

DMN-2 / Mined Land Reclamation Law Civil Penalty Policy

New York State Department of Environmental Conservation

DEC Program Policy

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I. Summary

This policy describes the Department of Environmental Conservation's (DEC) procedures for enforcement of the Mined Land Reclamation Law (MLRL). Mining has been regulated under New York State since 1975 following the enactment of the MLRL in 1974. The MLRL is codified in ECL Article 23, Title 27, with implementing regulations at Subchapter D of Chapter IV of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [6 NYCRR Parts 420 – 425]. The MLRL directs DEC to foster and encourage the development of an economically sound and stable mining industry through the orderly development of mineral resources compatible with sound environmental management practices.

II. Policy

The enforcement process is integral to achieving the goals of the MLRL, namely, the orderly development of mineral resources and reclamation of lands affected by mining compatible with sound environmental management practices. This policy provides procedures for addressing violations of the MLRL, its implementing regulations, and permits issued pursuant thereto. The policy is intended to be implemented consistently with DEC's DEE-1: Civil Penalty Policy (Civil Penalty Policy, dated June 20, 1990) and OGC-11 (Order on Consent Enforcement Policy, dated February 27, 2020). While DEE-1 and OGC-11 establish DEC's overall policy and guidance for addressing violations of the ECL and its implementing regulations, this policy is intended to be specific to violations of the MLRL.

The procedures set forth in this document are intended solely for the use and guidance of DEC staff. They are not intended to create any substantive or procedural rights enforceable by any party in administrative or judicial actions with DEC or the State of New York. DEC reserves the right to act at variance with this policy and procedures at its discretion and based on the facts and circumstances of individual cases.

Any enforcement action should be part of a system that integrates all aspects of the DEC enforcement team, including Regional and Central Office Mined Land Reclamation (MLR) staff, Office of General Counsel (OGC) attorneys, Regional and Division Directors and Regional Enforcement Coordinators.

III. Purpose and Background

This policy establishes DEC's procedures to ensure compliance with statutes, regulations, and permits that regulate mining under the MLRL. The policy is intended to promote consistency in the enforcement of the MLRL by providing a framework for assessing penalties in administrative proceedings for violations based on the factors discussed below. This policy should always be applied on a case-specific basis with due regard for the circumstances involved in each matter.

DEC's primary goal in enforcement of the MLRL is to protect the environment and public health and welfare. To achieve this objective, it is necessary to act against persons or entities that violate the MLRL. The purpose of enforcement is to achieve compliance with the law, to deter future violations, and, when necessary, to punish unlawful conduct. DEC will use its statutory and regulatory powers to achieve compliance with the MLRL. DEC's imposition of penalties, along with sanctions, should be calculated to promptly obtain compliance and to make compliance more attractive and less expensive than non-compliance. DEC enforcement activities should remove economic benefit, deter, and punish unlawful conduct, and require timely remedial action. While significant violations generally take priority, all types of non-compliance should receive enforcement attention. However, DEC should utilize its enforcement resources in a manner calculated to obtain the greatest environmental benefit.

IV. Responsibility

The Division of Mineral Resources (DMN) has primary responsibility for administering this policy. Typically, each DEC Regional Mined Land Reclamation Supervisor is responsible for ensuring that a case has merit, that the record is thorough and supports the enforcement action, and that use of the enforcement response tools by their staff is appropriate. DEC's Central Office and Regional OGC staff will provide support as needed.

V. Procedure for Calculating Civil Penalties

DEC staff should calculate penalties for MLRL violations consistent with the framework provided in DEE-1. The starting point is determining the statutory maximum penalty. Staff must then consider (1) the gravity of the offense and (2) any economic benefit realized by the violator as a result of non-compliance.

Specifically, DEC staff should document the statutory maximum penalty in their referral to OGC. Penalties for mining violations are set forth in ECL Section 71-1307, which provides that any person who violates any provision of ECL Article 23, or commits any offense described in section 71-1305, shall be liable for a civil penalty not to exceed \$8,000 per violation and an additional \$2,000 dollars for each day during which such violation continues, to be assessed by the Commissioner after an opportunity to be heard. For purposes of calculating penalties, each violation should be considered and assessed a separate amount. For example, encroaching on the regulatory setback is a separate violation from allowing fugitive dust to leave the site; each warrants a separate penalty assessment.

