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CERTIFICATE AND ORDER  
FOR FILING  
**PERMANENT**  
ADMINISTRATIVE RULES WITH THE SECRETARY OF STATE

MAY 15 3 28 PM '90

BARBARA ROBERTS  
SECRETARY OF STATE



I HEREBY CERTIFY that the attached copy is a true, full and correct copy of PERMANENT rule(s) adopted on May 11, 1990

by the Water Resources Commission  
(Department) \_\_\_\_\_ (Division) \_\_\_\_\_

to become effective May 15, 1990  
(Date)

The within matter having come before the Water Resources Commission  
(Department) \_\_\_\_\_ (Division) \_\_\_\_\_ after

all procedures having been in the required form and conducted in accordance with applicable statutes and rules and being fully advised in the premises:

Notice of Intended Action published in Secretary of State's Bulletin: NO  YES  Date Published: January 15, 1990

NOW THEREFORE, IT IS HEREBY ORDERED THAT the following action be taken: (List Rule Number(s) or Rule Title(s) on Appropriate Lines Below)

Adopted: 0AR 690-260 Civil Penalty Assessment For Other Than Well Constructors  
(New Total Rules)

Amended: \_\_\_\_\_  
(Existing Rules)

Repealed: \_\_\_\_\_  
(Total Rules Only)

as Administrative Rules of the Water Resources Commission  
(Department) \_\_\_\_\_ (Division) \_\_\_\_\_

DATED this 15th day of May, 19 90

By: William H. Young  
(Authorized Signer)  
Title: Director

Statutory Authority: ORS 540.145 \_\_\_\_\_ or

Chapter(s) \_\_\_\_\_, Oregon Laws 19 \_\_\_\_\_ or

House Bill(s) \_\_\_\_\_, 19 \_\_\_\_\_ Legislature; or Senate Bill(s) \_\_\_\_\_, 19 \_\_\_\_\_ Legislature

Subject Matter: Pertains to assessment of civil penalties for violations of state water law.

## OREGON ADMINISTRATIVE RULES

## WATER RESOURCES DEPARTMENT

## CHAPTER 690 DIVISION 260

## CIVIL PENALTY ASSESSMENT FOR OTHER THAN WELL CONSTRUCTORS

**Purpose of Rules**

690-260-005 The purpose of these rules is to provide guidance for enforcement and assessment of civil penalties for violations of state water law. Notice requirements, classification of violations, a penalty schedule and a hearing process are described in the rules.

These rules are intended to carry out authority granted to the Commission in ORS 536.900 to 536.935. Except as provided in OAR 690-262-090, the Commission delegates to the Director the authority to implement the provisions of OAR 690-260. These rules are in addition to civil penalty rules authorized by the 1985 Legislature for violations by well constructors (OAR 690-225).

**Definitions**

690-260-010 The following definitions apply in OAR 690, Division 260.

- (1) "Acceptable schedule" means a compliance schedule that is acknowledged and signed by the Director.
- (2) "Agency" means any state board, commission, department or division thereof, or any officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches of government.
- (3) "Beneficial use" means the reasonably efficient use of water without waste for a purpose consistent with the laws and the best interests of the people of the state.
- (4) "Burden of proof" means the necessity or duty of affirmatively proving a fact or facts in a dispute.
- (5) "Commission" means the Water Resources Commission.
- (6) "Corrective action" means actions to be taken by the responsible party, as specified by the Director, to correct violations reflected in a notice of violation or notice of assessment of civil penalty.
- (7) "Department" means the Water Resources Department.
- (8) "Director" means the Director of the Water Resources Department.

- (9) "Financial gain" means the amount of economic gain realized by the responsible party from non-compliance with the state water law from the date specified in a notice of violation until corrective action is taken.
- (10) "Hearing" means a contested case hearing as defined in the Oregon Administrative Procedure Act.
- (11) "Notice of assessment of civil penalty" means a written notice which includes a reference to the statute, rule, order, permit condition or standard involved; a statement of the matters asserted or charged; the amount of the penalty imposed; and a statement of the right of the person to request a hearing.
- (12) "Notice of violation" means a written notice which includes a reference to the statute, rule, order, permit condition or standard violated; the date of the violation; and the time specified for correction of the violation.
- (13) "Person" means any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency.
- (14) "Responsible party" means the person or agency that is in control and is either in violation as specified in a notice of violation or who may benefit from that violation.
- (15) "Similar violation" means a violation of a statute, rule, order, permit condition, or standard for which the person or agency has previously received a notice of violation.
- (16) "Waste" means, for purposes of assessing civil penalties, when the quantity of water diverted exceeds the quantity required to meet the beneficial use specified in a water right, not including reasonable system losses, return flows, or diversion rates of water allowed in a water right or a rotation agreement.

