

DEPARTMENT OF THE INTERIOR**Office of Surface Mining Reclamation and Enforcement****30 CFR Parts 723 and 845**

RIN 1029-AC00

Civil Penalty Adjustments**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.**ACTION:** Final rule.

SUMMARY: This rule adjusts the penalty amount of certain civil monetary penalties authorized by the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The rule implements the Federal Civil Penalties Inflation Adjustment Act of 1990 which requires that civil monetary penalties be adjusted for inflation at least once every four years.

EFFECTIVE DATE: November 28, 2001.**FOR FURTHER INFORMATION CONTACT:**

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SUPPLEMENTARY INFORMATION:

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I. Background*A. The Federal Civil Penalties Inflation Adjustment Act*

In an effort to maintain the deterrent effect of civil monetary penalties (CMPs) and promote compliance with the law, the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) (28 U.S.C. 2461 note) was amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134) to require Federal agencies to regularly adjust CMPs for inflation. The Inflation Adjustment Act, as amended, requires each agency to make an initial inflationary adjustment for all applicable CMPs, and to make subsequent adjustments at least once every four years thereafter. The Office of Surface Mining Reclamation and Enforcement (we or OSM) last adjusted the CMP's authorized by SMCRA on

November 28, 1997 (62 FR 63274). To satisfy the requirement of the Inflation Adjustment Act, we are again adjusting our CMP's according to the formula set forth in the law.

Under the Inflation Adjustment Act, the inflation adjustment for a CMP is determined by increasing the CMP by the amount of the cost-of-living adjustment, which is defined as the percentage of each CMP by which the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds the Consumer Price Index for the month of June of the calendar year in which the amount of the CMP was last set or adjusted. The Inflation Adjustment Act defines the Consumer Price Index as the Consumer Price Index for all urban consumers published by the Department of Labor (CPI-U). See 28 U.S.C. 2461 note. In addition, the Inflation Adjustment Act specifies that any resulting increases in a CMP (1) must be rounded according to a stated rounding formula, and (2) should apply only to violations that occur after the date the increase takes effect.

B. Method of Calculation

Since this adjustment will be effective before December 31, 2001, we must use the CPI-U for the month of June 2000. That figure is 172.4. We last adjusted our civil monetary penalties in November 1997. Therefore, we must use the CPI-U for June 1997 which is 160.3. The factor that we have used in calculating the increase is 172.4 divided by 160.3, or 1.0754834, rounded to 1.075 (i.e., a 7.5 percent increase).

Any increase under this adjustment is then subject to the rounding formula set forth in section 5(a) of the Inflation Adjustment Act. Under the formula, any increase must be rounded to the nearest:

- (1) Multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) Multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) Multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) Multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) Multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) Multiple of \$25,000 in the case of penalties greater than \$200,000.

C. Example of a Calculation

To explain the inflation adjustment calculation for the CMP amounts that were last adjusted in 1997, we will use the following example. Our regulations

at 30 CFR 845.15(b) presently require the imposition of a civil penalty of not less than \$825 for each day during which an operator fails to abate a violation within the specified abatement period contained in a notice of violation or a cessation order. Multiplying the \$825 by the inflation factor of 1.075 results in a sum of \$886.88. Then we round the raw inflation amount according to the rounding rules in section 5(a) of the Inflation Adjustment Act. Since we round only the increased amount, we calculate the increase amount by subtracting the current penalty amount from the raw inflation adjustment. Accordingly, the increased amount for the penalty in our example is \$61.88 (i.e., \$886.88 minus \$825.00). Under the rounding rules, if the penalty is more than \$100 but less than \$1,000, we round the increase to the nearest multiple of \$100 (i.e., \$61.88 is rounded to \$100.00). Finally, we add the rounded increase to the existing penalty which results in a new § 845.15(b) penalty amount of \$925.00 (i.e., \$825.00 plus \$100.00) for each day during which the failure to abate continues.