A. Gravity Component

Consistent with DEE-1, the gravity component has two elements. First, the penalty should be proportional to and reflect the potential harm or actual damage to the environment or human health, or both. Second, the penalty should reflect the importance of the violated requirement relative to the goals of the MLRL. For example, a mining activity that resulted in release of sediments into a protected stream that contravened water quality standards should lead to an increased penalty amount as compared to a release that did not contravene water quality standards. Mining that

resulted in the loss of residential water supply would justify a higher civil penalty than mining that occurred below the permitted depth of excavation without any harm to the residential water supply. Generally, the longer a violation continues uncorrected, the greater the harm or risk of harm to the environment, and thus a higher dollar amount for gravity should be assessed or justified. Tables 1 and 2 below provide a more detailed application of the gravity component. As noted below and in DEE-1, penalty amounts may be adjusted upward or downward depending on the presence of aggravating or mitigating factors, including culpability, violator cooperation, history of non-compliance, ability to pay and other factors. Staff may exercise independent judgment to deviate from the penalty ranges, consistent with this policy and DEE-1. Individual circumstances may warrant assessment of higher or lower penalties and this policy does not preclude staff from exercising their discretion to seek such penalties as appropriate, provided the penalty guidelines of this and other enforcement policies are followed. The penalty amounts calculated under this policy in adjudicated cases, on average and consistent with considerations of fairness, should be higher than penalty amounts that DEC accepts in consent orders or other settlement agreements.

Assessing Potential and Actual Harm of Violation

Table 1 below characterizes violations based on their potential to harm, or the actual harm caused to the environment and natural resources or the property, health, safety, and general welfare of the people of the State. The listings in Table 1 are not exhaustive, but are intended for use as a guidepost to assess violations from mining operations. Other factors may contribute to a high potential for harm even if the violation is listed as a moderate or low potential of harm. Each violation should be addressed by examining its potential for harm consistent with this policy and DEE-1.

Table 1 - Assessing Potential and Actual Harm

High	<ul style="list-style-type: none"> • The violation causes or has the potential to cause harm to property, health, safety, and general welfare of the people of the State. • The violation causes or has the potential to cause a “take” of an endangered or threatened species. • The violation causes or has the potential to cause significant damage to protected environmental and natural resources of the State. • The action undertaken was not permitted and as undertaken would not meet permitting standards (example: constructing a haul road outside the Life of Mine that affects the 100-foot buffer of a regulated wetland where there were alternatives routes within the Life of Mine for the haul road). • The exceedance is significantly greater than limits imposed by statute, regulation, or the permit (example: an air blast whose decibel (dB) greatly exceeds the permitted maximum).
Moderate	<ul style="list-style-type: none"> • An unpermitted activity that can be addressed through a permit modification and mitigation (example: use of unauthorized processing equipment is subsequently permitted with adequate noise mitigation). • The exceedance is moderately greater than limits imposed by statute, regulation, or the permit (example: an air blast whose dB moderately greater than the permitted maximum).
Low	<ul style="list-style-type: none"> • The failure to comply does not cause harm, but the regulatory requirement violated is intended to prevent harm or other violations (example: not having permit term markers to mark the boundary of permit term area). • The violation is an action that could be authorized with a permit modification and does not require mitigation (example: affecting the buffer when the permittee owns the adjacent property). • The exceedance is nominally greater than limits imposed by statute, regulation, or the permit.

Violation Classification: Assessing Importance to Regulatory Scheme

To assess the importance of the violation to MLRL’s regulatory scheme, the policy designates three classes of violations considering the importance of the requirement to achieving the goals of the MLRL. These goals include ensuring that mining activities are conducted in a manner protective of the environment, lands affected by mining are reclaimed, and public health and welfare are protected.

Class 1 violations are the most serious because they frustrate the goals of the MLRL and threaten the ability of DEC to assure the policy objectives of the MLRL are

met. For example, mining without a permit is a serious matter. It deprives DEC of the ability to monitor mining operations and the opportunity to assess appropriate financial security to ensure the reclamation of the affected area when mining activity ceases.

Class 1 violations require the immediate attention of the Regional Mined Land Reclamation Specialist and the DEC Regional Attorney. These violations should be assessed penalties at the highest penalty range considering all the factors discussed in this policy. A long-form consent order is one example of an appropriate enforcement mechanism for these violations — recognizing that sometimes formal enforcement may be necessary.

Class 2 violations are also serious violations of the MLRL and its regulations. Class II violations require a prompt response from MLR Staff and the DEC Attorney to return the violator to compliance. Class 2 violations should be assessed penalties at the middle penalty range considering all the factors discussed herein. A long-form or short-form consent order are examples of appropriate enforcement mechanisms for these violations.

