

Kansas Administrative Regulations

Mined-Land Conservation and Reclamation (KDHE)

Article 5.—Civil Penalties

47-5-5a. Civil penalties; adoption by reference.

(a) Subject to the provisions of subsection (c), the following federal regulations, as in effect on July 1, 2012, are adopted by reference, except as otherwise specified:

- (1) How assessments are made, 30 C.F.R. 845.11;
- (2) when penalty will be assessed, 30 C.F.R. 845.12;
- (3) point system for penalties, 30 C.F.R. 845.13;
- (4) determination of amount of penalty, 30 C.F.R. 845.14, except that the table shall

be replaced by the following table:

"Points	Dollars
1	20
2	40
3	60
4	80
5	100
6	120
7	140
8	160
9	180

10	200
11	220
12	240
13	260
14	280
15	300
16	320
17	340
18	360
19	380
20	400
21	420
22	440
23	460
24	

	480
25	500
26	600
27	700
28	800
29	900
30	1,000
31	1,100
32	1,200
33	1,300
34	1,400
35	1,500
36	1,600
37	1,700
38	1,800

39	1,900
40	2,000
41	2,100
42	2,200
43	2,300
44	2,400
45	2,500
46	2,600
47	2,700
48	2,800
49	2,900
50	3,000
51	3,100
52	3,200
53	3,300
54	3,400

55	3,500
56	3,600
57	3,700
58	3,800
59	3,900
60	4,000
61	4,100
62	4,200
63	4,300
64	4,400
65	4,500
66	4,600
67	4,700
68	4,800
69	4,900
70 and above	5,000"

(5) assessment of separate violations for each day, 30 C.F.R. 845.15, except that the statement "a civil penalty of not less than \$1,025 shall be assessed for each day during which such failure to abate continues" shall be replaced by "a civil penalty of not less than \$750 shall be assessed for each day during which such failure to abate continues";

(6) waiver of use of formula to determine civil penalty, 30 C.F.R. 845.16;

(7) procedures for assessment of civil penalties, 30 C.F.R. 845.17;

(8) procedures for assessment conference, 30 C.F.R. 845.18. However, the following sentence shall be deleted: "The assessment conference shall not be governed by section 554 of title 5 of the United States Code, regarding requirements for formal adjudicatory hearings." The following sentence shall be added: "The conference officer shall be selected by the department";

(9) request for hearing, 30 C.F.R. 845.19. However, subsection (b) shall be replaced by the following text: "(b) The department shall hold all funds submitted under paragraph

(a) of this section in escrow pending completion of the administrative and judicial review process, at which time it shall disburse them as provided in K.A.R. 47-5-16";

(10) when an individual civil penalty may be assessed, 30 C.F.R. 846.12;

(11) amount of individual civil penalty, 30 C.F.R. 846.14;

(12) procedure for assessment of individual civil penalty, 30 C.F.R. 846.17;

(13) payment of penalty, 30 C.F.R. 846.18. However, subsection (d) shall be replaced by the following text:

"(d)(1) Delinquent payment. Following the expiration of 30 days after the issuance of a final order assessing an individual civil penalty, any delinquent civil penalty shall be subject to interest at the rate established quarterly by the U.S. department of the treasury for use in applying late charges on later payments to the federal government, pursuant to the treasury financial manual 6-8020.20. The treasury current value of funds rate is published by the fiscal service in the notices section of the federal register.

Interest on unpaid civil penalties will run from the date payment first was due until the date of payment. Failure to pay overdue civil penalties may result in one or more of the following actions, which are not exclusive:

"(i) Initiation of litigation;

"(ii) reporting to the internal revenue service;

"(iii) reporting to state agencies responsible for taxation;

"(iv) reporting to credit bureaus; or

"(v) referral to collection agencies.

"(2) If a civil penalty debt is greater than 91 days overdue, a six percent per annum penalty shall begin to accrue on the amount owed for fees and shall run until the date of payment. This penalty is in addition to the interest described in this regulation.

"(3) For all delinquent penalties and interest, the debtor shall be required to pay a processing and handling charge that shall be based on the following components:

"(i) For debts referred to a collection agency, the amount charged to the department by the collection agency;

"(ii) for debts processed and handled by the surface mining section, a standard amount set annually by the department based upon similar charges by collection agencies for debt collection;

"(iii) for debts referred to the office of legal services, Kansas department of health and environment, but paid before litigation, the estimated average cost to prepare the case for litigation at the time of payment;

"(iv) for debts referred to the office of legal services, Kansas department of health and environment, and litigated, the estimated cost to prepare and litigate a debt case at the time of payment;

"(v) if not otherwise provided for, all other administrative expenses associated with collection, including billing, recording payments, and follow-up actions; and

"(vi) no prejudgment interest accrues on any processing and handling charges.";

(14) general provisions, 30 C.F.R. 847.2;

(15) criminal penalties, 30 C.F.R. 847.11. However, the term "Attorney General" shall be replaced with "Kansas attorney general"; and

(16) civil actions for relief, 30 C.F.R. 847.16.

