### Collection Referral - Attorney Generals Claim Section/Collection Agency

Immediately following the date of the final order, the Assessments Officer will gather information on the potential assets of the company or individual from agency records, Attorney General's office, Reclamation Services personnel, or any other available source.

After receiving all pertinent information, but within 90 days after the date the penalty becomes final, the Assessments Section will forward all relevant information to the Attorney General's Claim Section for penalties in excess of \$3,000 and deemed collectible. However, if evidence indicates that the person or company is preparing to file for protection under the bankruptcy

laws, all claim information will be immediately forwarded to the Claims Section.

If the penalty amount is less than \$3,000, the information gathered will be sent to a private collection agency (if under State contract). Penalty collections, which are deemed doubtful by the Civil Penalty Review Committee, will also be forwarded to the collection agency.

In addition to the collection efforts taken by the Attorney General's Office or collection agency, the DMLR will pursue collection by:

- denial of permits and significant permit revisions;
- participation in the Virginia individual and vendor Set-Off Debt Collection Program;
- seizing any available performance bond moneys (after reclamation obligations have been met on the permit);
- notifying other States and the Federal OSM to block permit issuance through the Applicant Violator System until the penalty debt to the Commonwealth is settled; or,
- issuing show cause orders to suspend or revoke a permit per 4 VAC 25-130-845.20(e).

### **Civil Penalty Review Committee**

The Civil Penalty Review Committee composed of the Assessments Officer and the DMME Fiscal Director, Accounting Manager, and Accountant will meet on a quarterly basis to determine the collectibility of outstanding civil penalties.

The committee will determine if a penalty is collectible, doubtful, or uncollectible (write off). Upon completion of the review, the committee's recommendation will be summarized by the Accounting Manager and forwarded for approval to the Department Director and Deputy Director.

Penalties deemed uncollectible will not be discharged, but shall remain on the agency records until paid in full or per any agreed order signed by the agency.

### **Set-Off Debt Collection Act**

The Assessments Officer will serve as the Department's **Set-Off Debt Coordinator** by filing the necessary claims with the Virginia Department of Taxation. The Assessments Officer will follow the procedures set out under the Dept. of Taxation's Integrated Revenue Management System (IRMS).

## **SECTION 7: CIVIL PENALTY DISPOSITION**

Receipt of civil penalty payment shall be in accordance with established agency policies and procedures.

A copy of the receipt will be forwarded to the Assessments section. If payment was made by check, a copy of the check will be forwarded to the Assessments section.

The DMME Office of Financial Services (OFS) will deposit the penalty into the escrow fund (#07-54).

After a penalty becomes final, the Assessments Officer will inform the OFS to transfer the

appropriate amount into the:

- (1). #09-63 Fund,
- (2). "Coal Surface Mining Reclamation Fund" (Pool Bond fund: #07-53), or
- (3). Virginia Environmental Emergency Response (VEER) fund – for penalties assessed under the State Water Control Law (Sections 45.1-254 and 62.1-44.32 of the Code of Virginia, as amended).

In the event the final penalty is reduced or eliminated, the Assessments Officer will instruct the OFS to refund, within 30 days, the appropriate amount to the company.

**Payment of penalty at administrative hearing (held at location other than the DMLR's Big Stone Gap office):**

The DMLR employee receiving the penalty shall -

- (1). if possible, contact the Assessments Officer or DMME OFS to report that the penalty (amount and from whom it was collected) was submitted.
- (2). submit the payment to the DMLR's Big Stone Gap office as soon as possible, preferably by 3:30 p. m. of the same working day, but no later than 3:30 p. m. of the next working day.
- (3). for cash payment (when the employee is concerned about carrying cash), go to a bank and obtain a cashier's check in the cash amount. The employee may have to pay the bank a service fee, but he/she will be reimbursed by the DMLR.
- (4). document the chain of custody when other DMLR personnel assist in the transport of the money to the DMLR's Big Stone Gap office.
  - (a). Each employee involved shall sign the memo attached to the payment.
  - (b). The memo will list the amount and type of payment, name of person making payment, name of DMLR personnel accepting payment, and each employee involved in the transfer.
  - (c). Each employee will list the date and time he/she took possession of the payment.

The Assessments Officer will ensure a payment by check is properly made for the required penalty amount. If payment is insufficient, the check will be deposited and the Assessments Officer will send a letter to the permittee demanding the balance.

For excess payments, the Assessments Officer will instruct the DMME OFS to refund the excess amount (with accrued interest where applicable) to the permittee within 30 days. The Assessments Officer will notify the permittee by letter of the refund. The DMME OFS will provide the Assessments section with a copy of the refund voucher.

**APPENDIX**

**Assessment Process - Outline**

<b>Participant</b>	<b>Activity</b>	<b>Time Frame</b>
Field Inspector	Forwards NOV/CO, report, & other evidence to DMLR office.	Within 5 days of NOV/CO issuance.
Permittee	Submit written information about violation to Inspector & Assessments Officer (A.O.)	Within 15 days of service of NOV/CO.
Assessments Officer	Review NOV/CO & relevant evidence, determine penalty(ies) & mail proposed assessment to permittee.	Within 30 days of NOV/CO's issuance.
	If conference not requested, perform reassessment to consider good faith & facts absent from proposed assessment.	Within 30 days of NOV/CO's abatement or initiation of alternative action.
Permittee	Request assessment conference 4 VAC 25-130-845.18(a).	Within 30 days from receipt of proposed assessment (PA) or reassessment (RA).
Assessments Officer	Schedule assessment conference & assign Conference Officer.	Within 60 days from permittee's receipt of PA or NOV/CO's abatement date, which ever is later.
	Public notice posted at the DMLR office.	At least 5 days prior to conference.
Conference Officer	Render decision on penalty(ies) in writing to A. O.	Within 25 days from conference.
Assessments Officer	Review Conf. Officer's decision & forward to permittee. Must approve/disapprove revision in excess of \$500 & 25%.	Within 3 days of receipt from Conf. Officer.
Permittee	Submit request for formal hearing (with penalty payment 4 VAC 25-130-845.19).	Within 30 days of service of the PA, RA, or Conference decision.
Administrative/Judicial Review	Render decision	
Assessments Officer	Request & ensure refund, plus interest, sent to permittee (if final decision requires).	Within 30 days from receipt of final decision.
Permittee	Submit any additional amount required by final decision to the DMLR.	Within 15 days from receipt of final decision.
Assessments Officer	Prepare lien against permittee for Division Director's signature & forward to Court Clerk(s) where permittee owns property.	Usually within 10 days from last date permittee had to submit penalty.

### **Violation Effect Guideline**

For each violation cited in the NOV/CO, consider the following prior to completing your inspection report. If the question is not applicable or pertinent to the situation, go on to the next. After review of these questions, discuss only those relevant factors that have or are likely to occur.

#### **Seriousness of the Violation**

1. Is the violation causing environmental harm or posing a threat to the public health or safety?
2. Could the violation cause environmental harm or threaten the public health or safety?
3. If you answered “yes” to either 1 or 2, explain in detail (where applicable) the:
  - (a). damage or hazard actually or potentially created.
  - (b). extent of damage:
    - (i). is it confined to the permit site?
    - (ii). would the violation cause harm or damage to the receiving stream(s), nearby residences, etc.?
  - (c). amount or volume of material or drainage involved (e.g., tons, cubic yards, gals/min., mg/l).
  - (d). distance from the cited violation to the nearest dwelling or stream that could be or has been harmed.
  - (e). site conditions which could minimize harm (what are they?).
  - (f). results of any analyses (e.i., water, soil, seed samples, survey of vegetation success). Identify where the samples were taken.
  - (g). contributing factors which could cause damage to occur from the violation. (If no damage has occurred, what could cause it - based upon your experience?).
4. If you responded “no” to 1 or 2, was the NOV/CO issued for an administrative violation (paperwork, failure to have adequate bond, failure to erect signs/markers, etc.)? If yes, how did the violation hinder your or the public’s ability (where applicable) to ensure the permittee’s compliance with the performance standard violated?

#### **Negligence**

5. Was the permittee or its representative aware of the violation prior to being cited? Did the company initiate corrective measures prior to issuance of the NOV/CO?
6. Did the permittee or its representative know that the problem was a violation of the Act, regulations, and/or approved permit plans? Were any comments volunteered by the company concerning its actions prior, during, or directly after you issued the NOV/CO?

