



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
**COMMISSION ON WATER RESOURCE MANAGEMENT**  
P.O. BOX 621  
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

October 1, 2014  
Honolulu, Hawaii

Penalty Guidelines (G14-01) (Revising G01-01)

SUMMARY

The purpose of this action is to update and revise the Commission Penalty Guidelines (G01-01) to: 1) include a flat administrative fee of \$500.00 where a violation is initially confirmed; and 2) update the Commission's penalty guideline to conform to Haw. Rev. Stat. §174C-15(b) (2004) by increasing the maximum daily fine from \$1,000 to \$5,000 per violation as authorized by Act 142, SLH 2004 (June 6, 2004).

LOCATION: Statewide

BACKGROUND:

Since 1987, the Commission has investigated more than 130 violations and assessed fines in excess of \$1,751,861. With each violation and subsequent sanction, the Commission staff had to evaluate the similarities and differences among the various kinds of violations and assess penalties in some proportionate manner.

On September 15, 1999, the Commission adopted the Penalty Guidelines (G99-01) but asked for more descriptive criteria and factors for use in calculating the minimum fine. The Commission also requested that the penalty guidelines be revised to offset any undue economic gain that would result by committing a violation.

On April 18, 2001, the Commission adopted a Revised Penalty Guideline (G01-01) (Exhibit 1) that included: 1) additional considerations to address the reasonableness of the sanctions; 2) more descriptive criteria and factors to apply in calculating the minimum fine (Section IV B, Duration of Violations, addresses the notice of violations, the violation start date, and sanctions based on the mitigative efforts of the violators); 3) who should be responsible for the sanctions, where multiple parties are involved; and 4) educational outreach to inform landowners of the need for permits from the Commission.

On June 6, 2004, Act 142, SLH 2004, increased the maximum fine from \$1,000 to \$5,000. Haw. Rev. Stat. §174C-15(b). The Penalty Guideline (G01-01) was never formally brought to the Commission to update, but has been implemented in conformance with Act 142.

On June 18, 2014, the Commission deferred action on an after-the-fact violation for Paul Dolnick (SCAP.3790.8) for violations at Waikolu Stream, North Hilo District, Hawaii, TMK: (3) 3-2-002:046, 047, 999 and 3-2-003:003, 008, 999. The Commission asked the staff to revise the penalty guideline to include administrative fees. This action will do that.

### DISCUSSION:

In the past the staff has revised the Penalty Guideline to account for notice, differing circumstances, durations, equitable and monetary relief considerations. The flowchart in Exhibit 2 illustrates these considerations. This also incorporated the Department's Civil Resource Violation System ("CRVS"), which provides for the collection of administrative actions, fees, and penalties. The amendment proposed here would simply adopt a flat \$500 administrative fee in all situations in which a violation has been confirmed and a written notice of potential violation issued.

Past violations provide some framework for estimating administrative fees. Several major fines in the past were substantial (\$453,000 against Kamehameha Schools for Lalakea Ditch violations, \$539,000 against City and County of Honolulu for over-pumping violations on Oahu, \$172,500 against Kabushiki Kaisha Oban for unpermitted well work). These large fines account for \$1,164,500 or more than 66% of the \$1,751,861 in penalties in the past 25 years. The remaining 130 violations accounted for only \$587,361 (an average of \$4,518 / violation).

It takes on average one full-day to investigate a potential violation and issue a written notice of potential violation. If the violation is on an outer island, then travel and lodging costs must be added. Outer island personnel in other DLNR divisions can sometimes assist in simple and routine investigations that do not require specialized knowledge, but there is a limit to how much we may ask of others to do our work.

Given the staff's experience in the initial phases of noticing violations (see Exhibit 2 flowchart), we estimate that a flat \$500 fee is reasonable (if actually understated). A flat fee avoids the difficulties of bookkeeping in every case. The flat administrative fee would apply to all violations at this stage regardless of the violator or the complexity of the violations. If violations prove more complex or result in further compliance and penalty issues, then further sanctions and penalties may be imposed. The flat \$500 initial administrative fee addresses the bulk of the violations and makes administration clear and simple.