D. Civil Monetary Penalties Affected by This Adjustment

Section 518 of SMCRA, 30 U.S.C. 1268, authorizes the Secretary of the Interior to assess CMPs for violations of SMCRA. OSM's regulations implementing the CMP provisions of section 518 are located in 30 CFR 723.14, 723.15, 724.14, 845.14, 845.15, and 846.14. Because of the rounding formula specified in the Inflation Adjustment Act, a substantial number of the CMP's in those sections will remain unchanged at this review. Those CMP's (the ones for which no adjustment is being made in 2001) will be subject to slightly different treatment when calculating the 2005 adjustment. Under the Inflation Adjustment Act, when we adjust those penalties in 2005, we will be required to use the CPI-U for June of the year when they were last adjusted which will be the CPI-U for June 1997. The 1997 CPI-U will be compared to the June CPI-U for 2004 to arrive at the factor which will be used to calculate the inflation increase.

E. Effect of the Rule in Federal Program States and on Indian Lands

The increase in civil monetary penalties contained in this rule will apply through cross-referencing to the following Federal program states: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear

at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. The increase in civil monetary penalties also applies through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR 750.

F. Effect of the Rule on Approved State Programs

Section 518(i) of SMCRA and 30 CFR 840.13(a) require that the civil penalty provisions of each State program contain penalties which are "no less stringent than" those set forth in SMCRA. Following publication of this final rule, we will evaluate the State programs approved under section 503 of SMCRA to determine any changes in those programs that will be necessary. When we determine that a particular State program provision should be amended in order to be made no less stringent than the revised Federal regulations, the particular State will be notified in accordance with the provisions of 30 CFR 732.17.

II. Procedural Matters and Required Determinations

Administrative Procedure Act

This final rule has been issued without prior public notice or opportunity for public comment. The Administrative Procedure Act (APA) (5 U.S.C. 553) provides an exception to the notice and comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary or contrary to the public interest. We have determined that under 5 U.S.C. 553(b)(3)(B), good cause exists for dispensing with the notice of proposed rulemaking and public comment procedures for this rule. This rulemaking is consistent with the statutory authority and requirements set forth in the Inflation Adjustment Act as amended by the Debt Collection Improvement Act of 1996. The Inflation Adjustment Act requires that we adjust our CMPs once every four years and specifies the manner in which the adjustment is to be made. Accordingly, the adjustments made may be seen as ministerial, technical, and non-controversial. For these same reasons, we believe there is good cause under 5 U.S.C. 553(d)(3) of the APA to have the rule become effective on a date that is less than 30 days after the date of publication in the **Federal Register**.

Executive Order 12866—Regulatory Planning and Review

This rule is not considered a significant regulatory action under the

provisions of Executive Order 12866. The rule adjusts OSM's CMPs according to the formula contained in the law. OSM has no discretion in making the adjustments. Further, most coal mining operations subject to these regulations do not engage in prohibited activities and practices, and, as a result, we believe that the aggregate economic impact of these revised regulations will be minimal, affecting only those who may engage in prohibited behavior in violation of SMCRA. In calendar years 1999 and 2000 combined, we issued a total of 101 violation notices (24 cessation orders and 77 notices of violations. The total CMP amount assessed by OSM for all of these violations was \$664,795.

We do not keep records of the amount of CMPs assessed by State Regulatory Authorities. In a 1980 decision on OSM's regulations governing CMPs, the U.S. District Court for the District of Columbia held that "because section 518 of SMCRA fails to enumerate a point system for assessing civil penalties, the imposition of this requirement upon the States is inconsistent with [SMCRA]." Consequently, we cannot require that the CMP provisions contained in a State's regulatory program mirror the point/penalty provisions of 30 CFR 723.14 and 845.14. The State regulatory programs, however, are required to have civil penalty provisions that are no less stringent than those set forth in section 518 of SMCRA. This includes the CMP provisions of section 518(h) which require the assessment of at least the minimum CMP specified there for the failure to abate a violation within the period of time permitted for abatement. During the past two years, the States issued a total of 743 failure-to-abate cessation orders. If you assume that each failure-to-abate cessation order was assessed the minimum CMP authorized, the annual assessment for all CMPs issued by all States for all failure-to-abate cessation orders would be substantially less than the dollar threshold established in Executive Order 12866 for a significant rule. Consequently, the amount of the CMPs that will eventually be assessed under the revised schedule contained in this rule by both OSM and the States is not expected to exceed the threshold contained in Executive Order 12866 for a significant rule.