7. Could the violation have been avoided if the company had taken “reasonable care”?
8. Was vandalism present? (Please note that the permittee is fully responsible for the actions of its employees, relative to the mining and reclamation operation.)

**Good Faith**

9. Did the NOV/CO set a specific abatement date and remedial action(s) to be conducted by the permittee?
10. Was the violation corrected during your inspection (on the same day the NOV/CO was issued)?
11. In complying with the NOV/CO’s remedial measures, what effort was taken by the permittee to achieve compliance in the shortest time possible, and prior to the set abatement date?

## Reference List

### Performance Standard (PS) Codes

<b>Code</b>	<b>Description</b>
AC	Approximate original contour
AO	Authorization to operate
AT	Acid/toxic material
BL	Blasting
BR	Backfilling & regrading
BZ	Buffer zone
DS	Disposal of spoil/coal processing waste/etc.
EF	Effluent
EP	Exceeding permit boundary
GC	Ground Control Plan
HE	Highwall elimination
HR	Haulroad/access road
IN	Liability Insurance Coverage/Certificate
MN	Mining within 100' - 300'
MP	Mining without a permit
OC	Ownership/Control
OT	Other
RT	Reclamation Tax (Pool Bond)
RV	Revegetation
SC	Subsidence control
SD	Spoil downslope
SL	Sealing wells/drill holes/mine adits
SM	Signs and markers
SS	Sediment/drainage control structures
TS	Topsoil
WM	Water monitoring

The following list applies a performance standard code with the statutes or regulations that could be violated. Please note that the regulation numbers would be prefixed by “4 VAC 25-130-”. The list of events or obstructions is not all-inclusive, but is provided as potential concerns. Each violation must be evaluated by its unique circumstances.

PS Code	Law/Regulation	Violation	Event/Obstruction
<b>Operating without Permit</b>			
MP	45.1-233	Operating w/o permit	Significant imminent environmental harm/danger to public health and safety
EP	45.1-234	Mining outside permit	“
<b>Ground Control Plan</b>			
GC	45.1-161.287	Lack of adequate ground control plan	Significant imminent environmental harm/danger to public health and safety
<b>Ownership and Control</b>			
AO	778.13	Failure to identify owners/controllers	administrative violation
AO	778.14	Failure to provide accurate violation information	administrative violation
AO	778.15	Failure to provide right of entry information	administrative violation
<b>Bond/Liability Insurance</b>			
AO	800.11/801.12	Failure to post bond	administrative violation
IN	45.1-235(G) 800.60	Failure to maintain liability insurance coverage	“
RT	801.14	Failure to submit “Pool Bond” taxes/reports	“
<b>Coal Exploration</b>			
AO	815.13	Failure to have copy of notice of exploration	obstruction to enforcement
HR	815.15(b)	Failure to construct, maintain, or reclaim roads	offsite sedimentation, degradation of water quality, hazard to public
AC	815.15(c)	Failure to reclaim to approx. original contour	“
TS	815.15(d)	Failure to remove, store, & redistribute topsoil	failure/delay of revegetation, erosion
RV	815.15(e)	Failure to revegetate	erosion, water pollution
SS	815.15(f)	Diverting ephemeral, intermittent or perennial stream	adverse impacts on stream’s biological community
SL	815.15(g)	Failure to case or seal exploration hole(s), boreholes, well, etc.	degradation of ground water, hazard to public.
AO	815.15(h)	Failure to remove facilities/equipment. No longer needed for exploration	obstruction to enforcement
SS	815.15(i)	Failure to provide sediment & drainage control	offsite sedimentation, pollution, hazard to public
AT	815.15(j)	Failure to properly handle or dispose acid/toxic material	degradation of water quality; danger/hazard to public
<b>Signs/Markers</b>			
SM	816/817.11	Failure to post signs and markers; buffer zone markers; blasting signs; red zone areas; incremental bond areas; topsoil markers	obstruction to enforcement - inability to identify minesite; damage to perennial stream; danger/injury to public; misuse of topsoil - revegetation failure

