

ALABAMA SURFACE MINING COMMISSION
ADMINISTRATIVE CODECHAPTER 880-X-11D
INSPECTION AND ENFORCEMENT PROCEDURES CIVIL PENALTIES

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880-X-11D-.01 Scope.

This Rule covers the assessment of civil penalties under Section 26 of the Act with respect to cessation orders and notices of violation issued under Rule 880-X-11C.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History:**880-X-11D-.02 Objective.**

Civil penalties are assessed under Section 26 of the Act and this Rule to deter violations and to ensure maximum compliance with the terms and purposes of the Act on the part of the coal mining industry.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History:

880-X-11D-.03 How Assessments Are Made.

The State Regulatory Authority shall review each notice of violation and cessation order in accordance with the assessment procedures described in Rules 880-X-11D-.04, 880-X-11D-.05, 880-X-11D-.06, 880-X-11D-.07, 880-X-11D-.08, and 880-X-11D-.09 to determine whether a civil penalty will be assessed, the amount of the penalty, and whether each day of a continuing violation will be deemed a separate violation for purposes of the total penalty assessed.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History:**880-X-11D-.04 When Penalty Will Be Assessed.**

(1) The Regulatory Authority shall assess a penalty for each violation which leads to the issuance of a cessation order.

(2) The State Regulatory Authority shall assess a penalty for each notice of violation, if the violation is assigned 31 points or more under the point system described in Rule 880-X-11D-.05.

(3) The State Regulatory Authority may assess a penalty for each notice of violation assigned 30 points or less under the point system described in Rule 880-X-11D-.05. In determining whether to assess a penalty, the State Regulatory Authority shall consider the factors listed in Rule 880-X-11D-.05(2).

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94, 95.

History:**880-X-11D-.05 Point System For Penalties.**

(1) The State Regulatory Authority shall use the point system described in this Rule to determine the amount of the penalty and, in the case of notices of violation, whether a mandatory penalty should be assessed as provided in Rule 880-X-11D-.04(2).

(2) Points shall be assigned as follows:

(a) History of previous violations. The State Regulatory Authority shall assign up to 30 points based on the history of previous violations. One point shall be assigned for each past

violation contained in a notice of violation. Five points shall be assigned for each violation (but not a condition or practice) contained in a cessation order. The history of previous violations, for the purpose of assigning points, shall be determined and the points assigned with respect to a particular coal exploration or surface coal mining operation. Points shall be assigned as follows:

1. A violation shall not be counted, if the notice or order is the subject of pending administrative or judicial review or if the time to request such review or to appeal any administrative or judicial decision has not expired, and thereafter it shall be counted for only one year;
2. No violation for which the notice or order has been vacated shall be counted; and
3. Each violation shall be counted without regard to whether it led to a civil penalty assessment.

(b) Seriousness. The State Regulatory Authority shall assign up to 30 points based on the seriousness of the violation, as follows:

1. Probability of occurrence. The State Regulatory Authority shall assign up to 15 points based on the probability of the occurrence of the event which a violated standard is designed to prevent. Points shall be assessed according to the following schedule:

Probability of Occurrence	Points
None.....	0
Insignificant.....	1 - 4
Unlikely.....	5 - 9
Likely.....	10-14
Occurred.....	15

2. Extent of potential or actual damage. The State Regulatory Authority shall assign up to 15 points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment as follows:

(i) If the damage or impact which the violated standard is designed to prevent would remain within the coal exploration or permit area, the State Regulatory Authority shall assign zero to seven points, depending on the duration and extent of the damage or impact.

(ii) If the damage or impact which the violated standard is designed to prevent would extend outside the coal exploration or permit area, the State Regulatory Authority shall assign eight to fifteen points, depending on the duration and extent of the damage or impact.

3. Alternative. In the case of a violation of an administrative requirement, such as a requirement to keep records, the State Regulatory Authority shall, in lieu of Paragraphs 1. and 2. assign up to 15 points for seriousness, based upon the extent to which enforcement is obstructed by the violation.

(c) Negligence.

1. The State Regulatory Authority shall assign up to 25 points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

(i) A violation which occurs through no negligence shall be assigned no penalty points for negligence;

(ii) A violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence;

(iii) A violation which occurs through a greater degree of fault than negligence shall be assigned 13 to 25 points, depending on the degree of fault.

2. In determining the degree of negligence involved in a violation and the number of points to be assigned, the following definitions apply:

(i) No negligence means an inadvertent violation which was unavoidable by the exercise of reasonable care.