Regulatory Flexibility Act

The Department of the Interior certifies that this proposed revision will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5

U.S.C. 601 *et seq.*). The aggregate economic impact of this rulemaking on small business entities should be minimal, affecting only those who violate the provisions of SMCRA. As indicated above, the number of civil penalties assessed over a two-year period was not significant when compared to the number of Federal inspections performed (over 2,000 in calendar year 2,000).

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

1. Does not have an annual effect on the economy of \$100 million or more for the reasons stated above.

2. Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions because the rule does not impose new requirements on the coal mining industry or consumers.

3. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises for the reasons stated above.

Unfunded Mandates Reform Act

For purposes of compliance with the Unfunded Mandates Reform Act of 1995, this rule does not impose any obligations that individually or cumulatively would require an aggregate expenditure of \$100 million or more by State, local, and Tribal governments and the private sector in any given year.

Federal Paperwork Reduction Act

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

We have reviewed this rule and determined that it is categorically excluded from the requirement to prepare an environmental document under the National Environmental Policy Act of 1969. This determination was made in accordance with the Departmental Manual (516 DM 2, Appendix 1.10).

Executive Order 12988—Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior has determined that this rule (1) does not unduly burden the judicial system

and (2) meets the requirements of sections 3(a) and 3(b)(2) of the Order. Additional remarks follow concerning individual elements of the Executive Order:

1. What is the preemptive effect, if any, to be given to the regulation?

This regulation will have the same preemptive effect as other standards adopted pursuant to SMCRA. To retain primacy, States have to adopt and apply standards for their regulatory programs that are no less effective than those set forth in OSM's regulations. Any State law that is inconsistent with or that would preclude implementation of the proposed regulation would be subject to preemption under SMCRA section 505 and implementing regulations at 30 CFR 730.11. To the extent that the proposed regulation would result in preemption of State law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations. This approach is established in SMCRA, and has been judicially affirmed. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

2. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

3. What is the retroactive effect, if any, to be given to the regulation?

This rule is not intended to have a retroactive effect. The increase in the amount of CMPs will apply only to violations that occur after the date the increase takes effect.

4. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). Prior to any judicial challenges to the application of the rule, however, administrative proceedings must be exhausted, unless specified otherwise. In situations involving OSM application of the rule, applicable administrative proceedings may be found in 30 CFR 723.19, 845.19 and 43 CFR part 4. In situations involving State regulatory authority application of the provisions equivalent to those contained in this rule, applicable administrative procedures are set forth in the particular State program.

5. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are discussed in the rule.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is not considered significant under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have takings implications. This determination is based on the fact that the rule will not have an impact on the use or value of private property and so, does not result in significant costs to the government.

Executive Order 13132—Federalism

This rule does not have Federalism implications. It will not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

List of Subjects

30 CFR Part 723

Administrative practice and procedure, Penalties, Surface mining, Underground mining.

30 CFR Part 845

Administrative practice and procedure, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: November 7, 2001.

J. Steven Griles,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR parts 723 and 845 are amended as follows.

PART 723—CIVIL PENALTIES

1. The authority citation for Part 723 is revised to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 *et seq.*, Pub. L. 100-34, Pub. L. 101-410, and Pub. L. 104-134.

2. Section 723.14 is amended by revising the table to read as follows:

§ 723.14 Determination of amount of penalty.

