

BLACKFEET TRIBE AQUATIC LANDS PROTECTION ORDINANCE

PENALTY POLICY

March 21, 2019

This regulation sets forth the penalty policy for violations of Ordinance 117, including how BEO expects to determine appropriate penalties. This regulation is intended to promote a consistent approach to assessing penalty amounts while allowing BEO flexibility in arriving at specific penalty amounts in any given case. The assessment of penalties has the following objectives:

1. Penalties should be large enough to deter noncompliance by the violator;
2. Penalties should help ensure a level playing field by making certain that violators do not obtain an economic advantage over others who have complied with Ordinance 117; and
3. Penalties should be based on a fair and logical methodology to promote consistent, fair and equitable treatment of the regulated community across the Reservation.

VIOLATION CATEGORIES

There shall be two categories of violations based on Article VI, Section 6.1 of the Blackfeet Aquatic Lands Protection Ordinance. The severity of the penalties is determined by the type of violator. Violators are either individuals or corporations, governmental entities or other non-individuals.

Category 1 – Failure to obtain a permit, continuing a project without a permit, or providing false information on a permit application as outlined in Section 6.1 (a) of the Blackfeet Aquatic Lands Protection Ordinance.

- a. Minimum individual penalty: \$500.
- b. Minimum non-individual penalty: \$3000.

Category 2 – Failure to comply with the terms or conditions of this Ordinance or any regulations promulgated under this Ordinance; failure to comply with any conditions attached to a permit issued under Ordinance 117 or failure to comply with orders of the Director as outlined in Section 6.1 (a) of the Blackfeet Aquatic Lands Protection Ordinance.

- a. Individual: \$500 minimum per violation for each permit condition per day.
- b. Non-individual: \$3000 minimum per violation for each permit condition per day.

Minimum penalties in both categories are subject to be increased at the discretion of the BEO Director based on the overall environmental and compliance significance of the violation but not to exceed the maximum penalty. The multipliers listed below provide guidance for calculating penalty increases.

1. Up to three times the minimum penalty for minor violations with low overall environmental or compliance significance,

2. Up to five times the minimum penalty for violations with moderate overall environmental or compliance significance, and
3. Up to ten times the minimum penalty for major violations with a high degree of either environmental or compliance significance.

MAXIMUM PENALTIES

Maximum penalties that may be imposed for egregious violations with extreme environmental consequences or blatant non-compliance:

- a. Individuals: Penalties may not exceed \$5,000 per day during which the violation continues or a maximum amount of \$50,000.
- b. Corporations, governmental entities, all other non-individuals: Penalties are not to exceed \$30,000 per day during the time the violation continues or a maximum amount of \$1,500,000.

ENVIRONMENTAL SIGNIFICANCE CONSIDERATIONS

1. Harm to Human Health or Welfare

BEO shall consider whether the Ordinance 117 violation has adversely impacted drinking water supplies or has otherwise endangered the health or livelihood of persons by virtue of the chemical nature of any discharge, e.g., whether the discharge has resulted in a violation of any applicable toxic effluent standard or prohibition under tribal law. The greater the actual or potential threat to human health or welfare, the larger the multiplier of the minimum penalty. If the violation has resulted in an imminent and substantial endangerment, the largest multiplier of the minimum penalty should be used to calculate the violation penalty.

2. Extent of Aquatic Environment Impacted

The impacted acreage of a violation is not necessarily indicative of the environmental significance of the violation, (i.e., a small impact to a unique or critical aquatic resource may have high environmental significance). However, all other factors being equal, the greater the acreage of aquatic resources directly impacted, the larger the multiplier used to calculate the resulting penalty. BEO should also consider how large the acreage is compared to other violations on the Reservation.

3. Severity of Impacts to the Aquatic Environment

The overall impact of a violation to Reservation aquatic resources and the extent to which it has caused or has threatened to cause destruction is environmentally significant. The greater the harm or risk of harm to aquatic ecosystems, the greater the multiplier used for determination of the penalty. The following situations for a violation should be considered:

- a. The violation has resulted in adverse impacts to life stages of aquatic life and other wildlife dependent on aquatic ecosystems, or has adversely impacted or destroyed wildlife habitat, including aquatic vegetation, waterfowl staging or nesting areas, and fisheries;
- b. The violation has caused flooding, impaired fisheries or adversely affected cultural, recreational, aesthetic, and economic values for the Reservation;

- c. The violation has impaired the flow, circulation or reduced the reach of Reservation waters, or has resulted in failure to meet any applicable water quality standard;
- d. The violation has resulted in harm to an endangered, threatened or rare species, or has resulted in harm to cultural plant or animal populations, or impacted rare, threatened or endangered species habitat, or has otherwise significantly impacted ecosystem diversity, productivity, or stability.

4. Uniqueness or Sensitivity of the Affected Aquatic Resource

Consideration should be given to whether the affected ecosystem is of a type that has become rare due to cumulative impacts (e.g., vernal pools, glacial features) or is relatively scarce (unique wetlands or other ecosystems). If the violation occurred in any of the following areas, the greatest multiplier should be used to calculate the penalty:

- a. A site determined to be unsuitable such as a previously denied permit;
- b. A site that has any tribal, federal or state prohibitions or restrictions;
- c. Any already impaired water under any tribal, federal or state designation;
- d. An aquatic resource that is an outstanding tribal or national resource;
- e. Areas designated as federal, state, tribal, or local protected lands; or
- f. An area established as a restored or enhanced wetland under an approved mitigation plan.

