

**Adirondack Park Agency
Policy, Procedures & Guidance System**

LEGAL - 2

Topic: Staff Civil Penalty Guidelines

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Cecil Wray, Chairman, Enforcement Committee

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I. Purpose

The purpose of these guidelines is to assist Agency staff in determining appropriate penalties for violations of the Executive Law, the Environmental Conservation Law (ECL), and the Agency's regulations, permits, variances and settlements, in a manner which achieves compliance, remediation and deterrence, but which is also fundamentally fair and provides due process to the alleged violator guaranteed by the constitutions of the United States and the State of New York.

II. Statutory and Regulatory Enforcement Authority

Adirondack Park Agency Act

Executive Law, Section 813(1) provides that any "person" who violates the APA Act or Agency regulation or permit or order issued by the Agency is liable for a civil penalty up to \$500 per day for each day the violation continues. "Person" includes individuals and their agents (such as contractors), businesses or other private entities, and municipalities, but not the State or State agencies. Penalties are recoverable in an action by the Attorney General.

The Attorney General may also institute an action to prevent, restrain, enjoin or correct any violation, and may join in the action any appropriate person or the person responsible for the violation to take such affirmative actions as are necessary to correct the violation (Executive Law, Section 813[2]).

Any civil penalty may be released or compromised by the Agency before referral to the Attorney General, or after referral, by the Attorney General with the consent of the Agency (Executive Law, Section 813[3]).

New York State Freshwater Wetlands Act

The Agency implements the New York State Freshwater Wetlands Act ("FWA") within the Adirondack Park (Environmental Conservation Law ("ECL"), Articles 24 and 71). Pursuant to ECL Section 71-2303, the Agency can impose penalties up to \$11,000 for each violation of the FWA after notice and opportunity for hearing, and can order remediation and restoration of wetlands by the violator after a hearing. Under the FWA,

state agencies may also be held responsible for wetland violations.

New York State Wild, Scenic and Recreational Rivers System Act

The Agency implements the Wild, Scenic and Recreational Rivers System Act (hereafter: "Rivers Act") on private lands within the Adirondack Park (ECL Article 15, Title 27). Section 15-2723 of the Rivers Act provides that any person who violates any provision of or order issued pursuant to the Rivers Act may be compelled to comply and shall pay a civil penalty of not less than \$100 and not more than \$1,000 per day for each day of the violation.

Agency Regulations

Agency enforcement regulations (9 NYCRR Part 581) provide the process for implementation of the Agency's statutory enforcement authority.

III. Background

The fundamental purpose of the Agency's enforcement program is to promote compliance with applicable laws and thereby improve and protect the Adirondacks. This is best accomplished by preventing violations that have potential to damage the environment. Enforcement is also necessary to abate and remediate damage and to restore natural resources. However, remedial or abatement actions do not necessarily replace the need for penalties when resolving cases with the person who undertook the violation. The possibility that civil penalties may be imposed, and the actual imposition of penalties, both contribute to the Agency's goal of achieving compliance as set forth in the General Enforcement Guidelines.

First and foremost, the assessment of penalties must be calculated to deter future violations. Penalties should persuade the violator to take precautions against future non-complying behavior. Penalties should also persuade others not to violate the law and/or to seek accurate jurisdictional advice from the Agency, together with any necessary Agency permit or variance. To achieve this objective, penalties must consistently place violators in a less advantageous position than those who have voluntarily obtained an Agency permit or variance. Furthermore, the penalties assessed by the Agency must be substantial enough to promote deterrence by ensuring that the violators and others do not perceive them to be part of the "cost of doing business".

For any given violation, there is no single "correct" penalty amount which can be determined by formula. Rather, the appropriate penalty figure generally lies within a range of amounts that would be fair and effective given the fact pattern in each case. For example, if a person who undertook a violation agrees to fully and promptly comply, a penalty figure in the lower end of that range is appropriate. On the other hand, if a person who undertook a violation is recalcitrant, is unresponsive to Agency enforcement action, negotiates in bad faith, has repeatedly created or increased violations, or seeks to

delay resolution of the violation for a reason other than a good faith challenge to Agency jurisdiction, the Agency's allegations of the facts, or the interpretation of the relevant statute and/or regulations, a penalty at the higher end of the range is warranted. In addition, the degree of harm to Park resources or public health caused by a violation may be relevant in determining an appropriate penalty amount.

An alleged violator should be apprised that the Enforcement Committee makes a formal determination of the amount of a civil penalty that is not subject to negotiation and may differ from the civil penalty amount sought by staff. This should not, however, operate to deter someone from seeking Enforcement Committee consideration of an alleged violation, particularly where novel facts are involved or there is a dispute over the law in a given case. Ultimately, the Enforcement Committee will make its determination regarding an appropriate penalty based on the law and all of the specific facts and circumstances of the case, and it has the discretion to determine a penalty that is higher, or lower, than staff offered during settlement negotiations. An Enforcement Committee penalty determination will not be affected by the fact that the alleged violator exercised his/her right to a due process hearing before the Enforcement Committee.