| | Points | Dollars |
|----|--------|---------|
| 1 | | 22 |
| 2 | | 44 |
| 3 | | 66 |
| 4 | | 98 |
| 5 | | 110 |
| 6 | | 132 |
| 7 | | 154 |
| 8 | | 176 |
| 9 | | 198 |
| 10 | | 220 |
| 11 | | 242 |
| 12 | | 264 |
| 13 | | 286 |
| 14 | | 308 |
| 15 | | 330 |
| 16 | | 352 |
| 17 | | 374 |
| 18 | | 396 |
| 19 | | 418 |
| 20 | | 440 |
| 21 | | 462 |
| 22 | | 484 |
| 23 | | 506 |
| 24 | | 528 |
| 25 | | 550 |
| 26 | | 660 |
| 27 | | 870 |
| 28 | | 980 |
| 29 | | 1,090 |
| 30 | | 1,100 |
| 31 | | 1,210 |
| 32 | | 1,320 |
| 33 | | 1,430 |
| 34 | | 1,540 |
| 35 | | 1,650 |
| 36 | | 1,760 |
| 37 | | 1,870 |
| 38 | | 1,980 |
| 39 | | 2,090 |
| 40 | | 2,200 |
| 41 | | 2,310 |
| 42 | | 2,420 |
| 43 | | 2,530 |
| 44 | | 2,640 |
| 45 | | 2,750 |
| 46 | | 2,860 |
| 47 | | 2,970 |
| 48 | | 3,080 |
| 49 | | 3,190 |
| 50 | | 3,300 |
| 51 | | 3,410 |
| 52 | | 3,520 |
| 53 | | 3,630 |
| 54 | | 3,740 |
| 55 | | 3,850 |
| 56 | | 3,960 |
| 57 | | 4,070 |
| 58 | | 4,180 |
| 59 | | 4,290 |
| 60 | | 4,400 |
| 61 | | 4,510 |
| 62 | | 4,620 |
| 63 | | 4,730 |

| Points | Dollars | Points | Dollars | Points | Dollars |
|--------|---------|--------|---------|--------|---------|
| 64 | 4,840 | 7 | 154 | 44 | 2,640 |
| 65 | 4,950 | 8 | 176 | 45 | 2,750 |
| 66 | 5,060 | 9 | 198 | 46 | 2,860 |
| 67 | 5,170 | 10 | 220 | 47 | 2,970 |
| 68 | 5,280 | 11 | 242 | 48 | 3,080 |
| 69 | 5,390 | 12 | 264 | 49 | 3,190 |
| 70 | 5,500 | 13 | 286 | 50 | 3,300 |
| | | 14 | 308 | 51 | 3,410 |
| | | 15 | 330 | 52 | 3,520 |
| | | 16 | 352 | 53 | 3,630 |
| | | 17 | 374 | 54 | 3,740 |
| | | 18 | 396 | 55 | 3,850 |
| | | 19 | 418 | 56 | 3,960 |
| | | 20 | 440 | 57 | 4,070 |
| | | 21 | 462 | 58 | 4,180 |
| | | 22 | 484 | 59 | 4,290 |
| | | 23 | 506 | 60 | 4,400 |
| | | 24 | 528 | 61 | 4,510 |
| | | 25 | 550 | 62 | 4,620 |
| | | 26 | 660 | 63 | 4,730 |
| | | 27 | 870 | 64 | 4,840 |
| | | 28 | 980 | 65 | 4,950 |
| | | 29 | 1,090 | 66 | 5,060 |
| | | 30 | 1,100 | 67 | 5,170 |
| | | 31 | 1,210 | 68 | 5,280 |
| | | 32 | 1,320 | 69 | 5,390 |
| | | 33 | 1,430 | 70 | 5,500 |
| | | 34 | 1,540 | | |
| | | 35 | 1,650 | | |
| | | 36 | 1,760 | | |
| | | 37 | 1,870 | | |
| | | 38 | 1,980 | | |
| | | 39 | 2,090 | | |
| | | 40 | 2,200 | | |
| | | 41 | 2,310 | | |
| | | 42 | 2,420 | | |
| | | 43 | 2,530 | | |

3. In § 723.15, paragraph (b) is amended by changing the dollar amount “\$825” to “\$925.”

PART 845—CIVIL PENALTIES

4. The authority citation for Part 845 is revised to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 et seq., Pub. L. 100-34, Pub. L. 100-202, Pub. L. 100-446, Pub. L. 101-410, and Pub. L. 104-134.

5. Section 845.14 is amended by revising the table to read as follows:

§ 845.14 Determination of amount of penalty.

* * * * *

| Points | Dollars |
|--------|---------|
| 1 | 22 |
| 2 | 44 |
| 3 | 66 |
| 4 | 98 |
| 5 | 110 |
| 6 | 132 |

§ 845.15 [Amended]

6. In § 845.15, paragraph (b) is amended by changing the dollar amount “\$825” to “\$925.”

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