(b) The following phrases and citations shall be replaced with the phrases and citations specified in this subsection wherever the phrases and citations appear in the text of the federal regulations adopted by reference in this regulation:

(1)(A) "Act" shall be replaced by "state act."

(B) "Director" and "director or his designee" shall be replaced by "secretary of health and environment or secretary's designee." However, in 30 C.F.R. 846.12, the word "director" shall remain unchanged.

(C) "Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Phone: 703-235-3800)" shall be replaced by "Office of administrative hearings."

(D) "Office," "State or field office," and "office of hearings and appeals" shall be replaced by "department."

(E) "Rule 65 of the Federal Rules of Civil Procedure" shall be replaced by "K.S.A. 60-901 et seq., and amendments thereto."

(F) "Secretary" shall be replaced by "secretary of the Kansas department of health and environment."

(2)(A) "Section 518(a) of the act" shall be replaced by "K.S.A. 49-405c(a)."

(B) "Section 518(e), 518(f), 521(a)(4), or 521(c) of the act" shall be replaced by "K.S.A. 49-405c(e), 49-405c(f), 49-405(m)(3), or 49-405(m)(4), and amendments thereto."

(C) "Section 518(e) and (g) of the act" and "section 518(e) of the Act" shall be replaced by "K.S.A. 49-405c(e) and (g), and amendments thereto."

(D) "Section 521 or 526 of the act" shall be replaced by "K.S.A. 49-405c, 49-405(m), 49-416a, and 49-422a, and amendments thereto."

(E) "Section 521(a) of the act" shall be replaced by "K.S.A. 49-405(m)(2), and amendments thereto."

(F) "Section 521(c) of the act" shall be replaced by "K.S.A. 49-405(m), and amendments thereto."

(G) "Section 525(c) of the act" shall be replaced by "K.S.A. 49-416a(c), and amendments thereto."

(H) "Section 526 of the act" and "section 526(c) of the act" shall be replaced by "K.S.A. 49-422a, and amendments thereto."

(I) "Sections 518, 521(a)(4), and 525 of the act" shall be replaced by "K.S.A. 49-405c, 49-405(m)(3), and 49-416a, and amendments thereto."

(3)(A) "30 CFR 816.11" shall be replaced by "K.A.R. 47-9-1(c)(1)."

(B) "30 CFR 843.16" shall be replaced by "K.A.R. 47-4-14a."

(C) "30 CFR 845.12, 845.13, 845.14, 845.15 and 845.16" shall be replaced by "K.A.R. 47-5-5a(a)(2), (3), (4), (5), and (6)."

(D) "30 CFR 845.12(b)" shall be replaced by "K.A.R. 47-5-5a(a)(2)."

(E) "30 CFR 845.13," "30 CFR 845.13(b)," and "§845.13(b)" shall be replaced by "K.A.R. 47-5-5a(a)(3)."

(F) "30 CFR 845.17(b)" shall be replaced by "K.A.R. 47-5-5a(a)(7)."

(G) "43 CFR 4.1300 et seq." and "rule 4 of the Federal Rules of Civil Procedure" shall be replaced by "K.A.R. 47-4-14a."

(4) "§846.12" shall be replaced by "K.A.R. 47-5-5a(a)(10)."

(c) Review of proposed assessments of civil penalties. If a request for hearing is made pursuant to paragraph (a)(9), the procedures in K.A.R. 47-4-14a and the following shall apply:

(1) Time for filing petition for a hearing.

(A)(i) If a timely request for an assessment conference has been made pursuant to paragraph (a)(8), a request for a hearing shall be made to the department within 30 days of service of notice, by the conference officer, that the conference is completed; or (ii) a request for a hearing of a proposed assessment of a civil penalty shall be made to the department within 30 days of service of the proposed assessment.

(B) No extension of time shall be granted for filing a petition for review of a proposed assessment of a civil penalty as required by paragraph (c)(1)(A)(i) or (A)(ii). If a petition for review is not filed within the time period provided in paragraph (c)(1)(A)(i) or (A)(ii), all of the following shall apply:

(i) The appropriateness of the amount of the penalty and the fact of the violation if there is no proceeding pending under K.S.A. 49-416a, and amendments thereto, to review the notice of violation or cessation order involved shall be admitted.

(ii) The petition shall be dismissed.

(iii) The civil penalty assessed shall become a final order of the secretary.

(2) Contents of petition; payment required.

(A) The petition shall include the following:

(i) A short and plain statement indicating the reasons why either the amount of the penalty or the fact of the violation is being contested;

(ii) if the amount of penalty is being contested based upon a misapplication of the civil penalty formula, a statement indicating how the civil penalty formula in subsection (a), adopting by reference 30 C.F.R. Parts 845 and 846, was misapplied and a proposed civil penalty utilizing the civil penalty formula;

(iii) the identification by number of each violation being contested;

(iv) the identifying number of the cashier's check, certified check, bank draft, personal check, or bank money order accompanying the petition; and

(v) a request for a hearing.

