

APPENDIX **P**

Administrative and Civil Penalty Guideline

Water Resource Protection Plan 2019 Update



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
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ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G14-01)
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 provided 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 provided 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.

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:

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. INITIAL STAFF ADMINISTRATIVE FEE

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

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:

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.

VI. 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.

VII. 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.