PS Code	Law/Regulation	Violation	Event/Obstruction
<b>Casing/Sealing</b>			
SL	816/817.13	Failure to case/seal drill holes	contamination of ground/surface waters
SL	817.14	Failure to temporary seal openings to be used to return coal processing waste to underground works; or for ground water monitoring	contamination of ground/surface waters; harm to public, wildlife, fish
SL	817.15	Failure to cap, seal, backfill, or otherwise manage an opening no longer needed	“
<b>Topsoil/Substitutes</b>			
TS	816/817.22	Failure to remove topsoil before blasting, drilling, etc. Failure to properly handle substitute topsoil Failure to store topsoil properly Failure to properly redistribute topsoil	loss of topsoil delay or failure to revegetate
<b>Protection of Hydrologic Balance</b>			
WM	816/817.41(b)	Failure to protect ground water	degradation of ground quantity/quality
BR	816/817.41(b)	Failure to place backfill materials to minimize adverse impact to hydrologic balance	degradation of surface/ground waters
WM	816/817.41(c)	Failure to monitor ground water	administrative violation./obstruction to enforcement
WM	816/817.41(d)	Failure to protect surface water	degradation of surface water quality/quantity
WM	816/817.41(e)	Failure to monitor surface water	admin. violation/obstruction to enforcement
AT	816/817.41(f)	Failure to control acid/toxic material	degradation of water quality/failure to revegetate
AO	816/817.41(g)	Transfer of well without DMLR approval	administrative violation
OT	816.41(h) 45.1-258	Failure to replace water supply	harm to person(s), property
AO	816.41(I) 817.41(h)	Discharge of water into underground mine w/o DMLR approval	hazard to public, degradation of water quality
EF	816/817.42	Failure to meet effluent standards	water pollution, sedimentation of offsite areas
SS	816/817.43	Failure to design, install, maintain diversions	“
SS	816/817.45	Failure to provide adequate drainage control	“
SS	816/817.46 & 49	Failure to properly install, design, maintain siltation/impoundment structures Failure to have structures certified/inspected	“ administrative violation; structure failure
SS	816/817.47	Failure to have adequate discharge control	erosion, offsite sedimentation
MN	816/817.57	Mining within 100 feet of perennial stream or stream containing biological community w/o DMLR approval	disruption of natural habitat; water pollution; sedimentation of stream; public hazard
<b>Blasting</b>			

PS Code	Law/Regulation	Violation	Event/Obstruction
BL	816/817.61	Failure to comply with state/fed. laws	injury to public & property
BL	816/817.62	Failure to conduct Pre-blast survey	obstruction to enforcement
BL	816.64	Failure to adhere to blasting schedule; to properly notify public	danger to public/property
BL	816/817.65	Failure to conduct blasting per plans/regulations	“
BL	816/817.66	Failure to provide proper blasting signs, warnings, access control	“
BL	816/817.67 & 68	Failure to conduct blasting within limits; prevent flyrock; maintain records	danger to public/property; obstruction to enforcement
<b>Disposal of Spoil &amp; Waste Material</b>			
DS	816/817.71(a)	Failure to dispose of spoil within permit or area approved for disposal	offsite sedimentation; water pollution; hazard to public
DS	816/817.71(b)	Failure to have fill design approved/certified	obstruction to enforcement; fill instability
DS	816/817.71(c)	Failure to place spoil on most moderately sloping & natural stable areas	Fill instability; erosion; hazard to public
DS	816/817.71(d)	Failure to conduct sufficient foundation investigation/test of foundation materials	“ obstruction to enforcement
DS	816/817.71(e)	Failure to remove vegetation/topsoil properly Failure to construct fill per plans	Fill instability; hazard to public; erosion
DS	816/817.71(f)	Failure to prevent water infiltration into fill	“
DS	816/817.71(g)	Failure to stabilize fill slopes	Fill instability; erosion
DS	816/817.71(h)	Failure to inspect during construction	obstruction to enforcement
SS	816/817.72(a)	Failure to divert drainage from above fill to stabilized diversion channels	Fill instability; erosion
DS	816/817.72(b) 816/817.73(e)	Failure to install underdrains properly	Fill instability; degradation of surface and/or ground water; hazard to public
DS	816/817.74	Failure to properly place spoil on the pre-existing bench	“
DS	816/817.75(d & e)	Failure to properly construct structural zone & its underdrain	“
AO	816.79	Conducting surface mining activities within 500 feet of underground mine (active or abandoned)	hazard to persons in underground mines
<b>Coal Processing Waste (cpw)</b>			
DS	816/817.81	Failure to dispose of cpw in approved area and/or to design, construct, & maintain per approved plans	hazard to public; instability of material; water pollution
DS	816/817.81(c)	Failure to meet compaction requirements	fill stability
AO	816/817.81(e)	Failure to notify DMLR of potential hazard	obstruction to enforcement
DS	816/817.83(a)	Failure to construct underdrain system	fill instability; hazard to public; water pollution