The new Penalty Guideline (G14-01) is attached as Exhibit 3. New language is bold and underlined. Deletions are line-stricken out for easy comparison between the current and proposed revised penalty guidelines. As a visual aid, the Exhibit 2 flowchart shows the flat \$500 administrative fee to cover average initial staff costs in the NOV (notice of violations) box.

RECOMMENDATION:

Staff recommends that the Commission adopt the new Penalty Guidelines (G14-01) attached as Exhibit 3.

Respectfully,



WILLIAM M. TAM  
Deputy Director

Exhibits:

1. Penalty Guideline G01-01.
2. Penalty Calculation for Violations - Flowchart.
3. Revised Penalty Guideline G14-01.

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.  
Chairperson



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ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G01-01)  
COMMISSION ON WATER RESOURCE MANAGEMENT  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
STATE OF HAWAII

I. GOALS

This penalty guideline seeks to provide a logical and consistent means to assess penalties and guide the settlement of Commission on Water Resource Management (Commission) enforcement cases. The Commission and staff should use this system to:

- A. Deter violations;
- B. Remove the economic benefit of violations;
- C. Provide fair treatment of the regulated community; and
- D. Offer the violator a chance to undertake a beneficial alternative, under proper conditions, in a partial or total replacement of a cash penalty.

II. LEGAL AUTHORITY

Hawaii Revised Statutes (HRS) § 174C-15 provides for fines of up to \$1,000 for any violation of any provision of HRS § 174C. For a continuing offense, each day during which the offense is committed is a separate violation.

Administrative Rule § 13-167-10 provides for fines of up to \$1,000 for any violation of any provision of Title 13, any permit condition or limitation established pursuant to Title 13, or for negligent or willful failure to comply with any final order of the Commission. For a continuing offense, each day during which the offense is committed is a separate violation.

III. APPLICABILITY

- A. This guideline applies to the Commission programs, which include but are not limited to:
  - 1. Measuring and reporting of water data;
  - 2. Well Construction and Pump Installation Permits;
  - 3. Stream Diversion Works Permits;
  - 4. Stream Channel Alteration Permits;

5. Instream Use Protection Program;
6. Instream Flow Standards;
7. Water Use Permits;
8. Violations of any permit issued by the Commission;
9. Violations for failure to comply with final orders issued by the Commission; and
10. Violations of Hawaii Administrative Rules Title 13.

B. This guideline is only for use by Commission personnel. The guideline is not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the Commission on Water Resource Management, Department of Land and Natural Resources or the State of Hawaii. The Commission's staff reserves the right to act at variance with this guideline and to change it at any time without notice. The Commission's staff expects to change this guideline as it gains experience with the guideline's implementation.

#### IV. PENALTY CALCULATION METHOD

A. The Commission's staff shall calculate an initial minimum penalty figure for daily fines for settlement purposes based on the following:

1. Finding of violation = \$250 per day/incident
2. Occurring in Water Management Area = \$250 per day/incident
3. Repeat Violation = \$250 per day/incident

(A repeat violation is deemed to occur when the party has previously been found to be a violator by the Commission. A repeat violation is tied to the party involved and is irrespective of the nature of the violation.)

B. Adjustments to Initial Minimum Penalty Figure in Section A: Mitigative and Gravity Factors.

Reduction or enhancement of any recommended fine will be made based on: (1) the degree of risk or actual harm to water resources or the environment and (2) specific factors listed below. Where the risk or actual harm is slight, reduction of the recommended fine should be considered and where the risk or actual harm is great, enhancement of the recommended fine should be imposed.

1. Mitigation Component

Mitigative factors can be considered in the recommendation of any fine or alternative penalty. Presence of one or more mitigative factors can reduce or eliminate the fine or alternative penalty recommendation. Mitigative factors include but are not limited to: insignificant impact on the resource, attempt to remedy the violation without notice, good faith effort to remedy violation once noticed, self reporting in a timely manner, and diligent and speedy effort to remedy the violation once noticed.

