



# Civil Penalties for Overpumping Water Rights Revisited

**N**ew rules and regulations for overpumping water rights were implemented by the Kansas Department of Agriculture's Division of Water Resources (DWR) back in 2017, but a few public water supply systems still seem to be getting caught off-guard by the agency's new harsher civil penalties. DWR water use reports will be mailed this January, but by the time you complete the report, it will be too late. Therefore NOW is the time to look at your raw water diversion meters to find out where you are in terms of the amount(s) of water pumped in 2019, and to see whether you could be at risk for receiving a penalty from DWR in 2020 for violating the terms, conditions and limitations of your water rights during 2019. In some cases, there may be administrative actions that can be taken before the end of the year to keep from getting fined, provided you proactively let DWR know of your predicament.

DWR's new penalty matrix was published in the November 2018 issue of *The Kansas Lifeline* and we are including it again on the following page. It should be noted that there is virtually no level of overpumping that

doesn't receive a civil penalty from the agency if the violation lasts for more than 24 hours. Beyond that, the fine is based on how long it took you to realize the water right was being overpumped and whether or not you have received a notice of a violation or were otherwise sanctioned during previous calendar years. In determining the length of time, the agency generally uses the water right's maximum authorized quantity.

## History of Enforcement

Water right enforcement at DWR began ramping up in the early 2000s after raw water flowmeters became more commonly required on wells and diversion works and more accurate water use data began being collected. It is worth noting that 85% of the water rights that DWR deals with are for irrigation. So, when the agency writes new water appropriation rules and regulations, they are primarily focused on that use of water. That's not to say that most irrigators are outlaws. There is just a larger percentage of them and a few bad apples can definitely spoil things for the rest of the water use community. The law must treat all water users equally, however, and the

agency does its best to make sure that other uses (municipal, industrial, stockwatering, etc.) are not unfairly penalized. Aside from late water use reports, the vast majority of water right violations pertain to over-pumping and water flowmeter installations. The first significant enforcement action that I can recall from working at DWR pertained to an irrigation permit I reviewed in the mid-1990s, where an irrigator with a limited authorized quantity on their water right was found to have removed the flow-direction indication sticker from their waterflow meter and had turned the meter around backwards in order to conceal overpumping. When confronted about the violation, the owner claimed that

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Category	Level A <24 Hours	Level B 24 - 72 Hours	Level C More than 72 Hours
No Penalty w/in 5 yrs	Written Notice of Non-Compliance	\$1000 per day and a reduction in quantity equal to 2X quantity overpumped (not to exceed one year suspension)	\$1000 per day and a reduction in quantity equal to 3X quantity overpumped (not to exceed one year suspension)
One Penalty w/in 5 yrs	\$1000 per day and a reduction in quantity equal to 2X quantity overpumped (not to exceed one year suspension)	\$1000 per day and a one year suspension	\$1000 per day and a three year suspension
Two Penalties w/in 5 yrs	\$1000 per day and a one year suspension	\$1000 per day and a three year suspension	\$1000 per day and a four year suspension
Three Penalties w/in 5 yrs	\$1000 per day and a three year suspension	\$1000 per day and a four year suspension	\$1000 per day and a five year suspension

*Overpumping Matrix under K.A.R. 5-14-12. Civil penalties for exceeding the authorized quantity of water. Effective July 14, 2017.*

his cattle must have “licked off” the direction arrow sticker on the meter and that installing the meter backwards had simply been a mistake. That permit ultimately got revoked. There are other stories of irrigators turning their meters around during the weekends, thinking that, as state employees, DWR staff would never be out and about to catch that kind of cheating. (Spoiler Alert: They are and do.) There are also cases of people tampering with their water flowmeters by taking them apart or otherwise modifying impellers and changing internal gearing so the meter doesn’t fully account for all the water flowing through them.

The agency’s first major effort to deal with overpumping was named the Blatant and Recurring Overpumping (BRO) program. Yes, another acronym. The goal of the first iteration of the program was to selectively deal with the worst of the worse in an attempt to achieve water right compliance. New civil penalty regulations were adopted in 2003 to give the agency a better

framework moving forward with all water right violations. Those regulations allowed the chief engineer to issue a notice of non-compliance upon the first noted violation. This was essentially a warning ticket to let the water right holder know that something had gone wrong, since in many cases the water right owner may or may not have realized that they were violating the terms, conditions or limitations of their water rights. In other cases, the water right owner might simply have made a mathematical error or otherwise misrepresented their water use. While that process was very useful and resulted in a greater percentage of compliance during subsequent calendar years, there were some water users with multiple water rights and wells that played a chess game of overpumping one of their water rights one year and then over-pumping a different water right the next year to avoid sanctions.

