PROCEDURES FOR ASSESSMENT OF CIVIL PENALTIES
KENTUCKY DEPARTMENT FOR SURFACE MINING RECLAMATION AND ENFORCEMENT

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CHAPTER I - INTRODUCTION

A. PURPOSE

KRS 350.990(1) directs the Natural Resources and Environmental Protection Cabinet to promulgate a regulation setting forth the method for calculating monetary penalties. 405 KAR 7:095 establishes how and when penalties will be assessed and includes a point system for calculating penalties, rules for assessing continuing violations, and a provision allowing waiver of the point system. This manual provides guidance to the Assessment and Records Section of the Department for Surface Mining Reclamation and Enforcement for implementing this statute and administrative regulation.

B. ENFORCEMENT OVERVIEW

1. Authority

Section 1 of 405 KAR 7:095 requires the Cabinet to review each violation, condition, or practice cited in a notice of noncompliance or cessation order and determine whether a civil penalty should be assessed, the amount of the civil penalty and whether there should be an assessment for each day the violation is observed. Section 2 of this regulation mandates that all persons issued cessation orders are to be assessed a penalty for each violation cited in the order.

The regulation mandates that if the violation cited in the notice of noncompliance is assigned at least thirty-one (31) points, a penalty shall be assessed. The regulation, however, allows the department discretion in determining whether or not to assess penalties for those violations assigned thirty (30) points or less. In order to maintain consistency, the Assessment Section has developed thresholds for the individual criteria for those violations assigned less than thirty-one (31) points. A penalty shall be assessed if any one of the following is assigned:

(a) 15 or more history points

(b) 21 or more seriousness points

(c) 18 or more degree of fault points

If none of the above point levels have been assigned and the violation is corrected, the violation will be terminated and no penalty will be assessed.

405 KAR 7:095 Section 5(1) gives the department discretion in assessing separate penalties for each day the violation is in existence. The department shall make the determination of whether to assess a separate penalty for each day the violation is in existence pursuant to the requirements of 405 KAR 7:095 Section 5(1).

Section 6 gives the department the discretion to waive the use of the point system, if the department determines that, taking into account exceptional factors present in the particular case, the penalty is unjust. The basis for every waiver must be fully explained in writing to the person to whom the notice was issued. The department must still consider the criteria set forth in 405 KAR 7:092 Section 3(2).

Since the point system was not designed to calculate penalties for illegal mining operations, the assessor shall waive the use of the point system for all such cases. A penalty ranging from $5,000 to $25,000 shall be assessed for each day that illegal mining occurred.

2. Assessor's Responsibility

It is the responsibility of the assessor to assess points for all violations cited by the field inspectors to determine penalty preassessments. The assessor must complete the preassessment and give notice of the preassessment amount to the person to whom the violation was issued.

In assessing penalties for notices of noncompliance and cessation orders, the assessor shall give attention to the specific criteria and considerations outlined in the following chapters. For each type of violation, the assessor's review will follow prescribed standard procedures that are aimed at achieving accuracy, fairness and consistency.

3. Assessment Process

All incoming notices of noncompliances, cessation orders, and related information received from the regional offices, inspectors, the violator or other persons are forwarded to the Assessment Section after being time-stamped. This section sets up an assessment working file for each case. The file contains records of all documents received as well as the disposition and dates of all actions undertaken by the Assessment Section.

Inspectors must forward directly to the Assessment Section copies of any modifications, terminations or vacations of the notice of noncompliance or cessation order. Any additional documentation becomes part of the assessment file. Information pertaining to the violation which the violator may submit, either to the inspector or to the Assessment Section, is also included in the assessment file.

After receipt of necessary information, the assessor determines the penalty by using the assessment worksheet and writes the explanation on the assessment officer's statement form.

The notice of proposed assessment is served on the violator in accordance with 405 KAR 7:091 Section 5. The assessment worksheet and a cover letter explaining the violator's rights are attached to the assessment notice.

Upon mailing of the notice of proposed assessment, the notice and worksheet, as well as other pertinent documents, are immediately forwarded to the Office of Administrative Hearings.

CHAPTER II - ASSESSMENT FACTORS

405 KAR 7:095 Section 3 requires that four criteria be evaluated in determining the amount of the penalty under the point system: violation history, seriousness, degree of fault, and good faith.

A. VIOLATION HISTORY - History points for all violations documented in the notices of noncompliances or cessation orders are assessed for each violation regardless of whether the violation led to a civil penalty. If the violation was vacated, however, history points should not be assessed.

The assessment of history points follows a strict formula: one (1) point per separate violation at the same site within the previous 12-month period following completion of administrative and judicial review; and five (5) points per each separate violation that led to a cessation order at the same site within the previous 12 month period following completion of administrative and judicial review of the cessation order.

The regulations preclude assessing history points for violations which are in the administrative or judicial review process. Violations are not deemed final until the entire review process is complete. If a right of review is not exercised, the violation is final as of the date when the right of review expires. This date is then used in determining whether a violation occurred within the one year time period. If a penalty has been paid for a violation and the violation was not contested, that particular violation has become final and should be counted in assessing history points. If the department has not assessed a penalty for a violation and the the fact of the violation was not appealed within the allotted time period, the case is final and the violation should be counted in assessing history points. Also if a final order has been issued and an appeal was not filed within the allotted time period, the case would be considered final and the violation should be counted in assessing history points.