2. Gravity Component

Gravity factors can be considered in the recommendation of any fine or alternative penalty. Presence of one or more gravity factors can enhance the fine or alternative penalty recommendation. Gravity factors include but are not limited to: significant risk of or actual damage or harm to the water resources or the environment, multiple or repeat violations of the code or regulations, evidence that the violator should have known about the violation, refusal to correct the violation once noticed, failure to meet deadlines as set by the Commission or its staff.

C. Calculation of the Number of Days for the Recommended Fine.

1. If one or more of the gravity components are met, a daily fine may be imposed. Those fines shall accrue on the following basis:
  1. Violation where no permit is issued and no prior permits have been issued or no permit is required.  
The date the violation has occurred.
  2. Violation where no permit is issued but prior permits have been issued  
The date the violation has occurred.
  3. Violation where permit has been issued  
Either:
    - a. The date the violation has occurred
    - b. The date of permit approval
    - c. The date permit issued
    - d. The date of Commission meeting for conditions or deadlines imposed by the Commission not contained in a permit
  4. Tolling. In calculating a recommendation for the imposition of a daily fine, the time may be tolled for upon the filing of a permit application, satisfactory progress in addressing the violation, or for good cause.
  5. End. In calculating a recommendation for the imposition of a daily fine, the period of the violation ends upon: (1) satisfactory resolution of the violation, or (2) removal or remedy of the violation.

- D. No staff recommendation shall exceed the maximum amount allowable in Section 174C-15, HRS.

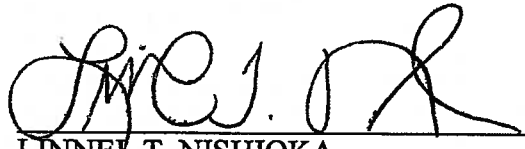
## V. ALTERNATIVE SETTLEMENT

The following considerations will guide the Commission's staff recommendation in deciding whether to allow a project to substitute for or be credited against a cash penalty. However, any finding of a violation by the Commission shall result in a minimum one-time \$500 cash fine in addition to an alternative settlement. Failure to successfully meet the alternative will result in re-institution of the fines as calculated in IV.

1. The project must be something that the violator was not required to do anyway, either because of legal or other obligation. Projects committed to, or started before a settlement is finally agreed upon may be eligible for credit, but such projects must be carefully examined to determine the extent to which they resulted from the enforcement case or were due to other factors, or prior plans or commitments. In some cases, partial credit may be appropriate.
2. The project must result in new water resources (including aquatic biota) information, provide water resources education, or benefit the water resources of the state.
3. The project may consist of corrective action to be completed within a timeframe established by the Commission. Failure to abide by the timeframe will result in re-institution of the fines as calculated in IV.

## VI. FUTURE APPLICATIONS

Future applications from an applicant who has not paid fines or met alternative settlements or for a project with outstanding violations may be considered incomplete until sanctions are fulfilled and/or violations are corrected.



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LINET T. NISHIOKA  
Deputy Director

# PENALTY CALCULATION FOR VIOLATIONS – FLOWCHART

(HRS §174C-15 & §13-167-10, §13-168-3, §13-169-3, CWRM POLICY 14-01)