(B) The petition for a hearing shall be accompanied by the following:

(i) Full payment of the proposed civil penalty in the form of a cashier's check, certified check, bank draft, personal check, or bank money order made payable to the Kansas department of health and environment, to be placed in an escrow account by the department pending final determination of the civil penalty; and

(ii) on the face of the payment, an identification by number of the violations for which payment is being tendered.

(C) As required by K.S.A. 49-405c and amendments thereto, failure to make timely payment of the proposed civil penalty in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

(D) No extension of time shall be granted for full payment of the proposed civil penalty. If payment is not made within the time period provided in paragraph (c)(1)(A)(i) or (A)(ii), all of the following shall apply:

(i) The appropriateness of the amount of the civil penalty, the fact of the violation, and, if there is no review proceeding, the notice of violation or cessation order involved shall be deemed admitted.

(ii) The petition shall be dismissed.

(iii) The civil penalty assessed shall become a final order of the secretary.

(3) Answer. An answer may be filed by the secretary within 30 days of service of the petition.

(4) Review of waiver determination.

(A) Within 10 days of the filing of a petition, the petitioner may move the presiding officer to review the granting or denial of a waiver of the civil penalty formula pursuant to paragraph (a)(6).

(B) The motion shall contain a statement indicating all alleged facts relevant to the granting or denial of a waiver.

(C) Review shall be limited to the written determination of the presiding officer granting or denying the waiver, the motion, and responses to the motion. The standard of review shall be abuse of discretion.

(D) If the presiding officer finds that the secretary abused the secretary's discretion in granting or denying the waiver, the presiding officer shall hold a hearing on the petition for review of the proposed assessment and make a determination pursuant to paragraph (c)(7).

(5) Burden of proof in civil penalty proceedings. In civil penalty proceedings, the following shall apply:

(A) The department shall have the burden of establishing a prima facie case regarding the fact of the violation, the amount of the civil penalty, and the ultimate burden of persuasion regarding the amount of the civil penalty.

(B) The person who petitioned for review shall have the ultimate burden of persuasion regarding the fact of the violation.

(6) Summary disposition.

(A) In a civil penalty proceeding in which the person against whom the proposed civil penalty is assessed fails to comply on time with any prehearing order of a presiding officer, the presiding officer shall issue an order to show cause for the following conditions:

(i) That person should not be deemed to have waived the person's right to a hearing.

(ii) The proceedings should not be dismissed and the assessment should become final.

(B) If the order to show cause is not satisfied as required, the presiding officer shall order the proceedings dismissed and issue a final order.

(C) If the person against whom the proposed civil penalty is assessed fails to appear at a hearing, that person shall be deemed to have waived the person's right to a hearing, and the presiding officer may assume, for purposes of the assessment, the following:

(i) The occurrence of each violation listed in the notice of violation or order; and

(ii) the truth of any facts alleged in the notice or order.

(D) In order to issue an initial order assessing the appropriate civil penalty when the person against whom the proposed civil penalty is assessed fails to appear at the hearing, a presiding officer shall either conduct an ex parte hearing or require the department to furnish proposed findings of fact and conclusions of law.

(E) Nothing in this article shall be construed to deprive the person against whom the penalty is assessed of the person's opportunity to have the department prove the violations charged in open hearing with confrontation and cross-examination of witnesses, unless that person fails to comply with a prehearing order or fails to appear at the scheduled hearing.

(7) Initial order of the presiding officer.

(A) The presiding officer shall incorporate, in the presiding officer's decision concerning the civil penalty, findings of fact on each of the four criteria in paragraph (a)(3) and conclusions of law.

(B)(i) If the presiding officer finds that a violation occurred or that the fact of violation is uncontested, the presiding officer shall establish the amount of the penalty according to the point system and conversion table specified in paragraphs (a)(3) and (4).

(ii) The presiding officer may waive the use of the point system if the presiding officer determines that a waiver would further abatement of violations of the state act, except that the point system shall not be waived for abatement of other violations of the state act.

(iii) If the presiding officer finds that no violation occurred, the presiding officer shall issue an order that the proposed assessment be returned to the petitioner.

(C) If the presiding officer finds that no violation occurred or reduces the amount of the civil penalty, the presiding officer shall order the department to remit the appropriate amount to the petitioner who made the payment within 30 days of the department's receipt of the order. If a timely petition for review of the presiding officer's decision is filed with the secretary, no amount shall be remitted to the petitioner until a final determination has been made.

(D) If the presiding officer increases the amount of the civil penalty above that of the proposed assessment, the presiding officer shall order payment of the appropriate amount within 15 days after the order increasing the civil penalty is mailed.

(8) Appeals.

(A) Any party may petition the secretary to review and reconsider the initial order of a presiding officer concerning an assessment pursuant to K.A.R. 47-4-14a.

(B) Any party may appeal the final order of the secretary pursuant to the Kansas judicial review act, K.S.A. 77-601 et seq., and amendments thereto.

(Authorized by K.S.A. 49-405; implementing K.S.A. 49-405, 49-405c, and 49-416a; effective May 1, 1985; amended Feb. 11, 1991; amended May 2, 1997; amended July 31, 1998; amended Dec. 1, 2006; amended Feb. 15, 2019.)