The following are key dates in determining whether a past violation has become final:

- Thirty (30) days from the date the notice of proposed assessment is received or if the notice is returned undeliverable, unclaimed or refused, thirty (30) days from the date of return, unless a penalty conference or penalty administrative hearing has been requested;

- Thirty (30) days from the date the conference officer's report is filed with the Office of Administrative Hearings unless an administrative hearing has been requested or a fact of violation administrative hearing is pending;
- Thirty (30) days from the issuance of a final Secretary's Order adjudicating the fact of violation unless a stay of enforcement is issued by a circuit court of appropriate jurisdiction. **(Note: Under KRS 350.032 the mere filing of a request for judicial review does not operate as a stay of the Secretary's Order.)**

If the assessor is unsure as to the status of a violation, the Department of Law should be contacted to determine if the violation has been finalized. Again, it should be noted that if a violation is vacated during the review or appeals process, the violation is not used in assessing history points.

B. SERIOUSNESS

In assessing the seriousness of a violation, the first question the assessor must answer is whether the violation is an environmental event or an administrative violation i.e. obstructive type violation. Other factors figure in the assessing of points under the seriousness category, but this distinction is essential.

1. **Administrative Violations** - Administrative violations are those violations which prevent or hinder the inspector from reviewing the overall operations of the mine to determine compliance. Similarly, those violations which prevent the public from identifying the minesite or exercising rights under the law are also considered a hindrance. These administrative violations are obstructive in nature, and generally involve the permittee's failure to keep records, authorizations, and to submit required reports such as water-monitoring reports, thereby hindering the inspector. They may also involve the failure to post a proper permit sign which might hinder public or inspector identification of the minesite.

When the violation constitutes an administrative violation, the assessment is based on the degree to which the violation prevented or impeded the enforcement by an inspector or enforcement initiated by the public. The major distinction made in assessing administrative violations is actual hindrance to the inspector or public versus potential hindrance to the inspector or to the public. Actual hindrance is assessed in the ten to fifteen point range, while potential hindrance is assessed in the one to nine point range. Set point assessments have been developed for some administrative violations. (See Chapter IV).

2. **Environmental Event Violations** - Violations which threaten or actually bring about environmental damage, personal injury or property damage are considered environmental event violations. These violations frequently involve backfilling, grading, revegetation, topsoil handling, sediment control, water quality, blasting, spoil on the downslope, and operating outside the permitted area.

It should be noted that the event itself is not the violation of the regulation. The environmental harm, personal injury or property damage which could, or does, result from the violation is the event which the the regulation is designed to prevent. If, for example, the violation is issued for failure to pass all surface drainage through a sediment pond or series of sediment ponds, the environmental harm which the regulation was designed to prevent is water pollution. Similarly, if a permittee violates topsoil requirements, the event which the regulation was designed to prevent is the loss of topsoil which, in turn, delays revegetation. The assessor must distinguish between the violation and the environmental harm in order to assess the seriousness of the particular event that the regulation attempts to prevent.

The inspector identifies the violation of a regulation, permit condition or both in the notice of noncompliance. The inspector informs the assessor about the violation through the inspector's violation statement. In this statement, the inspector must provide sufficient facts to the assessor so that an accurate assessment based on the likelihood of the event and the amount of actual and potential damage can be made.

Seriousness determinations for environmental violations have two components: **(1)** the probability of the event's occurrence; and **(2)** the extent of actual or potential damage resulting from the event. The first component concerns whether or not the event occurred or how likely it is to occur, if it has not already occurred. The second component concerns how much damage has resulted or would result from the violation if the inspector had not issued the notice of noncompliance or cessation order.

In order to ensure that assessments reflect the relative seriousness of a violation, there are point ranges for each part of the assessment to allow the assessor to weigh the specific effects of each violation. There are specific facts which move a particular violation up or down the point range in each category.

a. **Probability of Occurrence** - The assessment of probability of occurrence refers to the occurrence of the event that the violated regulation was designed to prevent. As noted before, an event refers to the environmental harm, personal injury, or property damage the regulation is intended to prevent.

In all notices of noncompliances, a violation has already occurred. There is no question of probability involved. The relevant question to answer for assessment purposes is whether the resultant event or harm associated with the violation has occurred or will occur. This degree of harm is assessed qualitatively under probability of occurrence.

The assessor must first determine what violation is involved, and what event or harm it was designed to prevent. Where more than one event or harm could result from a violation, the assessor should use the primary one for determining probability.

Once the environmental harm has been identified, the assessor can proceed to determine the probability of occurrence. Probability of occurrence points are assessed as follows:

Occurred:	15 Points
Likely to occur:	10-14 Points
Unlikely to occur:	5-9 Points
Insignificant chance:	1-4 Points
No probability:	0 Points

Based on the facts submitted by the inspector, the assessor will determine within which category the particular violation falls and assess penalty points accordingly. Within each of these categories, the assessor adjusts the assessment according to mitigating or aggravating circumstances. In the insignificant, unlikely, and likely categories the assessor begins at the mid-range, i.e., two (2), seven (7), and twelve (12), respectively, and moves up or down depending on the circumstances.

b. Extent of Damage - The determination of the extent of damage is a quantitative assessment of both actual and potential damage. It includes all types of damage, not just damages concerned with the primary environmental event identified in the probability determination. For example, if a sediment pond does not have proper drainage and the pond is breached, the principal harm is the water pollution. In addition to stream sedimentation damage, however, there may be damage to adjacent property as well. If someone's front yard, garden, or tobacco patch is covered with sediment, this damage must affect the extent of damages determination.

The assessment is made after examining the physical facts of the event and the physical characteristics of the impacted area. The greater the environmental harm or harm to people or property, the higher the points that will be assessed. The assessor determines the extent of actual damage based on the facts as described in the inspector's statement and on the notice of noncompliance and the inspection of noncompliance.