These guidelines do not substitute for the judgment exercised by the Enforcement Committee or advice of the Attorney General. Almost all violations are resolved between Agency staff and violators, which is the Enforcement Committee's preference because it is more efficient and usually means that compliance will be achieved sooner. Accordingly, these guidelines provide appropriate guidance to assure that penalties are set in a consistent way in all cases handled by Agency staff.

Additionally, these guidelines are intended to prevent violations by making the public aware of the Agency's capacity and willingness to assess penalties for violations against persons who undertook violations. Knowing that the potential exists for the assessment of substantial penalties may deter individuals from committing violations, encouraging consideration of the risks of being penalized against the costs of compliance. Also, educating the public about the Agency's perspective on penalties, and protection of due process rights promotes fundamental fairness by placing the regulated community on notice of the Agency's commitment to assess penalties for violations.

IV. Penalty Determination Factors

Consistent with the direction provided by these guidelines, Agency staff have flexibility to establish penalties in consideration of circumstances unique to each case. Although these guidelines attempt to achieve consistency in the Agency's overall approach to penalty calculation, it is recognized that the facts of each individual case vary from every other. It is not expected that identical penalties will always be assessed in cases involving the same violations. Fairness and effective deterrence may require differing penalty amounts in cases that appear similar on their face.

These guidelines establish the circumstances under which there will be a presumption that a penalty should be imposed against persons, as that term is defined by law, who undertake a violation. Staff will not generally seek penalties from the current owner of land on which a violation exists that was undertaken by a prior owner and the violation is appropriately remediated. Staff will not generally seek penalties from landowners who self-report violations and agree to an appropriate remediation. Staff may choose not to seek penalties under certain circumstances when landowners undertake immediate and effective remediation, especially when there are significant expenses associated with remediation.

Staff should consistently consider the following factors in penalty determinations for Agency enforcement cases. These factors are not prioritized and are not intended to be exhaustive, because of the varying facts in different enforcement cases.

1. Potential Harm and Actual Damage

This factor focuses on the extent to which the violator's conduct resulted in or could potentially result in harm to the environment or human health. The penalty should be proportional to potential or actual harm. The sensitivity of affected environmental sectors is relevant. For example, threats or impacts to wetlands, shorelines, river areas, or open space or other natural resources are contemplated under the harm factor. Furthermore, violations involving despoliation of sensitive natural areas or natural resources are on the extreme end of a spectrum of the harm. De minimis violations with no environmental harm are at the other end of the spectrum.

The longer a violation continues without remediation, the greater is the potential or actual harm to the affected natural resource or public health. For example, the loss of the functions and values of a wetland is cumulative for every year that it remains filled. Thus, the length of time that a violation continues without remediation due to a failure of the violator to report it or because of unjustifiable delay on the part of the violator to remediate it is relevant in determining a penalty.

2. Culpability

The violator's culpability may be relevant in assessing the amount of a penalty, and a higher penalty may be appropriate proportionate to the culpability of the violator. For example, a violation of a clear permit or settlement condition by the person who obtained the permit or agreed to the settlement reflects more culpability than that of a landowner who undertakes a subdivision involving wetlands when the wetlands on his property are not obvious to a layman. In assessing the degree of culpability, the following points should be considered: (i) how much control the violator had over the events constituting the violation; and (ii) the foreseeability of the violation.

3. History of Non-Compliance

A history of violations subsequent to Agency enforcement actions is usually evidence that the violator has not been deterred by previous enforcement responses. Unless violations are caused by factors entirely out of the control of the violator, penalties in subsequent enforcement actions should generally be more severe. In deciding how much higher the penalty should be, Agency staff should consider the following points: (i) how recent the previous violation was; (ii) the number of previous violations; (iii) the similarity of the previous violations to the present violation; and (iv) the violator's response to previous violations in regard to correction of the previous problem and attempts to avoid repeat violations.

4. Cooperation

The cooperation of the violator in remedying the violation and the self-reporting of a violation are appropriate mitigating factors for Agency staff to consider in determining an

appropriate penalty. Agency staff may reduce or not seek any penalty based on such cooperative behavior, particularly if the violator is willing to fully and promptly remediate the environmental problems or to otherwise come into compliance with applicable requirements. Examples of such cooperation include violators who agree in the field to restore a wetland or remove a shoreline setback violation and then complete the remediation work before a settlement agreement is even sent to them. The possibility of a reduced penalty for prompt resolution of violations is intended to provide an incentive for violators to cooperate. A request for a due process hearing before the Enforcement Committee to challenge jurisdiction, interpretation of relevant statutes and/or regulations or to resolve factual issues shall not be considered non-cooperation.