### Violation Policy

690-260-020 Upon the Director's own initiative, or in response to a complaint alleging violation of certain statutes, rules, orders, permit conditions or standards, the Director may investigate to determine if a violation occurred.

If the investigation indicates a violation is occurring, or has occurred, the Director, following appropriate notice, may impose a civil penalty against the responsible party for the violation. The Director bears the burden of proof to establish a violation. Assessment of a civil penalty shall not prevent the Director from taking other regulatory actions permitted by law.

## Notice of Violation

690-260-030 (1) The responsible party shall be notified of a violation within five days of confirmation by the Director of the violation. Notice of the violation occurs when the Department has either delivered the notice of violation in person or mailed the notice to the responsible party by certified or registered mail. Notice may be given, if reasonably possible, by personal delivery to the responsible party. The notice shall include the statute, rule, order, permit condition or standard violated; the date the violation occurred; and a specified time for correction. If the violation is not corrected within the time given in the notice, a civil penalty and damages related to enforcement may be imposed.

## Classification of Violations

690-260-040 (1) Violations are classified as follows:

Class I - Violations of the terms or conditions of a permit, certificate or license issued under ORS 536 to 543, Violation of ORS 537.130 or 537.535, Violation of ORS 540.045, 210, 320, 340, 435, 710, 720, or rules adopted under ORS 540.145.

Class II - Violation of ORS 540.310, 330, and 730.

Class III - Violation of any rule or order of the Water Resources Commission that pertains to well maintenance and violation of ORS 540.440.

(2) Violations shall be further divided into major, moderate, and minor categories as follows:

MAJOR is when substantial harm to other water rights, minimum flows, instream water rights, the public health or safety, or other water-based resources is immediate or imminent.

MODERATE is when substantial harm is not immediate or imminent, but could occur if left uncorrected.

MINOR is when no substantial harm is apparent.

## Reasonable Time for Correction of Violation

690-260-050 No civil penalty shall be assessed for a violation if the person or agency causing the violation, corrects the violation within the time given for correction in the notice of violation.

REASONABLE TIME FOR CORRECTION GUIDELINES

Category	MAJOR	MODERATE	MINOR
Class I	same day	2 days	10 days
Class II	5 days	10 days	acceptable correction schedule in 10 days and compliance within limits of schedule
Class III	acceptable correction schedule in 5 days and compliance within limits of schedule	acceptable correction schedule in 10 days and compliance within limits of schedule	acceptable correction schedule in 30 days and compliance within limits of schedule

**Repeat Violations and Continuing Notice of Violation**

690-260-055 Any similar violation for which the person or agency responsible has received a notice of violation within the last three years is a repeat violation. Such notice shall serve as a continuing notice of the violation. In the case of repeat violations, a civil penalty may be imposed without providing additional time for correction.

**Notice of Assessment of Civil Penalty**

690-260-060 (1) Persons or agencies who have received a notice of violation, as prescribed in OAR 690-260-030, and have not corrected the violation within the time specified in the notice or have been previously served a notice for a similar violation may be assessed a civil penalty. A notice of assessment of civil penalty shall be delivered either in person or sent by certified or registered mail to the responsible party.

(2) The notice shall include the following:

- (a) A reference to the particular sections of the statute, rule, order, permit condition or standard involved;
- (b) A short and plain statement of the matters asserted or charged;
- (c) A statement of the amount of the penalty or penalties imposed; and
- (d) A statement of the right of the person to request a hearing.

(3) In cases of continuing violations, each occurrence of substantially the same activity and each day's continuance of a violation after the responsible party has been notified is a separate and distinct violation, but not for purposes of the five day notice requirement. A civil penalty may be imposed for each day of violation of ORS 537.130, 537.535, 540.045, 540.310, 540.330, 540.710, 540.720, or 540.730. Such violations include, but are not limited to, the following:

- (a) Using water without a water right permit, certificate, order or claim of appropriation;
- (b) Failure to maintain a well and well equipment as required in Chapter 690 Division 215;
- (c) Failure to maintain a headgate, valve or measuring device as required by the watermaster;
- (d) Failure to install and maintain a measuring device(s) above and/or below a reservoir as required by the watermaster;
- (e) Tampering with a headgate following regulation by the watermaster;
- (f) Illegal or unauthorized use or storage of water; or
- (g) Interfering with the diversion and distribution works of another.

**Schedule of Civil Penalties**

690-260-070 (1) Base penalties shall be determined through the use of the following matrix:

Category	MAJOR	MODERATE	MINOR
Class I	\$1000	\$500	\$250
Class II	\$ 500	\$250	\$125
Class III	\$ 200	\$100	\$ 50

(2) Penalty Formula:  $P = BP \times R$  (The formula may include adjustments as described in OAR 690-260-080.)