Determining the degree of potential damage involves an estimation, based on the available facts, of how much damage would have occurred, assuming the normal course of climatic and operational events, if the inspector had not discovered the violation. These facts are usually supplied by the inspector based upon his knowledge of the routine operations on the permit.

The extent of damage points are assessed as follows:

> Damage which is confined within the permitted area: 0-7 points.
>
> Damage which has or will extend outside the permitted area: 8-15 points.

Based on the facts submitted by the inspector, the assessor determines the applicable category and assesses penalty points accordingly. As in probability of occurrence, the assessor adjusts the assessment based on mitigating or aggravating circumstances. If damages occur only within the permitted area, the assessor should start at three (3) points and move up or down depending on circumstances. If damages extend outside the permitted area, the assessor begins at eight (8) and moves up to a maximum of fifteen (15) points.

C. DEGREE OF FAULT -Assessing this criterion involves a determination of the degree of fault involved in committing a violation, either through an act or failure to act.

Degree of fault points are assessed as follows:

No negligence:	0 points
Negligence:	1-12 points
Greater degree of fault:	13-25 points

1. No Negligence - No negligence is defined at 405 KAR 7:095 Section 3(3)(a). A violation which is non-negligent can become negligent or willful if the violation is not rectified promptly.

When negligence can not be determined, points are not given. Ignorance of the law is not a "no -negligence" situation. Since a violator is charged with the duty of knowing the regulations, a violator is negligent even if a lack of knowledge of the law or regulations is asserted. A violator is also responsible for all that occurs on the permit site; therefore, it is not a "no-negligence" situation when the act or omission was by an employee or subcontractor working on the site.

2. Negligence - "Negligence" is defined at 405 KAR 7:095 Section 3(3)(b). In most instances negligent acts include committing an act which constitutes a violation, absent facts which might indicate a higher degree of fault, failing to do something that is required, or attempting to do something required but not doing it properly.

Up to twelve (12) points can be assessed for negligence depending on the degree. In assessing negligence points, the assessor should consider the following ranges:

a. **Lack of Diligence** - This standard pertains to the condition of the permit in those situations where reasonable attention would have prevented a violation from occurring or would help abate a violation. One (1) to six (6) points are to be assessed for lack of diligence depending on the circumstances.

b. **Lack of Reasonable Care** - This standard pertains to those situations where good judgment was not used in preventing a violation from occurring or in abating a violation. Depending on the circumstances, seven (7) to eleven (11) points are to be assigned for lack of reasonable care depending on the circumstances.

c. **Indifference** - This standard pertains to those situations where no interest or concern was demonstrated in preventing a violation from occurring or in abating a violation. Here indifference would imply apathy. Twelve (12) points are to be assessed for indifference.

d. **Failure to Abate a Violation** - When a violation is not abated as ordered by the department, twelve (12) points are to be automatically assessed, unless it is determined that a greater degree of fault occurred.

3. **Greater Degree of Fault** - A greater degree of fault than negligence is defined at 405 KAR 7:095 Section 3(3)(c) and means reckless, knowing or intentional conduct. From 13-25 points shall be assigned depending on the degree of fault. In assessing greater degree of fault points, the assessor should consider the following ranges:

a. **Reckless Conduct** - Reckless conduct is conduct which pays no regard to the probability of the event occurring, or even though the event is foreseen, the conduct persists in spite of the knowledge or disregard of a known or apparent high risk. Conduct is reckless in the situation where it would have been reasonably obvious that the course of conduct (either an action or failure to take an action) would likely cause damage or harm, and the conduct nevertheless persisted. An example of reckless conduct would be the placing of a large amount of spoil on a downslope above some houses.

Reckless conduct also exists when the conduct involves an activity that is inherently dangerous and, therefore, requires a greater degree of care to ensure safety. Blasting can be reckless in situations in which reasonable precautions were not followed.

Thirteen (13) to fifteen (15) points are to be assessed for recklessness depending on the specifics of the violation. The assessor should start at thirteen (13) and work upward depending on the circumstances.

b. **Knowing Conduct** - Knowing conduct occurs when there is an awareness that the conduct will result in a violation of the regulations and there is a failure to correct or avoid the situation. The following are examples of knowing conduct:

- A state inspector has previously warned or cited the violator regarding the same situation on the same site and there is a record in the inspector's report of the warning.
- An OSM inspector has previously warned or cited the violator regarding the same situation on the same site and there is a record of the warning or citation; and
- A specific permit condition is violated.

The point levels for knowing acts are strictly delineated. Specific permit condition violations are assessed at sixteen (16) to eighteen (18) points depending on the importance of the violated condition. If a previous warning or citation from the Office of Surface Mining for the same situation had been received, nineteen (19) points are assessed. If the department has previously warned or cited the violation in the past for the same set of circumstances, the point total should be twenty (20).

The fact that a violation was issued twice for the same violation may not necessarily indicate a knowing violation. For example, a failure to meet water-quality standards may have resulted from different circumstances, such as a breakdown in machinery or from a new disturbance for which inadequate treatment was provided. In this situation, negligence would be assessed. In addition, the inspector's violation statement should always be consulted to ascertain the inspector's impressions of the permittee's actions.

c. **Intentional Conduct** - Intentional conduct occurs when the violation is the result of a deliberate or purposeful act. Examples of such acts include pushing spoil on the downslope, cutting or pumping water from the permit bypassing silt coverage. Twenty-one (21) to twenty-five (25) points are to be assigned for intentional conduct depending on the circumstances. Again, the inspector's violation statement should be consulted to determine the inspector's appraisal of the situation.