5. Secondary or Off-Site Impacts

BEO shall consider the extent to which the violation caused, or threatened to cause, secondary or off-site impacts such as erosion and/or downstream sedimentation problems, nuisance species intrusion, wildlife corridor disruption, or wetland and riparian buffer zone degradation. The greater the amount of secondary impacts, the greater the multiplier used to calculate the penalty.

MITIGATING FACTORS FOR ENVIRONMENTAL SIGNIFICANCE

Wherever possible, BEO should seek complete on-site restoration of violations. In cases where it is possible for a violator to undo, or largely undo, the continuing environmental harm resulting from the violation, or will mitigate the environmental harm under an enforceable agreement, or in cases in which the original wetland or water is restored or will be restored under an enforceable agreement, BEO may reduce the penalty. This reduction should generally not be used in cases where off-site mitigation is undertaken in lieu of on-site restoration of the violation.

COMPLIANCE SIGNIFICANCE CONSIDERATIONS

1. Degree of Culpability

The overall culpability of the violator is considered the degree of negligence, recklessness, the intent or responsibility involved in committing the violation, and the degree of control the violator has over the conduct of workers on the permitted project. The greater the culpability, the greater the enhancement of the penalty:

- a. If the violator has direct knowledge of Ordinance 117 through receipt of prior permits, or has been notified of the need to obtain a permit, the highest multiplier should be used to calculate the penalty;
- b. If the violator bears less than full responsibility or may share the liability of the occurrence of a violation, BEO may assess the degree of culpability of each violator with respect to the violations in question.
- c. The motivation for the violation may be a factor for determining greater culpability. If the violator has sought to obtain a windfall profit by destroying Reservation wetlands or waters, through conscious or negligent disregard of Ordinance 117 permitting requirements, culpability should be considered high even though the violator will not in fact realize those profits and may have had little previous experience with Ordinance 117. The greatest multiplier should be used to calculate the penalty for these instances.

2. Compliance History of the Violator

BEO should consider whether the violator has a history of prior Ordinance 117 violations including un-permitted discharge violations, permit condition violations, or a previous violation at another site. The earlier violations need not relate to the same site as the present action. Prior history information may be obtained not only through BEO experience with the violator, but also from other Tribal departments, the Environmental Protection Agency (EPA), Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and other state and federal agencies knowledge and records. The greater the number of past violations and the more significant the violations were, the higher the multiplier that should be used to calculate the penalty.

3. Need for Deterrence

BEO should consider the need to send a specific and/or general deterrence message for the violations at issue. The Director should consider the extent to which the violator appears likely to repeat the types of violations at issue and the prevalence of this type of violation in the regulated community. The greater the apparent likelihood of the violator to repeat the violation, or the more prevalent the violation at issue in the general community, the greater the need for a strong deterrent message and the higher the multiplier used to calculate the penalty.

4. Additional Adjustments

BEO may further adjust the penalty:

- a. Upward based on a violator's bad faith or unjustified delay or refusal in preventing, mitigating, or remedying the violation in question. Once a violator has been informed of a violation, a prompt return to compliance is the minimum response expected, therefore, no downward adjustment is provided for by this policy for efforts made to come into compliance after being informed of a violation. This factor applies, for example, to a person who continues violating after having been informed of the violation, fails to provide requested information, or physically threatens BEO personnel. The more serious the bad faith demonstrated or the longer the unjustified delay engendered by the violator proceeds, the higher the adjustment may be; or

- b. Downward to provide an extra incentive for violators who make efforts to achieve an efficient and timely resolution of violations. This factor may only be applied if the violation is resolved promptly and has been or will be fully remediated.

ADDITIONAL CONSIDERATIONS FOR ADMINISTRATION OF PENALTIES

1. Inability to Pay

If the violator has raised the issue of inability to pay the proposed penalty, BEO should request whatever documentation is needed to ascertain the violator's financial condition. Any statements of financial condition should be appropriately certified. It is within the discretion of the Director to defer, forgive or allow payment of a penalty in installments due to the financial condition of the violator.

SUPPLEMENTAL MITIGATION PROJECTS

Supplemental Mitigation Projects (SMPs) are environmentally beneficial projects that a violator agrees to undertake but is not legally obligated to perform. Favorable penalty consideration may be given because the SMP provides an environmental benefit above and beyond what is required to remedy the violation at issue in the enforcement action. Use of SMPs is at the discretion of the BEO Director, and should be used only in extraordinary cases. A potential SMP is a project that results in protection of a wetland or other special aquatic site, including, for example, purchase and dedicated use of buffer land around a wetland that helps to ensure the survival of wetland resources or deeding over wetlands in perpetuity for the purpose of conservation. It should be noted that restoration of any area of the violation does not constitute a SMP.

DOCUMENTATION, APPROVALS, AND CONFIDENTIALITY

Each component of the penalty determination should be clearly documented with supporting materials and written explanations. Documentation and explanation of a particular penalty calculation shall constitute confidential information that is not subject to disclosure as a matter of tribal law.