

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 723, 724, 845 and 846

[Docket ID: OSM-2009-0004]

RIN 1029-AC61

Civil Monetary Penalties

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.

DATES: *Effective Date:* November 28, 2009.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

- A. The Federal Civil Penalties Inflation Adjustment Act
- B. Method of Calculation
- C. Example of a Calculation
- D. Civil Monetary Penalties Affected by This Adjustment
- E. Effect of the Rule in Federal Program States and on Indian Lands
- F. Effect of the Rule on Approved State Programs

II. Procedural Matters and Required Determinations

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), as amended by the Debt Collection Improvement Act of 1996, requires Federal agencies to regularly adjust CMPs for inflation. 28 U.S.C. 2461, note. 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. We, the

Office of Surface Mining Reclamation and Enforcement (OSM), have adjusted the CMPs authorized by SMCRA on three previous occasions: November 28, 1997 (62 FR 63274), November 21, 2001 (66 FR 58644), and November 22, 2005 (70 FR 70698). As required by the Inflation Adjustment Act, we are again adjusting our CMPs according to the formula set forth in the law.

Under the Inflation Adjustment Act, the amount of the adjustment for a CMP is determined by increasing the CMP by the amount of the cost-of-living adjustment. The cost-of-living adjustment 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 [the CPI-U] published by the Department of Labor." See 28 U.S.C. 2461, note. The Inflation Adjustment Act specifies that any resulting increases in a CMP must be rounded according to a stated rounding formula. *Id.* The increased CMPs apply only to violations that occur after the date the increase takes effect. *Id.*

B. Method of Calculation

Because these adjustments will be effective before December 31, 2009, we are calculating the CMP increases based on the CPI-U inflation factor for the month of June 2008, which is 218.815. Because of the rounding formula contained in the Inflation Adjustment Act, we did not adjust all CMPs in 2001 or 2005. Thus, we are using three different multipliers for the current CMP adjustments.

First, for the CMPs that were last adjusted in 1997, we are using a multiplier of 1.3650 (a 36.5 percent increase). We arrived at this multiplier by dividing the CPI-U for June 2008 (218.815) by the CPI-U for June 1997 (160.3).

Second, for the CMPs that were last adjusted in 2001, we are using a multiplier of 1.2293 (a 22.93 percent increase). We arrived at this multiplier by dividing the CPI-U for June 2008 (218.815) by the CPI-U for June 2001 (178.0).

Last, for the CMPs that were last adjusted in 2005, we are using a multiplier of 1.1250 (a 12.50 percent increase). We arrived at this multiplier by dividing the CPI-U for June 2008 (218.815) by the CPI-U for June 2005 (194.5).

Any potential increase under these adjustments is subject to the rounding formula set forth in section 5(a) of the Inflation Adjustment Act. See 28 U.S.C. 2461, note. 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

The following example illustrates the inflation adjustment calculation based on a CMP that was last adjusted in 2005: Generally, OSM assigns points to a violation as described in 30 CFR 845.13. The CMP owed is based on the number of points received. So, under our existing regulations in 30 CFR 845.14, a violation totaling 70 points would amount to a \$6,500 CMP.

To adjust this amount, using the formula above, we multiply \$6,500 by the inflation factor of 1.1250, resulting in a raw inflation amount of \$7,312.50. Because the Inflation Adjustment Act requires us to round any increase in the CMP amount, we must then calculate the difference in the raw inflation amount and the existing penalty. So, we subtract the current penalty amount (\$6,500.00) from the raw inflation adjustment (\$7,312.50), which results in an increase of \$812.50.

The rounding formula in section 5(a) of the Inflation Adjustment Act specifies that if the penalty is greater than \$1,000 but less than \$10,000, the increase must be rounded to the nearest multiple of \$1,000. Therefore, we round \$812.50 up to \$1,000.00. Finally, we add the rounded increase (\$1,000.00) to the existing penalty (\$6,500.00), resulting in a new penalty amount of \$7,500.00.

