

# WEST VIRGINIA CODE: §22-11-22a

## **§22-11-22a. Civil penalties and injunctive relief; civil administrative penalties for coal mining operations.**

(a) Any person who holds a permit to operate a coal mining operation issued under article three of this chapter who violates any provision of any permit issued under or subject to the provisions of this article or article eleven-a of this chapter is subject to a civil penalty not to exceed \$25,000 per day of the violation and any person who violates any provision of this article or of any rule or who violates any standard or order promulgated or made and entered under the provisions of this article, article eleven-a of this chapter or article one, chapter twenty-two-b of this code is subject to a civil penalty not to exceed \$25,000 per day of the violation: Provided, That any penalty imposed pursuant to the Surface Coal Mining and Reclamation Act [§§ 22-3-1 et seq.] shall be credited against any enforcement action under this article for violations of standards protecting state waters.

(1) Any such civil penalty may be imposed and collected only by a civil action instituted by the secretary in the circuit court of the county in which the violation occurred or is occurring or of the county in which the waters thereof are polluted as the result of such violation.

(2) In determining the amount of a civil penalty the circuit court shall consider the seriousness of the violation or violations, the economic benefit, if any, resulting from the violation, any history of the violations, any good-faith efforts to comply with the applicable requirements, cooperation by the permittee with the secretary, the economic impact of the penalty on the violator, and other matters as justice may require.

(3) Upon application by the secretary, the circuit courts of the state or the judges thereof in vacation may by injunction compel compliance with and enjoin violations of the provisions of this article, article eleven-a of this chapter, the rules of the board or secretary, effluent limitations, the terms and conditions of any permit granted under the provisions of this article or article eleven-a of this chapter or any order of the secretary or board, and the venue of any such actions shall be the county in which the violations or noncompliance exists or is taking place or in any county in which the waters thereof are polluted as the result of the violation or noncompliance. The court or the judge thereof in vacation may issue a temporary or preliminary injunction in any case pending a decision on the merits of any injunction application filed. Any other section of this code to the contrary notwithstanding, the state is not required to furnish bond as a prerequisite to obtaining injunctive relief under this article or article eleven-a of this chapter. An application for an injunction under the provisions of this section may be filed and injunctive relief granted notwithstanding that all of the administrative remedies provided in this article have not been pursued or invoked against the person or persons against whom such relief is sought and notwithstanding that the person or persons against whom such relief is sought have not been prosecuted or convicted under the provisions of this article.

(4) The judgment of the circuit court upon any application filed or in any civil action instituted under the provisions of this section is final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals. Any such appeal shall be sought in the manner provided by law for appeals from circuit courts in other civil cases, except that the petition seeking review in any injunctive proceeding must be filed with said Supreme Court of Appeals within ninety days from the date of entry of the judgment of the circuit court.

(5) Legal counsel and services for the director, secretary or the board in all civil penalty and injunction proceedings in the circuit court and in the Supreme Court of Appeals of this state shall be provided by legal counsel employed by the department, the Attorney General or his or her assistants and by the prosecuting attorneys of the several counties as well, all without additional compensation, or the director, secretary or the board may employ counsel to represent him or her or it in a particular proceeding.

(b) The secretary may assess a civil administrative penalty whenever he or she finds that a person who holds a permit to operate a coal mining operation issued under article three of this chapter has violated any provision of this article or article eleven-a of this chapter, any permit issued under or subject to the provisions of this article or article eleven-a of this chapter or any rule or order issued pursuant to this article or article eleven-a of this chapter. A civil administrative penalty may be assessed unilaterally by the director in accordance with this subsection.

(1) Any civil administrative penalty assessed pursuant to this section shall not exceed \$10,000 per violation and the maximum amount of any civil administrative penalty assessed pursuant to this section shall not exceed \$125,000: Provided, That any stipulated penalties accrued after the date of the draft order shall not be included for purposes of determining the total amount of the civil administrative penalty. For purposes of this section, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(2) In determining the amount of any civil administrative penalty assessed under this subsection, the secretary shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of good faith, economic benefit or savings, if any, resulting from the violation, cooperation of the alleged violator, and such other matters as justice may require.

(3) No assessment may be levied pursuant to this subsection until after the alleged violator has been notified by certified mail or personal service pursuant to the West Virginia rules of civil procedure. The notice shall include a proposed order which refers to the provision of the statute, rule, order or permit alleged to have been violated, a concise statement of the facts alleged to constitute the violation, a statement of the amount of the administrative penalty to be imposed and a statement of the alleged violator's right to an informal hearing prior to the issuance of the proposed order.

(A) The alleged violator has thirty calendar days from receipt of the notice within which to deliver to the secretary a written request for an informal hearing.

(B) If no hearing is requested, the proposed order becomes a draft order after the expiration of the thirty-day period.

(C) If an informal hearing is requested, the director shall inform the alleged violator of the time and place of the hearing. The secretary may appoint an assessment officer to conduct the informal hearing and make a written recommendation to the secretary concerning the proposed order and the assessment of a civil administrative penalty.

(D) Within thirty days following the informal hearing, the secretary shall render and furnish to the alleged violator a written decision, and the reasons therefor, concerning the assessment of a civil administrative penalty. The proposed order shall be revised, if necessary, and shall become a draft order.

(4) The secretary shall provide the opportunity for the public to comment on any draft order by publishing a Class II legal advertisement in the newspaper with the largest circulation in the county in which the violation occurred, and by other such means as the secretary deems appropriate, which shall provide notice of the draft order, including the civil administrative penalty assessment. The secretary shall consider any comments received in determining whether to revise the draft order before issuance of a final order. During the thirty-day public comment period, any person may request a public hearing regarding the draft order and the secretary may grant or deny the request at his or her discretion. If a request for a public hearing is denied, the secretary shall provide notice to the person requesting a hearing and reasons for such denial.

(5) Within thirty days of the close of the public comment period on a draft order, the secretary shall issue a final order or make a determination not to issue a final order, and shall provide written notice by certified mail or personal service pursuant to the West Virginia rules of civil procedure to the alleged violator and shall provide notice by certified mail or personal service pursuant to the West Virginia rules of civil procedure to those persons who submitted written comments on the draft order during the public comment period.

(6) The issuance of a final order assessing a civil administrative penalty pursuant to subsection (b) of this section may be appealed to the environmental quality board pursuant to section twenty-one of this article. Any person who submitted written comments on a draft order during the public comment period shall have the right to file such an appeal or intervene in any appeal filed by the alleged violator.

(7) The authority to levy a civil administrative penalty is in addition to all other enforcement provisions of this article and the payment of any assessment does not affect the availability of any other enforcement provision in connection with the violation for which the assessment is levied: Provided, That no combination of assessments against a violator under this section

shall exceed \$25,000 for each violation: Provided, however, That any violation for which the violator has paid a civil administrative penalty assessed under this section may not be the subject of a separate civil penalty action. No assessment levied pursuant to this section becomes due and payable until at least thirty days after receipt of the final order or the procedures for review of the assessment, including any appeals, have been completed, whichever is later.

(c) In addition to the authorities set forth in this section, the secretary may also enter into agreements, settlements and other consent orders resolving alleged violations of this chapter.

(d) The secretary shall propose, for legislative review, rules, including emergency rules, in accordance with the provisions of article three, chapter twenty-nine-a of this code to establish procedures for assessing civil administrative penalties in accordance with this section by no later than July 1, 2015.