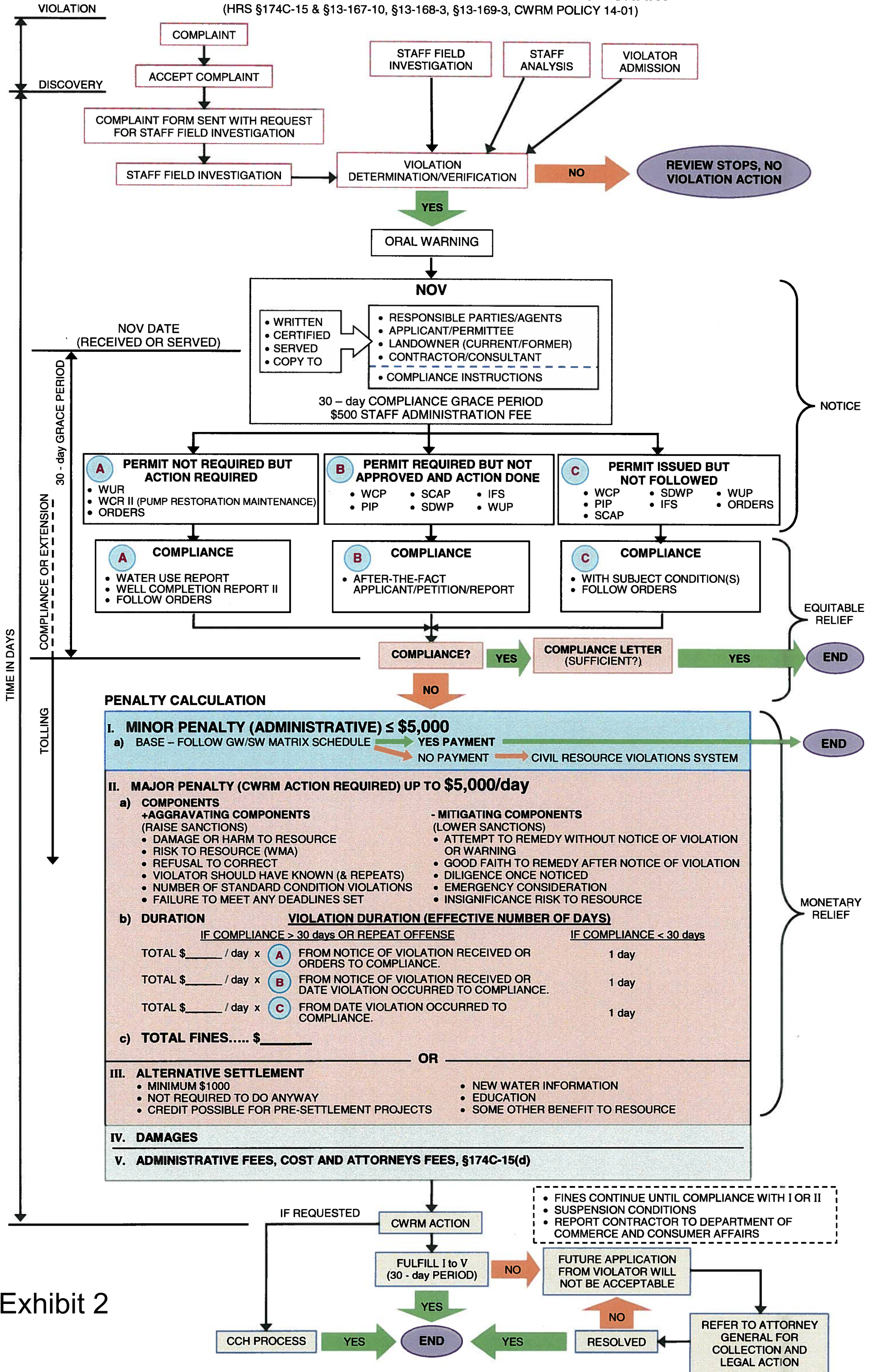


Exhibit 2





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**Act 142, approved on June 6, 2004, updated the maximum fine limit from \$1,000 to \$5,000 in 174C HRS.**

III. APPLICABILITY

- A. This guideline applies to the Commission programs, which include but are not limited to:

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#### **IV. INITIAL STAFF ADMINISTRATIVE FEE**

**An administrative fee of \$500 shall be assessed with the issuance of a written notice of violation.**

#### **IV.V. PENALTY CALCULATION METHOD**

- A. The Commission's staff shall calculate an initial minimum penalty figure for daily fines for settlement purposes based on the following:

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