Where  $P =$  Penalty in dollars

$BP =$  Base Penalty in dollars from matrix in (1) above

$R =$  Repeat factor from table below

Table of R Factors	
1st violation	R = 1
2nd similar violation	R = 2
3rd similar violation	R = 3
4th similar violation	R = 4
5th similar violation	R = 5

### Adjustments to Schedule of Civil Penalties

690-260-080 (1) In addition to the repeat factor listed in OAR 690-260-070 (2), the Director shall consider (a) the past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation, (b) any prior violations of statutes, rules or orders pertaining to water use, (c) the economic and financial conditions of the person incurring the penalty, including any financial gains resulting from the violation, and (d) the immediacy and extent to which the violation threatens other rights to the use of water or the public health or safety or the public interest in the waters of this state. The Director may consider any other relevant factor, when imposing a civil penalty.

- (2) If the Director finds that the financial gain of non-compliance exceeds the dollar value of the penalty calculated from the formula, the Director may increase the penalty to equal the financial gain, as long as the increased penalty does not exceed \$5,000 for each violation.
- (3) The Director may recommend that the Commission reduce or remit a civil penalty if appropriate and consistent with the protection of the public interest in the waters of this state.
- (4) In any contested case proceeding or settlement in which a person or agency receiving a civil penalty has raised economic condition as a reason to reduce the penalty, the person or agency has the burden of proof to provide evidence concerning economic condition.

### Opportunity For Hearing

690-260-090 (1) Persons or agencies receiving a notice imposing a civil penalty may request a hearing within 10 days from the date of mailing the notice. Notice may be served personally or by mail. In the case of service by mail, the date of mailing shall serve as the notice date. The request for hearing shall be considered made on the date that the request is postmarked.

- (2) The Commission delegates to the Director the authority to schedule and conduct a contested hearing if one is requested. The Director may issue a proposed order following the hearing.

If no exceptions are filed, the proposed order becomes final. If exceptions are filed to the proposed order, the Commission shall issue the final decision.

- (3) The Director may recommend that the Commission reduce or remit the amount of the penalty if evidence, or negotiations presented in preparation for the hearing, indicates that the amount of the penalty was inappropriate. The following factors may be considered when reducing or remitting a civil penalty:
  - (a) History of similar violations;
  - (b) Willingness to comply;
  - (c) Impact on other water rights;
  - (d) Economic gain resulting from the violation; and
  - (e) Financial ability of the violator to pay the penalty.
  - (f) Incorrect identification of the responsible party.

#### Liability for Damages Related to Enforcement

690-260-100 (1) Persons or agencies who have been ordered to take corrective action by the Water Resources Commission, and who fail to do so without sufficient cause, are liable for damages. The calculation of damages may include all expenses incurred by the Department after the time for corrective action specified in the notice of violation has passed, that are the result of the person's or agency's failure to act. The damages shall not exceed the amount of all expenses incurred by the Water Resources Department in carrying out enforcement duties related to the corrective action. Damages are in addition to the civil penalties assessed for violations.

- (2) As used in this rule, "sufficient cause" includes, but is not limited to, the following:
  - (a) Failure of notice to be given to the appropriate person or agency through no fault of the person or agency; and
  - (b) Failure to take the corrective action because of conditions or circumstances outside the control of the person or agency.
- (3) As used in this rule, "all expenses" include, but are not limited to, the following:
  - (a) That portion of the salaries and other personnel expenses of the watermaster, assistant watermaster, other Department employee, or fees of legal advisors for time spent on enforcement duties related to corrective action;
  - (b) The travel and equipment costs of the watermaster, assistant watermaster, other Department employee or legal advisor spent on enforcement duties directly related to corrective action;
  - (c) The court costs of the Department spent on enforcement



duties related to corrective action; and

- (d) The notice, publishing, copying or other supplies and miscellaneous costs of the Department spent on enforcement duties related to corrective action.
- (4) Notices of assessment of damages may be included with the notice of assessment of civil penalty, or be issued at any time after the time for correction has elapsed. A notice of assessment of damages shall be served in person or mailed to the person or agency who is liable for damages. The notice shall include the following:
- (a) A reference to the statute, rule, order, permit condition or standard involved in the corrective action;
  - (b) A short and plain statement of the matters asserted or charged;
  - (c) A statement of the amount of the damages imposed; and
  - (d) A statement of the right of the person or agency to request a hearing.

#### Notice of Violation to Water Providing Organizations

690-260-110 (1) When a member of a water providing organization is notified of a violation, a duplicate notice of violation shall be served in person or by registered or certified mail on the organization.

(2) The purpose of notification to the organization is to encourage the organization to assist in obtaining compliance from the individual member.

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