D. GOOD FAITH

This criterion provides a method for considering the degree of good faith exercised in attempting to achieve compliance after notification of a violation. Under the regulations, good faith points are awarded when abatement occurs with rapid or normal compliance. Rapid compliance is where extraordinary measures were taken to abate the violation in the shortest time and the abatement was achieved before the set time for abatement. Normal compliance is where abatement of the violation occurs by the abatement date set by the inspector.

When assessing good faith points the assessor shall consider the following ranges:

No compliance - When only a portion of the violation was abated by the abatement date, zero (0) points are given;

Slow compliance - When the violation is abated by the extended deadline, One (1) to four (4) points are given;

Normal compliance - When the violation is abated by the original abatement date, five (5) points are given;

Rapid compliance - When extraordinary measures were taken and the violation was abated before the abatement date, six (6) to fifteen (15) points are to be given depending on the number of days before the abatement date.

By definition, good faith points can only be given when a violation has been abated. For a violation to be abated, it must be correctable or the damage must be retrievable or repairable. Therefore, violations where the damage is irretrievable, such as sub-standard water discharges, steep slope mining, topsoil or prime farmland contamination, etc., should not be eligible for good faith points. Since no remedial measures can be performed, there is no way for the permittee to demonstrate good faith.

CHAPTER III - ASSESSMENT MECHANISM

A. ASSESSOR'S STATEMENT

After having reviewed the file and having obtained any necessary additional information, the assessor will calculate the point assessment under the four (4) criteria set forth in 405 KAR 7:092 Section 3(2) - history, seriousness, degree of fault, and good faith. The assessor must state in the assessment officer's statement why the points are being assessed in each category and why the points are being assessed at a certain level. The statement details the penalty assessment analysis, and the rationale for the points assessed within each category.

B. COMPLETING THE ASSESSMENT WORKSHEET AND NOTICE

The assessment worksheet is the record of point assessment and penalty. Each violation being considered is listed on the form. If two or more violations were cited as a result of the same act, each should be listed on the same line with only one assessment calculated for the act. The assessor then fills in the points assessed under each appropriate category and adds up the points for each violation. If it is determined that a more than one day occurrence applies, then the assessor fills in the appropriate number of days and multiplies this figure by the assessment amount to get the total assessment amount. This is done for each violation. The total assessments are then added to determine the total assessment amount for the notice of non-compliance. If a cessation order has been issued, then the cessation order penalty is also calculated on this form (see D. Cessation Order Assessments for more detail). Also, if history points are being assessed, the assessor should list each past non-compliance number, cessation order number, the date, the number of violations it contained, and the final disposition and date.

C. NOTICE OF PROPOSED ASSESSMENT

The notice of proposed assessment provides official notification of the total proposed assessment for the violations cited in notice of noncompliance or cessation order. The form must be returned to the Office of Administrative Hearings within thirty (30) days of receipt of the notice.

Service of the notice of proposed assessment must be made in accordance with 405 KAR 7:091 Section 5.

D. CESSATION ORDER ASSESSMENTS - There are three (3) types of cessation orders issued by inspectors. The first is issued when a permittee has failed to abate a violation after the issuance of a notice of noncompliance (FTACO). The second is issued for imminent danger to the environment or to the health and safety of the public (IDCO). The third type is used for illegal (wildcat) mining where a permit was not obtained or has expired, and mining operations have continued (IMCO).

1. Cessation Order for Failure to Abate - The penalty for a cessation order issued for failure to abate shall be assessed pursuant to 405 KAR 7:092 Section 13(2). This assessment is added to each performance standard assessment already calculated.

2. Cessation Order for Imminent Danger

The penalty for an imminent danger cessation order shall be assessed pursuant to 405 KAR 7:092 Section 13(1). The assessment shall be based on the four criteria in 405 KAR 7:095 Section 3: violation history, seriousness, degree of fault, and good faith. Additional cessation order penalties shall be assessed in the event a failure to abate cessation order is issued on the imminent danger cessation order.

3. Illegal Mining Cessation Orders

The penalty for an illegal mining cessation order (IMCO) shall be assessed pursuant to 405 KAR 7:092 Section 13(3). In addition, if mining does not cease upon the issuance of the non-compliance and IMCO or if reclamation has not commenced within two days, a failure to abate cessation order will be issued. The penalty for the FTACO will be in addition to the initial penalty.

CHAPTER IV -

THE APPLICATION OF ASSESSMENT FACTORS TO SPECIFIC VIOLATIONS

A. ADMINISTRATIVE VIOLATIONS

Administrative violations relate to a failure to provide information required under the law, regulations , or specific permit conditions. This failure either hinders the ability of inspectors or the public to identify an operation for enforcement purposes or prevents inspectors from adequately determining whether a permittee is in compliance.

Certain guidelines have been developed with regard to seriousness, degree of fault, and good faith point assessments for administrative violations. In general, these guidelines should be followed, but the assessor must, of course, vary the assessment where unique facts exist.

A discussion of the most common administrative violations follows. In each case, policy guidance is provided under these subheadings: a). Seriousness; b). Degree of Fault; and c). Good Faith.

1. Permit Sign Violations

a. **Seriousness** - Failure to post a permit sign can be a serious hindrance. While it may not always seriously hinder an inspector, it can hinder the public's ability to identify an operation for enforcement proposes.

The following point assessments for seriousness normally apply:

> Where no sign was ever posted - Ten (10) points (may be adjusted upward depending on the length of time).
>
> Where a sign was posted but has been knocked down, stolen, etc. and was never re-posted - six (6) points.
>
> Where a sign was posted but information was incomplete - one (1) point for each piece of missing information (company name, address, telephone number, permit number).

b. Degree of Fault- The assessment for degree of fault depends on the specifics of the violation. (See pp. 9-11 for a general discussion of degree of fault.)

c. Good Faith - The assessment for good faith follows the standard procedures (see p. 12).