5. Extent of Compliance Attained Through Resolution

Depending on the specific facts of a case, remediation required by a settlement may provide full compliance in different ways. There is literal compliance, such as where the removal of a deck from within the shoreline setback is required. There is also compliance that, while not literal, still provides the same effect. An example is a single family dwelling built without a permit that, through settlement conditions, achieves the same level of compliance as if it had been permitted. However, in some cases, full compliance is not practical or possible. In such cases, it is appropriate to impose a higher penalty than in a case where full compliance will be obtained. This reflects the fact that the violation will remain partially unresolved. It also takes into account the fact that the violator will incur less expense and burden for remediation than full compliance would require.

6. Economic Benefit

This factor is an estimate of the economic benefit of avoided or delayed compliance, including the value of avoided costs which would have been expended if compliance had occurred when required. The benefit component may include any economic benefits resulting from noncompliance, such as profit by contractors or other agents from illegal land use or development. A common example of avoided costs includes the costs associated with a permit or variance application that was not submitted to the Agency before an activity was undertaken. Enhanced real property value may be considered as an economic benefit. In general, Agency staff should seek penalties that will at a minimum remove any economic benefit of non-compliance.

7. Importance to the Regulatory Scheme

Undertaking any action which requires an Agency permit or variance, without first obtaining the permit or variance, is always a serious matter, not a mere "technical" or "paper work" violation, even if the activity is otherwise in compliance. Failure to first obtain required approvals deprives the Agency of the opportunity to satisfy its obligation to review and condition jurisdictional activities. If significant penalties are not imposed for such violations, it would be unfair to those who voluntarily comply with the law by satisfying the requirements of the permit process. Failure to comply with the requirements of a permit, variance or of a settlement is likewise extremely serious. This factor also takes into account the relative importance of the violated requirement to the underlying statutory goals and the likelihood that the activity would have been approved had a permit, amended permit or variance been sought. Violations which involve wetlands, shorelines, river areas or open space or other natural resources are necessarily more serious than other violations. Likewise, an activity for which the Agency would not have issued a permit more seriously undermines the applicable statutory goals than an activity which, but for the failure to obtain prior Agency approval, is otherwise in compliance.

8. Litigation Practicalities

The exercise of prosecutorial discretion by the Agency staff is a critical component of these guidelines and is to be applied in all cases when calculating an appropriate penalty.

In exercising this discretion, staff should consider, among other things, the factual and legal foundation of their case, the due process rights of the alleged violator pursuant to the constitutions of the United States and the State of New York, the resources and time required for hearings and/or litigation, and the relative priority and severity of the violations involved in the case.

9. Unique Factors

In determining penalties, Agency staff has discretion to take into account other appropriate factors not anticipated in these guidelines.

V. Ensuring Future Compliance and Remedial Action

These guidelines address the issue of appropriate penalties for violations that have already occurred. However, the Agency's enforcement practice may also include penalties or other devices which ensure actual compliance with settlement agreements, including compliance with remediation requirements. Agency staff may consider the use of the following mechanisms for ensuring compliance in settlements. However, the use of such mechanisms does not restrict Agency staff from taking appropriate, additional enforcement actions, or seeking additional penalties, for violations of settlements.

1. Suspended Penalties

Suspended penalties are penalties or portions of penalties that are required to be paid only if the violator fails to comply with the settlement agreement. In appropriate cases, suspending a portion of a penalty can be an effective method of assuring compliance with a settlement. When a suspended penalty is used to secure compliance, the payable penalty determined to be appropriate based on these guidelines is not reduced. The suspended penalty is in addition to the payable penalty, and should be based on a reasoned assessment by Agency staff of the minimum amount necessary to deter the violator from violating the settlement. The suspended portion should generally not exceed one-half of the overall penalty assessed by the settlement.

2. Financial Assurance Mechanisms

When substantial remediation is required, it may be appropriate to require the violator to provide financial assurance to ensure that the remediation is done within the timeframe required by the settlement agreement. Surety bonds, letters of credit and escrow accounts may be considered by Agency staff as possible mechanisms for obtaining such financial assurance. Staff should consult with the Counsel prior to using any of these mechanisms.

VI. Legal Effect

The guidelines set forth in this document are intended for the use and guidance of Agency staff. This document is not intended to create any substantive or procedural rights, enforceable by any party in administrative and judicial litigation with the State of New York. The Enforcement Committee reserves the right to act at variance with these guidelines.

Notices of apparent violations served on alleged violators shall be accompanied by a copy of these civil penalty guidelines.

Any penalty determinations undertaken hereunder in anticipation of litigation are exempt from disclosure under the Freedom of Information Law.

Pursuant to §4547 of the Civil Practice Law and Rules of the State of New York, all evidence or conduct of negotiations or settlement are inadmissible as evidence as proof of liability for or invalidity of the claim which is disputed as to either validity or amount of damages.