Class 3 violations are violations of the daily, routine maintenance requirements typically specified in a permit as special permit conditions or general permit conditions. Class 3 violations should be promptly addressed to the extent legal and technical resources are available. A written Notice of Violation with a short time to remedy the violations is an appropriate enforcement mechanism for these Class 3 violations, when they occur independent of other violations. For repeated or willful Class 3 violations, a long-form or short-form consent order are examples of appropriate enforcement mechanisms.

Table 2 describes the classes of MLRL violations, in accordance with DEE-1 as discussed above. The descriptions are not exhaustive but are intended to provide examples in implementing this policy.

Table 2 - Classification of Mining Violations

Class 1	<ul style="list-style-type: none"> • Mining without a permit. • Failure to maintain financial security. • Flyrock leaving the property. • Unpermitted Silt-laden stormwater discharges from the life of mine • Mining outside the approved Life of Mine¹ boundary, horizontally and/or vertically (<i>i.e.</i>, mining below approved final elevations, mining into slope setbacks from property lines or easements). • Unauthorized mining below the water table. • Exceedances of ground vibration and air blast limits. • Failure to initiate reclamation within two years of ceasing mining activities. • Failure to strip and save soil required for reclamation. • Repeated or willful violations of Class 2 violations.
Class 2	<ul style="list-style-type: none"> • Affecting the buffer with mining activities other than excavation (example: grubbing and stripping of topsoil, stockpiling, hauling). • Mining beyond the permitted separation from groundwater. • Unauthorized importation of off-site material. • Operating outside permitted hours of operations, including blasting outside of permitted blasting hours. • Failing to prevent fugitive dust from leaving the property. • Failure to monitor a blast in accordance with permit conditions. • Constructing and/or operating a new access road not previously reviewed and approved. • Operating unauthorized processing equipment. • Failure to report a spill. • Failure to pay annual regulatory program fees. • Repeated or willful violations of Class 3.
Class 3	<ul style="list-style-type: none"> • Importing aggregate from other permitted sources without authorization. • Failure to delineate the permit term area/Life of Mine boundary with markers. • Using an unapproved pre-existing access road. • Tracking of material onto public road. • Failure to submit required reports or monitoring data to DEC. • Stripping topsoil outside the authorized permit term area but within the approved Life of Mine boundary.

¹ Life of Mine refers to the maximum extent of the area that is planned to be mined and reclaimed at the mine location and includes all area and the whole action reviewed as part of the State Environmental Quality Review.

The potential harm or actual harm caused by the violation and violation classification must be considered together to determine the gravity component of the civil penalty. The penalty matrix below is a tool to enable DEC staff to consider these factors on a case-by case-basis and arrive at an appropriate penalty amount given the severity of violation and significance of the regulatory requirement violated.

Penalty Matrix For Gravity Component

Statutory Daily Penalty \$8,000 For the First Day \$2,000 Each Additional Day		Violation Class (Importance to Regulatory Scheme) (See Table 2)		
		Class 1	Class 2	Class 3
Potential or Actual Harm (See Table 1)	High	100-80%	80-60%	60-40%
	Moderate	80-60%	60-40%	40-20%
	Low	60-40%	40-20%	20-10%

B. Economic Benefit Component

Under DEE-1, DEC also seeks to recover the economic benefit to the violator of non-compliance with the law and regulations. An economic benefit of noncompliance is frequently realized where property has been mined without a permit, and the violator can obtain a profit by selling the commodity excavated without incurring regulatory costs.

Factors that staff should evaluate to determine the economic benefit obtained by the violator include, but are not limited to, physical land disturbance, cost of remediation, economic value of the type and quantity of the commodity mined less overhead (profit), and costs avoided by noncompliance, such as the costs to prepare the mined land use plan through professional consultation, avoidance of permit regulatory fees, and the cost to maintain financial security for reclamation.

As discussed in DEE-1, DEC may, in its discretion, settle for less than the economic benefit of noncompliance under the following three circumstances. First, if the economic benefit of noncompliance is minor, DEC may decide not to seek the benefit component of the penalty. Second, there may be a compelling public interest not to seek the economic benefit if recovery of the benefit would result in business closures or bankruptcies, if a not-for-profit entity is involved, or if recovery of the benefit would disrupt essential public services. However, staff should seek the economic benefit of non-compliance if the regulated entity is likely to discontinue operations regardless of whether or not there are additional financial penalties or if there is a likelihood of continued harmful non-compliance.