2. **Failure to Implement Water Monitoring or Failure to Submit The Required Reports**

a. **Seriousness** - Failure to implement an approved monitoring plan or failure to submit the required reports may seriously hinder enforcement since an inspector may not be able to determine whether hydrologic balance and water quality requirements are being met. The following seriousness points should normally be assessed:

> Failure to implement a groundwater monitoring plan or a surface-water monitoring plan: ten (10) points. If both plans are not implemented: fifteen (15) points.
>
> Failure to submit groundwater monitoring reports or surface-water reports: seven (7) points. If both reports are not submitted: fifteen (15) points.

b. **Degree of Fault** - Once a plan has been approved, it must be implemented, and all necessary reports must be timely submitted. An approved plan is a specific permit condition, therefore, failure to implement or follow the plan, or failure to submit the reports is a knowing violation and sixteen (16) to twenty (20) points should normally be assessed unless there are extenuating circumstances which would make the failure negligent.

c. **Good Faith** - The assessment for good faith points follows the standard procedures (see p. 12).

3. **Failure to Maintain Blasting Records**

a. **Seriousness** - Blasting is a very hazardous activity which requires a high degree of care. When proper blasting records are not kept, it may be nearly impossible for an inspector to ascertain whether the blasting operations have been carried out according to the regulations. Failure to maintain adequate records can be a serious hindrance. Where the records are incomplete, the degree of seriousness depends on whether enough information can be pieced together to determine if the regulations were being met.

The following seriousness point assessments should normally be followed:

> Where the missing information can be ascertained from the information in the records: five (5) points;
>
> Where missing information cannot be ascertained: ten (10) points; and

Where no blasting records exist and blasting has occurred: (15) points.

b. Degree of Fault - Since blasting is very hazardous, failure to provide blasting records at all is considered a reckless act unless there are factors which indicate a knowing or willful act. Thirteen (13) to fifteen (15) points should be assessed when no records have been maintained. Where the records are incomplete, the degree of fault would be considered negligence and seven (7) to twelve (12) points should be assessed.

c. Good Faith - The assessment for good faith points follows the standard procedures (see p. 12).

4. Failure to Submit Certification

a. Seriousness - Failure to submit certifications for both sediment structures and hollowfills can be a serious hindrance to the inspector in determining whether the structure of the hollowfill is constructed as designed. If the inspector observes a problem with a structure or hollowfill and no certification has been received, twelve (12) points should normally be assessed. If no problem is observed and there is no certification, seven (7) points should normally be assessed.

b. Degree of Fault - The regulations require that sediment structures and hollowfills be certified by a registered engineer as being properly constructed. Failure to do so constitutes negligence and seven (7) to twelve (12) points should normally be assessed.

In some cases recklessness might apply where it is obvious that the structure or fill is not sound and there exists potential danger of the structure failing or the fill sliding. Thirteen (13) to fifteen (15) points should be assessed for these cases.

c. Good Faith - Assessment for good faith points follows the standard procedures (see p. 12).

B. EVENT VIOLATIONS

Eleven (11) event violations are discussed below with the four (4) assessment factors discussed for each violation (probability of occurrence, extent of damage, degree of fault, and good faith).

1. **Failure to Post Perimeter Markers or Topsoil Markers**

a. **Probability of Occurrence** - The purpose for perimeter markers is to ensure knowledge of the location of the permit boundaries, so that all of the mining activities will remain within the permitted area. Also, perimeter markers assist inspectors in determining if operations are staying within the permitted area or increment. Where a disturbance has already occurred outside the permitted area, the event has occurred and fifteen (15) points are assessed. If the violation is abated but off permit disturbance did not occur, the event did not occur and zero (0) points are assessed.

If the violation remains unabated by the assessment date and there has been no off permit disturbance, the assessor should first determine if the operation is active or inactive. If it is active, the assessor should determine how close the mining operation is to the permit boundary and the potential for going beyond the permitted area. Where the mining activity is near an unmarked boundary, the probability of an off permit disturbance would be much higher than in a situation where the mining is progressing away from the unmarked boundary. If the operation is near the boundary, it is likely that the event will occur and ten (10) to (14) points should be assessed. If the operation is advancing away from the boundary it is unlikely that the event will occur and five (5) to nine (9) points should be assessed.

It should be noted that since the assessment is not normally made until after the final inspection of noncompliance, the assessor will generally know if the event has or has not occurred, and the probability of occurrence should be easily determined.

b. **Extent of Damage** - A violation of this regulation will always involve potential or actual damages which extend beyond the permitted area. If the event has not occurred, eight (8) points are generally assessed since the potential did exist. If there is disturbance outside the permitted area, the extent of damage will depend upon how much land has been disturbed and the degree of disturbance.

c. **Degree of Fault** -This assessment will depend on the specifics of the violation and will be assessed following the standard procedures (see pp. 9-11).

d. **Good Faith** - The assessment for good faith follows the standard procedures. (see p. 20)

If the violation involves topsoil markers, the same considerations would be applied, depending on whether topsoil was contaminated or destroyed.