PS Code	Law/Regulation	Violation	Event/Obstruction
DS	816/817.83(c)	Failure to cover with 4 feet (or lesser amount, if approved) best available non-toxic, non-combustible material	failure to revegetate; water pollution
DS	816/817.83(d)	Failure to inspect	obstruction to enforcement
AO	816/817.84	Failure to obtain approval of structure	obstruction to enforcement; hazard to public; water pollution
DS	816/817.84	Failure to prepare site/construct per plans	“
AO	816/817.87	Failure to extinguish cpw fires. Removal of burning/unburned cpw without DMLR approval	hazard to public
OT	816/817.89	Failure to properly dispose non-coal waste	hazard to public; water pollution
<b>Air Resources Protection</b>			
AO	816/817.95	Failure to prevent erosion & air pollution attendant to erosion	air pollution; hazard to public
<b>Protection of Fish/Wildlife</b>			
OT	816/817.97	Failure to report presence of critical habitat/endangered or threatened species. Failure to conduct operations to minimize disturbances/adverse impacts on fish, wildlife, & related environmental values	destruction of critical habitat/species
<b>Slides and other Damage</b>			
OT	816.99(a)	Failure to provide undisturbed natural barrier	Slides; damage to property; hazard to public
OT	816/817.99	Failure to notify DMLR of slide which may adversely affect the public/environment	obstruction to enforcement; hazard to public
<b>Backfilling and Regrading</b>			
BR	816/817.100	Failure to conduct timely reclamation	obstruction to enforcement
AC	816/817.102	Failure to return to approximate original contour	obstruction to enforcement; offsite sedimentation, degradation of water quality, hazard to public
BR	816/817.102(a)	Failure to grade final slopes per plans	backfill instability; erosion; failure/delay in revegetation
AT	816/817.102(f)	Failure to cover/treat acid, toxic, and/or combustible material	water pollution; hazard to public
BR	816/817.104(a)	Failure to use all reasonably available material to achieve lowest practical stable grade	obstruction to enforcement; backfill stability
BR	816/817.105	“	“
HE	816/817.106	Failure to eliminate highwall to maximum extent possible	“
SD	816/817.107(b)	Placement of spoil, debris, waste, or equipment on the downslope	slides; hazard to public; water pollution

PS Code	Law/Regulation	Violation	Event/Obstruction
AO	816/817.107(c)	Disturbance of areas above highwall without DMLR approval	obstruction to enforcement
OT	816/817.107(d)	Burial of woody material in backfill without DMLR approval	backfill stability
<b>Revegetation</b>			
RV	816/817.111	Failure to establish permanent vegetative cover	erosion
RV	816/817.113	Failure to seed & plant during favorable period	failure/delay of revegetation; erosion
RV	816/817.114	Failure to mulch or use soil stabilizing practices	“
RV	816/817.116	Failure to re-establish vegetation per reference area or approved standards	“
<b>Subsidence Control</b>			
SC	817.121	Failure to adhere to subsidence control plan	hazard to public/environment
MN	817.121	Mining under or near perennial stream or impoundment (≥20 ac.-ft) which serves as significant water source, without DMLR approval	damage to hydrologic balance; hazard to public
SC	817.122	Failure to distribute mining schedule	obstruction to enforcement
<b>Cessation of Operations</b>			
AO	816/817.131	Failure to submit notice of intent to cease	obstruction to enforcement
BR	816/817.132	Failure to close, backfill, permanently reclaim all affected areas	hazard to public; water pollution
<b>Postmining Land Use</b>			
RV	816/817.133(a)	Failure to timely restore affected areas	delay in revegetation/postmining land use; obstruction to enforcement
<b>Access Roads &amp; Haulroads</b>			
BZ	816/817.150(d)	locating road or part of road in channel of intermittent/perennial stream	stream sedimentation; water pollution; hazard to public
HR	816/817.150(f)	Failure to reclaim road after no longer needed	“
HR	816/817.151	Failure to grade, install, vegetate road	“
BZ	816/817.151(b)2	Constructing stream crossing w/o approval	“
SS	816/817.151(c)	Failure to install road drainage system	“
HR	816/817.151(d)	Failure to surface road	“
HR	816/817.151(e)	Failure to maintain road	“
HR	816/817.151(f)	Failure to construct/reconstruct road prior to	“