C. Summary of Penalty Calculation Steps with Examples

To summarize, the following steps should be used to determine the civil penalty for each violation:

1. Determine number of days that the violation has occurred.
2. Calculate the maximum daily statutory penalty.
3. Determine the potential for harm or actual harm of the violation (high, moderate, low) using the criteria in Table 1.
4. Determine the classification of the violation to the MLRL (Class 1, Class 2, Class 3) using the criteria in Table 2.
5. Select the appropriate penalty range in the Penalty Matrix to calculate the civil penalty utilizing the importance of the violation (high, moderate, low) and its classification (Class 1, Class 2, Class 3).
6. Based on the penalty adjustment factors as applied to the specific case, select an appropriate value within the selected Penalty Matrix range based on case-specific factors.

7. Multiply the maximum daily penalty based on statute by the value selected above to determine the penalty.
8. Add the gravity component penalty calculated for each of the violations together to get the total penalty.
9. Calculate the economic benefit realized from non-compliance for each violation, as appropriate and if available. Adjustments may be made to the calculated penalty in consideration of the economic benefit of noncompliance of realized.

The examples below are for illustrative purposes only and are not intended to limit DEC's discretion to determine an appropriate civil penalty amount on a case-by-case basis consistent with this policy and DEE-1.

Example 1: Silt-laden stormwater discharge from the Life of Mine, occurring for 4 days, discharged directly to a Class C(t) stream. Maximum daily penalty for 4 days is \$14,000 (\$8k + \$2k + \$2k + \$2k). This is a class 1 violation with a high potential for harm (100-80%). No fish kill occurred, so the lower limit of the percent range could be selected. Therefore, the penalty based on the gravity component would be \$11,200 (\$14k x 80%). The economic benefit of noncompliance is the savings from not installing erosion control, estimated at \$4,000. This amount is less than the calculated gravity component. Staff can take this into account when determining the final penalty amount.

Example 2: Mining into the water table in a 1-acre area, 30 ft deep, at a sand and gravel 10-acre Life of Mine. Occurring for 1 month (20 operating days). Maximum daily penalty for 20 days is \$46,000. This is a class 1 violation with a moderate potential for harm. The area affected is relatively small, therefore, the lower limit of the percent range could be selected. Therefore, the penalty for mining into the water table would be \$27,600 (\$46,000 x 60%). In conjunction, the material excavated was removed from the site via a pre-existing unauthorized access road. The maximum daily penalty for 20 days is \$46,000. This is a class 3 violation with a low potential for harm. Therefore, the penalty for using the access road would be \$4,600. The total penalty based on the gravity component would be \$32,200 (\$27,600 + \$4,600). The economic benefit of non-

compliance was the profit realized from the sale of the material excavated below the water table, estimated at \$40,000. This amount is more than the calculated gravity component. Staff can take this into account when determining the final penalty amount and may consider a total penalty higher than the gravity component alone.

D. Other Policy Considerations

Suspended penalties may be utilized consistent with DEE-1. Staff must document its determination regarding a suspended penalty determination and maintain it in the case file. DEE-1 provides guidance on what portion of a penalty may be suspended. The respondent will not be required to pay the amount suspended if the respondent complies with all provisions of the consent order. DEE-1 also provides guidance on use of stipulated penalties.

While it is important to obtain compliance, remedial measures and abatement actions alone are not sufficient and do not replace the need for penalties. The fair and appropriate penalty is one that puts the violator at a disadvantage compared to those who voluntarily comply with the law. In any case, DEC may exercise prosecutorial discretion in appropriate cases.

VI. Related References

1. DEE-1: Civil Penalty Policy, dated June 20, 1990, <https://www.dec.ny.gov/regulations/25227.html>.
2. OGC-11: Order on Consent Policy, dated February 27, 2020, https://www.dec.ny.gov/docs/legal_protection_pdf/ogc11orderonconsentpolicy2020.pdf or site to <https://www.dec.ny.gov/regulations/2379.html>
3. CP-37: Environmental Benefit Project (EBP), dated October 7, 2005.
4. ECL Article 23, Title 27, <https://www.nysenate.gov/legislation/laws/ENV/A23T27>
5. Subchapter D of Chapter IV of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR Parts 420 – 425), [https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=lee36b360b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)&bhcp=1](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=lee36b360b5a011dda0a4e17826ebc834&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)&bhcp=1)
6. ECL Article 71, Title 13 (ECL Section 71-1305, 71-1307) Enforcement of Article 23, Offenses, Sanctions, <https://www.nysenate.gov/legislation/laws/ENV/71-1305>, <https://www.nysenate.gov/legislation/laws/ENV/71-1307>