2. Failure to Maintain Backfilling and Grading

a. **Probability of Occurrence** - The events which the backfilling and grading regulations are designed to prevent include rill and gully erosion, exposure and drainage of toxic materials, highwall deterioration, and water pollution. If any of these events have occurred, (15) points are assessed. If none of the events have occurred, the probability of occurrence shall be determined based on the following factors: amount of vegetative cover, presence of exposed toxic materials, amount of exposed highwall, proximity to adjacent streams, sediment control, and weather conditions. The longer the area remains non-current, the greater the probability of occurrence.

b. **Extent of Damage** - This assessment depends upon the amount of acreage or feet the backfilling and grading is actually behind. In order to maintain consistency, points will be assessed using the following charts:

Length Unreclaimed

<250 feet	1 point	1501 - 2500 feet	5 points
250 - 500 feet	2 points	2501 - 3500 feet	6 points
501 - 1000 feet	3 points	>3500 feet	7 points
1001 - 1500 feet	4 points		

Acreage Unreclaimed

<1 acres	1 point	4.0 - 4.99 acres	5 points
1.0 - 1.99 acres	2 points	5.0 - 5.99 acres	6 points
2.0 - 2.99 acres	3 points	>5.99 acres	7 points
3.0 - 3.99 acres	4 points		

c. **Degree of Fault** - This assessment will depend on the specifics of the violation and will be assessed following the standard procedures (see pp. 9-11).

d. **Good Faith** - The assessment for good faith follows the standard procedures (see p. 12).

3. Failure to Properly Maintain an Access Road

a. Probability of Occurrence - The events which access road regulations are designed to prevent include water pollution, siltation, erosion, air pollution, conditions which adversely affect public safety, and instability. If any of these events have occurred, fifteen (15) points are assessed. If none of the events have occurred the probability of occurrence shall be determined based on the following factors: topography, proximity of adjacent streams, proximity to public roads and homes, silt control, and weather conditions. The length of time the violation went unabated may influence the degree of probability. For example, the assessor could determine that likely probability existed due to the fact that the violation went unabated for a considerable period of time, even though there is no noticeable damage.

b. Extent of Damage - This assessment depends on the amount of environmental harm resulting from the violation. If the damage, or potential damage remains within the permit area, then 1-7 points shall be assessed depending on the effect of the problem involved. If there is a potential for off permit damage, or if off permit damage has occurred, then 8-15 points shall be assessed. The extent of the impact and the duration will determine the exact assessment to be given.

c. Degree of Fault - If the the road was not constructed in accordance with the approved plans, the violation would be considered a knowing violation of the approved permit and 16-20 points should be assessed. The degree of fault for failure to maintain could range from negligence to knowing.

d. Good Faith - The assessment for good faith follows the standard procedures (see p. 12).

4. Failure to Provide or Maintain Sediment Control or to Meet Effluent Standards

a. Probability of Occurrence -Sediment control and effluent standards are designed to prevent water pollution and sedimentation of streams. Water pollution and stream sedimentation can only be considered to have occurred when the substandard water or silt actually flows from the permitted area into a stream or other body of water. This means that while surface runoff may have failed to pass through a silt structure, stream siltation will not have occurred unless that silt laden runoff enters a receiving stream. A discharge of water may fail to meet effluent standards, but unless that substandard discharge enters a receiving stream, stream siltation has not occurred. Therefore fifteen (15) points are only assessed when the discharge of substandard water of silt has actually entered the stream. If it has not entered the stream, the assessor must determine how likely the event is to occur and assess the appropriate points.

In the case where inadequate sediment control has been cited but water pollution has not occurred, the assessor looks at certain variables in making the assessment. The assessor should consider whether the sediment structure is so loaded with sediment that it could not handle runoff from a normal rainfall. If the structure was breached or bypassed, the assessor should consider the proximity of the sediment structure to the receiving stream. If the event has not occurred, the type of vegetative buffers and the contour of the land between the structure and stream will also effect the assessment of the probability of the event.

If it is determined that stream sedimentation will likely be caused by a normal rainfall, the fact that sediment has actually reached the edge of the streambank should generally result in an assessment at the high end of the ten to fourteen (10-14) point range. Depending on all other factors, if sediment has not progressed far beyond the sediment pond and there exists a vegetative buffer between the pond and the stream, an assessment in the unlikely category (5-9 points) is appropriate.

b. **Extent of Damages** - To determine the degree or extent of harm, the assessor should first look at the size and nature of the stream, and then the size or extent of the discharge. If a stream is affected, is it a high quality stream which supports fish, recreation, farming, or drinking, or is it already polluted? The fact that the stream is already polluted does not mean that there has been no damage but it could lessen the impact of the damage.

The assessor should then consider the parameters violated and review the lab analysis. The extent of damage is generally more serious if several parameters are violated. Also, the discharge rate should be considered in assessing the extent of damage. Generally, the greater the discharge rate or the greater the duration, the higher the damage points assessed in order to reflect the larger amount of damage.

c. Degree of Fault - The assessment for degree of fault depends on the specifics of the violation and shall be assessed using the standard procedures (see pp. 9-11). If a sediment structure has not been constructed in accordance with the permit plan, it is generally considered a knowing violation and 16-20 points would be assessed. If the sediment structure or a treatment facility has not been properly maintained, the violation is generally considered negligent and 7-11 points would be assessed.

d. Good Faith - The assessment for good faith follows the standard procedures (p. 12). It should be noted that good faith points are not usually awarded for effluent standards since irretrievable damage is involved.

5. Topsoil - Prime Farmland Violations

a. Probability of Occurrence - For all topsoil violations, the event is considered to be a loss of topsoil leading to a delay or failure of revegetation. Important considerations in assessing probability points are the actual amount of topsoil lost or potentially lost in relation to the total surface area disturbed and the quality of the remaining topsoil and substrata. If, for example, there has been a slight loss of topsoil but there is ample topsoil remaining to be segregated or there is ample vegetation in evidence, the probability of vegetation delay or failure would be low.

b. Extent of Damage - If topsoil is lost from only a <u>small portion</u> of the entire disturbed area, the damage would remain within the permit area and 1-7 points should be assigned. For consistency, the following chart should usually be used in determining damage points.

TOPSOIL AFFECTED (ACRES)

≤.25			1 point
>0.25	-	0.5	2 points
>0.5	-	0.75	3 points
>0.75	-	1.0	4 points
>1.0	-	1.25	5 points
>1.25	-	1.5	6 points
>1.5			7 points

If the topsoil violation is on prime farmland, 7 points will be assessed.

In instances where large areas are affected, or actual failure of revegetation is noted and drainage control structures are not in place, damage is considered to extend outside the permit area, because erosion from unvegetated areas would affect land and water outside the permit area. 8-15 points shall be assigned. In estimating the extent of the damage, the assessor should consider how much area is or might be impacted, and the likely duration of the event.

c. **Degree of Fault** -The assessment for degree of fault depends on the specifics of the violation and shall be assessed using the standard procedures (see pp. 9-11). The permit package contains a topsoil/prime farmland handling plan that must be followed. Therefore, if the topsoil has not been segregated and stockpiled as approved, the violation can be considered as a knowing violation and 16-20 points assessed. If an attempt has been made to follow the plan, negligence points would be assessed.

d. **Good Faith** - If the topsoil loss is irretrievable, good faith points are not awarded. If the violation is correctable, the good faith points are awarded using the standard procedures (see p. 12).

6. Spoil on Downslope/Steep Slope Mining

a. **Probability of Occurrence** - The environmental damage resulting from a slide is the event which the regulations are designed to prevent. The consequences or potential consequences of slides and their accompanying environmental damage must be considered in terms of making an accurate assessment. The environmental damage, -- erosion, stream sedimentation, property damage, destruction of timber, or personal injury -- is the event. For example, if spoil has been placed on the downslope and has actually slid, a slide has occurred. The placement of the spoil on the downslope or the movement of the spoil (slide) may not have caused any immediate environmental harm, but it is probable that an event such as stream sedimentation or property damage is more likely after a slide than before its occurrence. If the affected area is covered by silt control, it is more unlikely that stream sedimentation would occur.

b. **Extent of Damage** - In most cases steep slope mining and spoil on the downslope involve damages that extend beyond the permitted area. The size of the area that is affected or will be affected by the violation will be the key in assessing damage points (see p. 26 for off permit reference chart).

c. **Degree of Fault** - The assessment for degree of fault depends on the specifics of the violation. If the violation involved the placing of spoil material in an area above houses, thereby creating a danger to life and property, the degree of fault could be considered a reckless, knowing or intentional act and greater degree of fault points would be assessed. If a greater degree of fault is ruled out, the actions are considered to be negligence.

d. **Good Faith** - The good faith assessment follows the standard procedures (see p. 12). However, it should be noted that if the violation is non-correctable, no good faith points are awarded.

7. Revegetation Violations

a. **Probability of Occurrence** - Revegetation regulations are designed to prevent erosion, failure of the post-mining land use, and stream sedimentation. One of these events, particularly erosion, is likely to occur before the next seeding season if the seeding deadline is not met. 10-14 points shall be assessed. If the revegetation violation is abated in a timely manner, the probability of occurrence would be less.

b. **Extent of Damage** - Revegetation violations generally involve damages that will remain within the permitted area. In this case, one point should be assessed for each acre affected by the violation with a maximum of seven (7) points possible. If severe erosion has occurred as a result of a vegetation violation and there is inadequate sediment control, the damage or potential damage may extend beyond the permitted area, and eight (8) or more points shall be assigned, depending on the duration and extent of the impact.

c. **Degree of Fault** - The assessment for degree of fault follows the standard procedures (see pp. 9-11).

d. **Good Faith** - The assessment for good faith points follows the standard procedures (see p. 12).

8. Inadvertently Mining Outside the Permit Area

a. **Probability of Occurrence** - This section pertains to land outside the permitted area that is disturbed inadvertently. An example of this is inadvertently exceeding the permit boundaries. The event which the violated standard is designed to prevent is environmental harm such as water pollution, stream sedimentation, erosion, landslides, and public safety. The probability should be assessed according to the specifics of the case. If careful adherence to the other performance standards is exercised, the probability of environmental damage would be low. If the activities taking place off the permitted area are in violation of other performance standards, the probability of environmental harm would be greater.

Sometimes a new area outside the permitted area is inadvertently disturbed during the pendency of the approval of a revision or an amendment, or after an area has been permitted, but bond has not been posted on the increment. In such cases the event which the violated standard is designed to prevent is environmental harm such as water pollution, erosion, loss of topsoil, sediment deposition, and public health and safety. The probability of occurrence of the event shall be determined according to the specifics of the case, including adherence to other performance standards

b. Extent of Damage - This violation would result in damage extending outside the permitted area. From 8-15 points should be assessed depending on the size and impact of the disturbance. The following chart will generally be used in assessing points for mining outside the permitted surface area.

EXTENT OF DAMAGE	POINTS
<.5 acre	8
.50 -1.0 acre	9
1.01-1.5 acres	10
1.51-2.0 acres	11
2.01-2.5 acres	12
2.51-3.0 acres	13
3.01-3.5 acres	14
>3.50 acres	15

If the off-permit disturbance is covered by silt control, the impact of the disturbance will not be as great as if there was no silt coverage. Small areas outside the permit area may result in the penalty being "terminated". An area which is <0.25 acres off of the permit area, but is under required sediment control and currently poses a low threat to the public or the environment, should be assessed 12 points for the probability that future damage could occur and 8 points for the damage that has already occurred outside of the permit area. In such cases, the extent of damage points should be reduced.