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PS Code	Law/Regulation	Violation	Event/Obstruction
		coal haulage	
<b>Auger Mining</b>			
AO	819.11(b)	Conducting auger mining w/o approval	obstruction to enforcement; water pollution; hazard to public
AO	819.13(c)	Failure to leave areas of undisturbed coal	obstruction to enforcement
BR	819.19	Failure to reclaim auger holes	degradation of surface/ground waters; hazard to public
AO	819.21	Augering within 500 feet of active/abandoned deep mine without approval	hazard to underground miners; potential blowout of mine waters
<b>Prime Farmland</b>			
TS	823.12	Failure to remove soil to be used to reconstruct prime farmland prior to drilling, blasting, or mining; failure to properly store soil	destruction of soil; failure to re-establish prime farmland
TS	823.14	Failure to replace soil	“
RV	823.15(a)	Failure to establish vegetative cover	“
OT	823.15(b)	Failure to use area for crops commonly grown per approved plans	obstruction to enforcement
<b>Mountain Top Removal</b>			
AO	824.11	Failure to operate per plans	obstruction to enforcement
<b>Remining Operations with Pollutational Discharges</b>			
WM	825.11	Failure to implement monitoring program	obstruction to enforcement
AO	825.11	Failure to implement abatement plan	“
EF	825.12	Failure to treat pre-existing discharges per approved plans	obstruction to enforcement; continued water quality degradation
<b>In Situ Processing</b>			
EF	828.11	Failure to minimize disturbance to the prevailing hydrologic balance	water pollution

**Conference Officer's Statements:**

**(These statements are guides to personnel serving as Conference Officers.)**

**Statement A** - (only civil penalties being reviewed).

My name is \_\_\_\_\_, and I will be serving as the Conference Officer for this assessment conference. The conference request by  Name - Title - Company - Permit No.  was timely submitted and seeks review of the civil penalty(ies) assessed for  cite NOV/CO and amounts  .

It will be my duty to consider the pertinent evidence submitted today and render a decision to affirm, lower, raise or vacate the civil penalty(ies). I will send my decision to the Assessments Officer, who will forward it on to you. Should I revise a penalty by more than \$500 and 25 %, the Assessments Officer must give approval.

Anyone present today may introduce evidence or testify relative to the appropriateness of the penalty(ies) assessed. I must ask that you limit your comments to the assessments, specifically as they pertain to the four assessment criteria:

**Seriousness, Negligence, History** of previous violation at the site, and **Good Faith Exhibited** in complying with the notice/order.

The validity of the action taken by the Division's Reclamation Services Section is not subject to review in this proceeding.

You may address questions to anyone present today. Are there any questions as to the scope of this conference before we proceed?

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**Statement B** - (both penalty(ies) and issuance of NOV/CO being reviewed)

My name is \_\_\_\_\_, and I will be serving as the Conference Officer for this assessment conference. The conference request by  Name - Title - Company -Permit No.  was timely submitted and contests the issuance and subsequent penalty(ies) assessment of  cite NOV/CO and penalty amounts  .

It is my duty to consider the evidence presented today, and determine if each NOV/CO was properly issued and assessed. The Compliance Manager will review my decision concerning the issuance of the NOV/CO, and will either affirm, modify or overrule it. The Assessments Officer will review the assessment portion of my decision. Should I revise a penalty by more than \$500 and 25%, the Assessments Officer must affirm the action.

As a matter of procedure, I will file my decision with the Assessments Officer. He will ensure that the decisions are timely made (fact of issuance - within five working days from close of conference; penalty decision - within 30 days).

Anyone present today has the right to submit evidence relative to the issuance and assessments of the NOV/COs. You may ask questions of anyone present. Are there any questions before we proceed?