(ii) Negligence means the failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or these regulations due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care.

(iii) A greater degree of fault than negligence means reckless, knowing, or intentional conduct.

3. In calculating points to be assigned for negligence, the acts of all persons working on the coal exploration or surface coal mining and reclamation site shall be attributed to the person to whom the notice or order was issued, unless that person establishes that they were acts of deliberate sabotage.

(d) Good faith in attempting to achieve compliance.

1. The State Regulatory Authority shall subtract points based on the degree of good faith of the person to whom the notice or order was issued in attempting to achieve rapid compliance after notification of the violation. Points shall be assigned as follows:

Degree of Good Faith	Points
Rapid Compliance.....	1 to 10
Normal Compliance.....	0

2. The following definitions shall apply under Paragraph (2) (d) 1. of this Rule:

(i) Rapid compliance means that the person to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement.

(ii) Normal compliance means the person to whom the notice or order was issued abated the violation within the time given for abatement.

3. If the consideration of this criterion is impractical because of the length of the abatement period, the assessment may be made without considering this criterion and may be reassessed after the violation has been abated.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93.

History:

880-X-11D-.06 Determination Of Amount Of Penalty.

The State Regulatory Authority shall determine the amount of any civil penalty by converting the total number of points assigned under Rule 880-X-11D-.05 to a dollar amount, according to the following schedule:

Points	Dollars	Points	Dollars
1	150	27	1,050

Points	Dollars	Points	Dollars
2	150	28	1,200
3	150	29	1,350
4	150	30	1,500
5	150	31	1,650
6	300	32	1,800
7	300	33	1,950
8	300	34	2,100
9	300	35	2,250
10	300	36	2,400
11	330	37	2,550
12	360	38	2,700
13	390	39	2,850
14	420	40	3,000
15	450	41	3,150
16	480	42	3,300
17	510	43	3,450
18	540	44	3,600
19	570	45	3,750
20	600	46	3,900
21	630	47	4,050
22	660	48	4,200
23	690	49	4,350
24	720	50	4,500
25	750	51	4,650
26	900	52	4,800
		53	4,950
		54 and above	5,000

Author: Randall C. Johnson

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History: Amended: Filed July 29, 2008; effective September 2, 2008.

880-X-11D-.07 Assessment Of Separate Violations For Each Day.

(1) The State Regulatory Authority may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the State Regulatory Authority shall consider the factors listed in Rule 880-X-11D-.05 and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points under Rule 880-X-11D-.05(2), the state Regulatory Authority shall assess a civil penalty for a minimum of two separate days.

(2) In addition to the civil penalty provided for in Paragraph (1) whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order, a civil penalty of not less than \$750.00 shall be assessed for each day during which such failure continues, except that, if the person to whom the notice or order was issued initiates review proceedings with respect to the violation, the abatement period shall be extended as follows:

(a) If suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding under Sections 10 and 20 of the Act, after a determination that the person to whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the State Regulatory Authority issues a final order with respect to the violation in question;

(b) If the person to whom the notice or order was issued initiates review proceedings under Section 10 of the Act with respect to the violation, in which the obligations to abate are suspended by the court pursuant to Sections 10 and 20 of the Act, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court; and

(c) Such penalty for the failure to abate a violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30-day period, the State Regulatory Authority shall take appropriate action pursuant to Sections 25 and 26 of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.

Author:

Statutory Authority: Statutory Authority Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History:

880-X-11D-.08 Waiver Of Use Of Formula To Determine Civil Penalty.

(1) The State Regulatory Authority, upon its own initiative or upon written request received within 15 days of issuance of a notice of violation or a cessation order, may waive the use of the formula contained in Rule 880-X-11D-.05 to set the civil penalty, if it determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust. However, the State Regulatory Authority shall not waive the use of the formula or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate violations of the Act, these regulations, or any condition of any permit or exploration approval. The basis

for every waiver shall be fully explained and documented in the records of the case.

(2) If the State Regulatory Authority waives the use of the formula, it shall use the criteria set forth in Rule 880-X-11D-.05(2) to determine the appropriate penalty. When the State Regulatory Authority has elected to waive the use of the formula it shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History:

880-X-11D-.09

Procedures For Assessment Of Civil Penalties.

(1) Within 15 days of service of notice or order, the person to whom it was issued may submit written information about the violation to the State Regulatory Authority and to the inspector who issued the notice of violation or cessation order. The State Regulatory Authority shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty.