Additionally, should mining of an area outside of the permitted underground area occur, the following chart will be used in assessing points.

EXTENT OF DAMAGE	POINTS
<2 acres	8
2-3	9
>3-4	10
>4-5	11
>5-6	12
>6-7	13
>7-8	14
>8	15

c. **Degree of Fault** - If a small area outside the permit area has been disturbed inadvertently, 8-15 points would be assessed, using the standard procedures (see pp. 9-10). If the disturbance outside the permit was intentional or knowing, the assessment will be made under Illegal Mining below (#11 below).

d. **Good Faith** - The assessment of good faith points follows the standard procedures (see p. 12).

9. Blasting Violations

a. **Probability of Occurrence** - Blasting regulations (other than records), are designed to prevent injury to the public and damage to property. If there has been personal injury or damage to property, fifteen (15) points are assessed because the event has occurred. Likelihood is determined on the basis of whether the event would have been likely at the time of the violation.

In order to assess likelihood, it is necessary to reconstruct the circumstances surrounding the particular violation: proximity to members of the public or private property such as a dwelling, the nature of surrounding property, whether hikers or hunters could have been nearby or other relevant factors. Potential damage should be assessed according to the probability of injury to the public or property in light of these facts. Additionally, the assessor must determine what degree of care, if any, was involved. It is possible in light of other protective measures, that the probability of injury or damage was reduced.

The regulation requiring the publication of the blasting schedule in the newspaper is designed to prevent injury to the public. The failure to do so is the violation, but the event is injury to the public.

b. Extent of Damage - Whenever people could be injured, as in blasting, the actual or potential damage would extend outside the permitted area. This is because if anyone is injured, the ramifications of the injury would extend off the permitted area. When blasting takes place and the probability of injury to the public or property is high, there will necessarily be high potential damage, i.e., the possibility of property damage, serious injury, or death. In these instances, the assessor should assess points at the high end of the 8-15 point range.

While actual damage may not have occurred, the potential damage or injury must be evaluated for failure to publish the latest schedule. Again, factors to consider include the number of people in the area, the proximity of houses to the permitted area, the population density, etc. It is also important that the assessor examine the overall blasting techniques employed. The inspector should provide information concerning whether a reasonably high degree of care was exhibited in blasting operations, i.e., posts guards during blasting or sounds warnings. A record of diligence in blasting methods will lower the potential damage from the failure to publish the blasting schedule in the newspaper.

c. Degree of Fault - The example of failure to publish blasting schedules cited above demonstrates the difference between negligence and recklessness. If the blasting schedule was not published as required, but other precautionary measures such as posting a guard to keep people away from the blast was exhibited, negligence points would be assessed. Generally, most blasting violations will be considered reckless acts and 13-15 points should be assessed.

d. Good Faith - The assessment of good faith points is made using the standard procedures (see p. 12). If there is no remedial action which can be taken, good faith points will not be awarded.

10. Improper Hollowfill Construction

a. Probability of Occurrence - The events that the standard is designed to prevent include slides, erosion, failure of hollowfill, and public safety. If a violation was cited in the early stages of construction before irreversible damage was caused, the probability of occurrence of the events would be low. If irreversible damage has already occurred, 15 points shall be assessed. The probability of occurrence would increase with the size and location of the hollowfill, topography, weather conditions, vegetation and other site conditions.

b. **Extent of Damage** - Improper hollowfill construction could could cause or potentially cause damage that would extend beyond the permitted area. If the violation is caught in the early stages and is promptly corrected, then the damage would likely remain within the permit area and 0-7 points shall be assessed, depending on the degree of the violation and the size and the location of the hollowfill. If the violation is not caught in early stages or is not timely corrected, the potential for off permit damage does exist, and 8-15 points shall be assessed.

c. **Degree of Fault** - These points are assessed using the standard procedures (see pp. 9-11).

d. **Good Faith** - These points are assessed using the standard procedures (see p. 12).

11. Illegal Mining

Since the point assessment procedures were not designed to handle illegal mining violations or mining without a valid permit, the assessor will waive the point assessment and assess a penalty ranging from $5,000-25,000 per day. Wildcat mining is the most serious type of mining without a valid permit. Wildcat mining shall be assessed a penalty at the high end of the penalty range.

There are other instances of mining without a valid permit, in addition to wildcat mining, where the point assessment should be waived and a penalty of $5,000-$25,000 per day should be assessed. These are knowingly mining on an expired permit, mining prior to issuance of permit, mining on an unbonded increment and exceeding the permit boundaries.

Factors that shall be considered in arriving at a penalty of between 5,000-25,000 per day are: size of disturbance, adherence to performance standards, duration of mining without a valid permit, and environmental damage. If a permit application had been submitted to the department and mining operations were commenced prior to the approval by the department, the violation is technically one of mining without a permit. In this case, however, the applicant had notified the department of its mining intentions but has started prior to the completion of the department's review and approval. For assessment purposes, this situation would not be treated as seriously as a wildcat miner who has not submitted an application. The assessor should check the status of the application and, if it has been approved or is approvable, assess the minimum penalty of $5,000 for the violation. This assessment policy is followed only if the applicant stopped mining after receiving the citation and did not resume until approval was granted by the department. If the operations continue after issuance of the citation, the assessor should assess the maximum penalty.

APPENDIX A OF 405 KAR 7:095

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

(8 Ky.R. 1480; eff. 1-6-83; Am. 21 Ky.R. 524; 1345; 2119; eff. 2-22-95; TAm eff. 8-9-2007.)