For those CMPs that were last adjusted in 1997 or 2001, the calculation would be the same, but the multiplier would be either 1.3650 or 1.2293, instead of 1.1250. When the regulations in 30 CFR 845.14 were issued in 1982 (47 FR 35640), the amount of the civil penalty that was assessed increased by \$20.00 with each additional point that was assessed from 2 through 25, and the penalty increased by \$100.00 with each additional point

that was assessed from 25 through 70. For example, an assessment of 47 points resulted in a penalty of \$2,700.00, and an assessment of 48 points resulted in an assessment of \$2,800.00. Because of the rounding formula required by the law, the difference in the penalty amount for each additional point is no longer consistent in many instances.

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 parts 723, 724, 845, and 846. Because of the rounding formula specified in the Inflation Adjustment Act, we are only adjusting CMPs in four sections—30 CFR 723.14, 724.14, 845.14, and 846.14. When we review and adjust our CMPs in 2013, we will compare the CPI-U for June 2012 with the CPI-U for the year in which each CMP was last adjusted. In some instances that will be 2001, 2005, or 2009.

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: Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for those States appear at 30 CFR parts 903, 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 for in 30 CFR 750.18.

F. Effect of the Rule on Approved State Programs

Section 518(i) of SMCRA requires that the civil penalty provisions of each State program contain penalties which are "no less stringent than" those set forth in SMCRA. Our regulations specify that each State program "shall contain penalties which are no less stringent than those set forth in section 518 of the Act and shall be consistent with 30 CFR part 845." 30 CFR 840.13(a). In order to implement the penalty provisions of section 518(a) of SMCRA, we developed a point system for determining the amount of the CMP to assess for a violation of our regulations. 44 FR 15461-63 (Mar. 13, 1979). However, 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 CMPs, we cannot require the States to adopt the point system and civil penalty amounts found in 30 CFR 845.14. *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144, Mem. Op. (D.D.C. Feb. 26, 1980), 14 Env't Rep. Cas. (BNA) 1083. In response to the Secretary's request for clarification, the Court further stated that it could not uphold requiring the States to impose penalties as stringent as those appearing in 30 CFR 845.15. *In re Permanent Surface Mining Regulation Litigation*, No. 79-1144, Mem. Op. (D.D.C. May 16, 1980), 19 Env't Rep. Cas. (BNA) 1477. As a result of the litigation, 30 CFR 840.13(a) was suspended in part on August 4, 1980. 45 FR 51548. Consequently, State regulatory programs are not required to mirror all of the penalty provisions of our regulations.

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) 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. 5 U.S.C. 553(b). We have determined that under 5 U.S.C. 553(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 are ministerial, technical, and non-discretionary.

Executive Order 12866—Regulatory Planning and Review

This rule has been reviewed under the provisions of Executive Order 12866 and is not considered a significant regulatory action. This determination is based on the fact that the rule adjusts OSM's CMPs according to the formula contained in the Inflation Adjustment Act. OSM has no discretion in making the adjustments. Further, most coal mining operations subject to the rule 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.

Our civil penalty data for Fiscal Years 2005-2008 indicates that over a four year period, we collected an average of approximately \$129,000 annually for all violations. If we assume that the average annual collection remains constant at \$129,000, and we adjusted that collection figure for inflation using the largest inflation factor contained in this rule (36.50 percent), the CMPs collected annually under the new penalty amounts would result in an annual increase of approximately \$47,000 for a total CMP collection of \$176,000 annually. Because the majority of the increases are based on lower inflation factors (22.93 percent or 12.50 percent) the actual annual increase will be even less. Consequently, the annual increase in CMPs that we might reasonably expect to collect under the revised dollar amounts contained in this rule is substantially less than the \$100 million annual threshold contained in Executive Order 12866 for an economically significant rule. Based on the above data, we have determined that:

a. The rule will not have an annual effect of \$100 million or more on the economy, nor will it adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities.

b. The rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. The rule will not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. The rule does not raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this 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.*). As discussed above, the aggregate economic impact of this rulemaking on small business entities should be minimal, and affects only those who violate the provisions of SMCRA.

Small Business Regulatory Enforcement Fairness Act

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

1. Will not have an annual effect on the economy of \$100 million.
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. Will 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.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State local or tribal governments or the private sector. As previously discussed, the annual increase in CMPs that we might reasonably expect to collect under the revised dollar amounts contained in this rule is substantially less than the \$100 million annual threshold. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

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

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by the categorical exclusion listed in the Department of the Interior regulations at 43 CFR 46.210(i). That categorical exclusion covers policies, directives, regulations and guidelines that are of an administrative, financial, legal, technical, or procedural nature. We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

Executive Order 12988—Civil Justice Reform

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

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 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian tribes and have determined that the proposed revisions would not have substantial direct effects on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Executive Order 12630—Takings

Under the criteria in Executive Order 12630, this rule does not have significant takings implications; therefore, a takings implication assessment is not required. This determination is based on the fact that the rule will not have an impact on the use or value of private property.

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.”

Data Quality Act

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106–554).

List of Subjects*30 CFR Part 723*

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

30 CFR Part 724

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.

30 CFR Part 846

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

Dated: June 9, 2009.

Ned Farquhar,

Acting Assistant Secretary, Land and Minerals Management.

■ For the reasons set out in the preamble, 30 CFR parts 723, 724, 845 and 846 are amended as follows:

PART 723—CIVIL PENALTIES

■ 1. The authority citation for Part 723 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 *et seq.*, and 31 U.S.C. 3701.

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

§ 723.14 Determination of amount of penalty.

Points	Dollars
1	32
2	64
3	86
4	108
5	110
6	132
7	254
8	276
9	298
10	320
11	342
12	364
13	386
14	508
15	530
16	552
17	574
18	596
19	618
20	640

Points	Dollars
21	662
22	684
23	706
24	728
25	750
26	860
27	1,070
28	1,080
29	1,090
30	1,100
31	1,210
32	1,320
33	2,430
34	2,540
35	2,650
36	2,760
37	2,870
38	2,980
39	3,090
40	3,200
41	3,310
42	3,420
43	3,530
44	3,640
45	3,750
46	3,860
47	3,970
48	5,080
49	5,190
50	5,300
51	5,410
52	5,520
53	5,630
54	5,740
55	5,850
56	5,960
57	6,070
58	6,180
59	6,290
60	6,400
61	6,510
62	6,620
63	6,730
64	6,840
65	6,950
66	7,060
67	7,170
68	7,280
69	7,390
70	7,500

PART 724—INDIVIDUAL CIVIL PENALTIES

■ 3. The authority citation for Part 724 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 *et seq.*, and 31 U.S.C. 3701.

■ 4. Section 724.14 is amended by revising the first sentence of paragraph (b) to read as follows:

§ 724.14 Amount of individual civil penalty.

* * * * *

(b) The penalty shall not exceed \$7,500 for each violation. * * *

PART 845—CIVIL PENALTIES

■ 5. The authority citation for Part 845 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 *et seq.*, 31 U.S.C. 3701, Public Law 100–202, and Public Law 100–446.

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

§ 845.14 Determination of amount of penalty.

* * * * *

Points	Dollars
1	32
2	64
3	86
4	108
5	110
6	132
7	254
8	276
9	298
10	320
11	342
12	364
13	386
14	508
15	530
16	552
17	574
18	596
19	618
20	640
21	662
22	684
23	706
24	728
25	750
26	860
27	1,070
28	1,080
29	1,090
30	1,100
31	1,210
32	1,320
33	2,430
34	2,540

Points	Dollars
35	2,650
36	2,760
37	2,870
38	2,980
39	3,090
40	3,200
41	3,310
42	3,420
43	3,530
44	3,640
45	3,750
46	3,860
47	3,970
48	5,080
49	5,190
50	5,300
51	5,410
52	5,520
53	5,630
54	5,740
55	5,850
56	5,960
57	6,070
58	6,180
59	6,290
60	6,400
61	6,510
62	6,620
63	6,730
64	6,840
65	6,950
66	7,060
67	7,170
68	7,280
69	7,390
70	7,500

PART 846—CIVIL PENALTIES

■ 7. The authority citation for Part 846 continues to read as follows:

Authority: 28 U.S.C. 2461, 30 U.S.C. 1201 *et seq.*, and 31 U.S.C. 3701.

■ 8. Section 846.14 is amended by revising the first sentence of paragraph (b) to read as follows:

§ 846.14 Amount of individual civil penalty.

* * * * *

(b) The penalty shall not exceed \$7,500 for each violation. * * *

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