(2) The State Regulatory Authority shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order. If the mail is tendered at the address of that person set forth in the sign required under Rule 880-X-10C-.03 or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this Paragraph shall be deemed to have been complied with upon such tender.

(3) Unless a conference has been requested, the State Regulatory Authority shall review and reassess any penalty if necessary to consider facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The State Regulatory Authority shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment in the manner provided in Paragraph (2) within 30 days after the date the violation is abated.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History:

880-X-11D-.10 Procedures For Assessment Conference.

(1) The State Regulatory Authority shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued, if the request is received within 30 days from the date the proposed assessment or reassessment is mailed.

(2)(a) The State Regulatory Authority shall assign a conference officer to hold the assessment conference. The assessment conference shall be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later.

(b) The State Regulatory Authority shall post notice of the time and place of the conference at the field office closest to the mine at least five days before the conference. Any person shall have a right to attend and participate in the conference.

(c) The conference officer shall consider all relevant information on the violation. Within 30 days after the conference is held, the conference officer shall either:

1. Settle the issues, in which case a settlement agreement shall be prepared and signed by the conference officer on behalf of the State Regulatory Authority and by the person assessed; or

2. Affirm, raise, lower, or vacate the penalty.

(d) An increase or reduction of a proposed civil penalty assessment of more than 25 percent and more than \$500.00 shall not be final and binding on the State Regulatory Authority until approved by the Director of the State Regulatory Authority, or designee.

(3) The conference officer shall promptly serve the person assessed with a notice of his or her action in the manner provided in Rule 880-X-11D-.09(2) and shall include a worksheet if the penalty has been raised or lowered. The reasons for the conference officer's action shall be fully documented in the file.

(4)(a) If a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect.

(b) If full payment of the amount specified in the settlement agreement is not received by the State Regulatory Authority within 30 days after the date of signing, the State Regulatory Authority may enforce the agreement or rescind it and proceed according to Paragraph (2)(c)2. within 30 days from the date of the rescission.

(c) At a formal review following an assessment conference, no evidence as to statements made or evidence produced by one party at a conference shall be introduced as evidence by another party or to impeach a witness.

Author: Randall C. Johnson

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History: May 20, 1982; **Amended:** November 14, 1989; effective: March 7, 1991.

880-X-11D-.11 Request For Hearing.

(1) The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition to the DHA and an amount equal to the proposed penalty in the form of a Certificate of Deposit which meets the requirements of Rule 880-X-9C-.03(6), (c), (e), (f), and (g), if a conference has been held, the reassessed or affirmed penalty to the State Regulatory Authority (to be held as provided in Paragraph (2)) within 30 days from receipt of the proposed assessment or re-assessment or 30 days from the date of service of the conference officer's action, whichever is later. The fact of the violation may not be contested, if it has been decided in a review proceeding commenced under Rule 880-X-11C-.07 in accordance with Chapter 880-X-5.

(2) The State Regulatory Authority shall hold all Certificates of Deposit submitted under Paragraph (1) pending completion of the administrative and judicial review process, at which time it shall make the appropriate disbursement.

Author: Randall C. Johnson

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History: Filed May 20, 1982. **Amended:** Filed July 27, 1998; effective August 31, 1998; operative January 3, 1999.

Ed. Note: On December 4, 1998, the Office of Surface Mining approved this rulemaking adopted by the commission on July 16, 1998. The effective date of this rule will be January 3, 1999.

880-X-11D-.12 Final Assessment And Payment Of Penalty.

(1) If the person to whom a notice of violation or cessation order is issued fails to request a hearing as provided in Rule 880-X-11D-.11, the proposed assessment shall become a final order of the State Regulatory Authority and the penalty assessed shall become due and payable upon expiration of the time allowed to request a hearing.

(2) If any party requests judicial review of a final order of the State Regulatory Authority, the Certificate of Deposit shall continue to be held until completion of the review. Otherwise, the Certificate of Deposit shall be deemed payment of the penalty.

(3) If the final decision in the administrative and judicial review results in an order reducing or eliminating the proposed penalty assessed under this Rule, the State Regulatory Authority shall within 30 days of receipt of the order refund to the person assessed all or part of the funds represented by the Certificate of Deposit including all or the pro rata share of interest accrued by the Certificate of Deposit.

(4) If the review results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference to the State Regulatory Authority within 15 days after the order is mailed to such person.

Author:

Statutory Authority: Code of Ala. 1975, §§9-16-71, 73, 74, 75, 76, 79, 80, 92, 93, 94.

History: