

Levying Civil Penalties

Contact: Policy and Planning Section Effective Date: 5/13/2009

Purpose: To provide guidance to Water Resources Program staff on the compliance and enforcement process, and to provide for the consistent levying of penalties.

Application: This guidance applies to the issuance of all penalties except those that are related to well construction violations under RCW 18.104.155.

Background:

Civil penalties are enforcement tools that provide an economic motivation to change behavior and ensure compliance with the law. Civil penalties are not issued to punish the violator, but to correct environmental regulatory violations and deter future violations.

The Water Resource Program's authority to levy penalties is found in the following statutes:

- Water Code (1917) Chapter 90.03 RCW;
- Floodplain Management (1935) Chapter 86.16 RCW;
- Regulation of Public Ground Waters (1945) Chapter 90.44 RCW;
- Department of Ecology (1970) Chapter 43.21A RCW;
- Water Resources Act of 1971 Chapter 90.54 RCW;
- Water Well Construction Act (1971) Chapter 18.104 RCW.

The Water Resources Program may levy civil penalties ranging from \$100 to \$5,000 per day per violation of any provision of chapters 43.83B, 90.03, 90.22, and 90.44 RCW. The program may also levy a civil penalty for violations of rules, regulatory orders, permits, and similar documents adopted or issued under these chapters.

This guidance is intended to guide Water Resources Program staff, and facilitate consistency among staff in levying civil penalties. Further, this guidance explains the programs interpretation of the applicable laws and regulations. This document provides guidance to staff but does not prescribe specific monetary penalty amounts in specific cases. When determining the range of a civil penalty in a specific case, Water Resources Program staff have discretion to set a penalty amount based on the results of their investigation.

Compliance/Enforcement Process

The Water Resources Program strives to gain voluntary compliance with state water law. This is done by providing technical assistance through a network of compliance and enforcement staff including water masters, stream patrollers, and other assigned staff. When voluntary compliance is not obtained, a sequence of increasingly stringent actions is used to take consistent, fair, and

assertive enforcement actions. These actions can end in a Penalty Order, or in rare cases, a criminal violation. We choose and conduct compliance and enforcement actions keeping in mind these goals and objectives.

The enforcement tools available to Water Resources Program compliance and enforcement staff include both informal and formal options.

Informal options

- Verbal or Written Warnings: A verbal warning or warning letter may be issued when Ecology has received a complaint and a preliminary investigation shows a potential or actual violation. Verbal warnings and warning letters are not appealable actions. They are appropriate for less serious violations, or to request actions to prevent violations before they occur (RCW 90.03.605(1)(b)).
- Notice of Correction: Staff may recommend issuance of a Notice of Correction when they have observed and documented a violation during an inspection or investigation, but not during a technical assistance visit. It is an informal enforcement action and is not appealable (RCW 43.05.060).

Formal options

- Notice of Violation: A Notice of Violation informs the responsible party of a violation of law or agency rule, and what they must do, by a specific date, to achieve compliance. A Notice of Violation is a formal enforcement action and is an appealable action, requires a docket number, and is issued by certified mail or delivered in-person¹.
- Administrative Order: An Order is a formal requirement to correct or prevent a documented violation. An Administrative Order is an appealable action, requires a docket number, and is issued by certified mail or delivered in-person¹.
- Notice of Penalty: A Notice of Penalty is a formal enforcement action that issues a financial penalty. It is an appealable action, requires a docket number, and is issued by certified mail or delivered in-person¹.
- Criminal Violation: A criminal violation is any crime against the Water Code. Unauthorized use of water, interference with works, wrongful use of water, property destruction, or obstruction of right of way are all considered criminal misdemeanors (RCW 90.03.400 through 90.03.420).

Nothing in this guidance is intended to prevent the programs compliance and enforcement staff from taking immediate action to cause a violation to be ceased immediately if, in their opinion,

¹ Other delivery methods may be used for persons outside the United States or if these attempts fail to deliver the mailing.

the nature of the violation is causing harm to other water rights or to public resources (RCW 90.03.605(2)).

Consistent Penalties

After the program has decided to issue a penalty, the amount is calculated using a penalty matrix (attachment 1). The matrix is not intended to determine if a penalty is appropriate, but rather it enables the program to be consistent in the penalty amounts levied.

Penalties are set by RCW 90.03.600 from a minimum of \$100 to a maximum of \$5,000 per day, per violation. The penalty matrix will be used to determine the amount to levy for each violation amount, up to the statutory maximum. Each violation is a separate and distinct offense. For continuing violations, every day the violation continues constitutes a separate and distinct violation.

Pursuant to RCW 90.03.600, the procedures outlined in RCW 90.48.144 apply to all phases of levying a penalty and reviewing and appealing a Penalty Order. In determining the amount of a penalty, staff considers:

- The seriousness of the violation.
- Whether the violation is repeated or continuous after a verbal or written warning has been provided.
- Whether damage has occurred to the health or property of others.

Damage to the health of the environment, and whether the violator gained an economic benefit through the violation, are also factors that may be considered when calculating penalties.

The penalty matrix uses a series of questions designed to help determine the amount of a civil penalty, including considerations of:

Prior behavior of the violator

Consideration of the violator's prior behavior includes taking into account whether the violation is repeated or continuous after the violator(s) were aware of the violation, steps taken to comply, and opportunities the violator had to correct the violations.

Specific criteria include:

- Record of similar violations or a pattern of violations indicating general disregard of environmental laws and rules.
- Precautions taken to prevent the violation.

Remedial actions taken by the violator to correct the problem

Includes the degree the responsible party cooperated with Ecology to gain compliance, and how timely and appropriately corrective actions were taken.

Damage to the health or property of others, or to the environment

Involves the gravity of the damage to the environment, human health, or the property of others, and the circumstances of its occurrence. Environmental effects include, but are not limited to, waste of water, theft of water, lowered water tables, impaired streamflows, and impairment of senior water rights.

Specific criteria include:

- Whether the damage was due to negligence, recklessness, or was intentional.
- The duration and number of specific violations.
- Whether the responsible party gained an economic benefit through the violation.

Magnifying factors

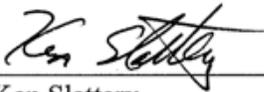
- If the violator has a history of repeat or continuous violations of the same nature, the minimum amount of the penalty is \$1000.
- If the violator has a history of previous penalties, multiply the previous penalty by three, up to a maximum of \$5,000, for each violation.
- For a continuing violation multiply the penalty amount by the number of days the violation continues.

Mitigative Factors

Penalties may be reduced upon consideration of certain mitigative factors. Any reduction of a penalty is at the discretion of the programs compliance and enforcement staff.

Tracking Penalty Orders

All penalty orders require a docket number, and must be entered into the Agency's Docket Management System with the appropriate data and narrative. All penalty orders and associated correspondence must be copied to the Fiscal Office Penalty Desk.



Ken Slattery
Program Manager
Water Resources Program

Special Note: These policies, procedures, and guidance documents are used to guide and ensure consistency among water resources program staff in the administration of laws and regulations. These policies and procedures are not formal administrative regulations that have been adopted through a rule-making process. In some cases, the policies may not reflect subsequent changes in statutory law or judicial findings, but they are indicative of the department's practices and interpretations of laws and regulations at the time they are adopted. If you have any questions regarding a policy or procedure, please contact the department.

Attachment 1

Penalty Matrix				
	No	Possibly	Probably	Definitely
1. Willful or knowing violation?	0	1	2	3
<p>"No" if the violator obviously did not know that the action or inaction constituted a violation. "Possibly" if the violator should have known. "Probably" if it is likely the violator knew. "Definitely" if the violator clearly knew. (If the answer is "definitely," consider consulting with the environmental crimes unit.)</p> <p>Mitigative Factor - Degree of cooperation in working toward compliance.</p>				
2. Failure to obtain necessary permits?	0			3
<p>"No" if the paperwork was complete and appropriate for the action that caused the violation. "Definitely" if missing any of the required permits and approvals for the action that caused the violation.</p>				
3. Economic benefit?	0	1	2	3
<p>Did non-compliance benefit anyone economically? Avoided costs may include engineering costs, permit fees, or product sales. "No" if it is clear that no one obtained an economic benefit. "Possibly" if someone might have benefited. "Probably" if anyone benefited, but the benefit is not quantifiable. "Definitely" if the economic benefit is quantifiable.</p>				
4. Environmental or resource damage?	0	1	2	3
<p>"No" if there is no evidence to support a claim of environmental damage or impairment of beneficial uses. "Possibly" if environmental damage or impairment of beneficial uses can be inferred from evidence or knowledge of the effects of the violation. "Probably" if there is evidence to support a claim of environmental damage or impairment of beneficial uses and there is a plausible connection between the violation and the damage or impairment. "Definitely" if there is direct evidence linking demonstrable environmental damage or impairment of the beneficial uses with the violation.</p> <p>Mitigative Factor - Compensation paid or agreed to for damages to public resources.</p>				

5. Damage to the property of others?	0	1	2	3
<p>"No" if there is no evidence to support a claim of property damage or impairment of beneficial uses.</p> <p>"Possibly" if property damage or impairment of beneficial uses can be inferred from evidence or knowledge of the effects of the violation.</p> <p>"Probably" if there is evidence to support a claim of property damage or impairment of beneficial uses and there is a plausible connection between the violation and the damage/impairment.</p> <p>"Definitely" if there is direct evidence linking demonstrable property damage or impairment of the beneficial uses with the violation.</p> <p>Mitigative Factor - Compensation paid or agreed to for damages to public resources.</p>				
6. Damage to the health of others?	0	1	2	3
<p>"No" if there is no evidence to support a claim of damage to health.</p> <p>"Possibly" if damage to health can be inferred from evidence and knowledge of the effects of the violation.</p> <p>"Probably" if evidence supports a claim of damage to health and there is a plausible connection between this violation and the effect on health .</p> <p>"Definitely" if there is direct evidence linking damage to health or adverse effects with the violation.</p>				
7. Unresponsive in correcting the violation?	0	1	2	3
<p>"No" if the violation was corrected as soon as the responsible person learned of it.</p> <p>"Possibly" if the violation was corrected in a less timely and cooperative fashion.</p> <p>"Probably" if the responsible party attempted to correct the problem but did not correct it.</p> <p>"Definitely" if the responsible party made no attempt to correct the violation.</p> <p>Mitigative Factors - Timeliness and appropriateness of corrective actions taken. Degree of cooperation in working toward compliance.</p>				
Total				

Rating	1	2-5	6-10	11-15	16-20	21
Penalty/day	\$100	\$500	\$1,000	\$2,000	\$4,000	\$5,000