Moreover, if a water user overpumped a water right and then

reoffended in a subsequent year, the water right was subject to monetary fine starting at \$250. Fines got progressively more severe each time the water user violated the terms of the water right with higher fines, and in some cases, water right reductions to “pay back” the overpumped water. For some water users, however, \$250 might seem like cheap water, especially when there is a corn crop needing “just a little more water.”

### Enforcement Gets More Serious

The days of DWR “warning tickets” are over. Under growing public and political pressure to make water right enforcement mean something, to prevent people from stealing water, especially in areas of the declining Ogallala aquifer, DWR adopted new tougher rules and regulations in 2017. While changes had been discussed for years, once the new regulations were implemented, there was unfortunately very little public outreach by the

agency to let public water suppliers know about those changes. When I received a call in August 2018 from a rural water district that had gotten a \$3,000 fine for first-time overpumping, I thought there must be some kind of mistake. KRWA was also contacted by a handful of other systems that had received even more significant fines last year, some for up to \$10,000, as a result of not very much water overpumped. In some cases, the fines



A focus of KRWA's work is to help water systems reduce unaccounted for water. KRWA Tech Greg Metz is shown using the latest sonic leak detector in KRWA's equipment inventory – a new SebaKMT (HL 7000) ultrasonic unit.

were later reduced to some degree during a formal settlement conference with DWR, but those final decisions really boiled down to whether it was a first-time violation or whether there was a pattern of prior violations.

Given that 2018 was the first year of implementing the new penalty regulations, the agency capped civil penalties at \$10,000. There was at least one system that KRWA worked with that would likely have gotten a much larger fine, had the cap not been in place that year. It quickly became apparent that water users with lower producing wells were perhaps being penalized more harshly than those with high producing wells. For an example, an irrigator with an 800 gallon per minute well could pump a million gallons of water in less than 24 hours and receive only a notice of non-compliance with no civil penalty, whereas it might take more than three days for a public water supplier, with a much lower authorized rate, to pump that same amount of water, which in turn automatically bumps them into the highest and most severe category on the new penalty matrix. DWR indicates they are working to refine their guidelines to make it more equitable and fairer for all water users, especially for first-time violations. After all, the agency is not as interested in collecting fines as they are at achieving compliance with water rights.

### The bottom line

Systems should be double checking the amount of water pumped versus the amount authorized by their water rights at regular intervals throughout the year to ensure that no water rights are

**If you are not sure about your authorized quantities, KRWA will be happy to help research your water rights.**

Calendar Year	Number of Orders	Amount Assessed	Amount Collected
2015	109	\$ 123,200	\$ 95,000
2016	65	\$ 105,850	\$ 57,250
2017	74	\$ 139,250	\$ 78,680
2018	274	\$1,446,750	\$456,600

inadvertently overpumped and to avoid a steep fine from DWR. If you are not sure about your authorized quantities, KRWA will be happy to help research your water rights. Many of the overpumping examples I have seen recently appear to be the result of high water loss, possibly from non-surfacing leaks in the distribution system. DWR publishes annual statistics regarding water loss for every public water supplier in the state and it's a good idea to compare your water use with others in your area to see how your use compares with that of your peers. The publication includes statistics for the last four years so you can see trends. If your system is experiencing high loss or an increasing trend of unaccounted for water (UFW), it may be a good idea to have KRWA help you determine what could be causing high water loss. KRWA has seven (7) sonic detection units including a new SebaKMT (HL 7000) ultrasonic leak detection unit to aid in this effort.

KDA/DWR enforcement activity for all uses of water over the last five calendar years. (See the chart above.) The agency collected significantly more money in fines after new rules were enforced during 2018. DWR conducted 198 settlement conferences from the 274 civil penalties issued in the 2018 calendar year, some of which resulted in a penalty.

*Ken Kopp, P.G., Water Rights/Source Water Specialist, joined KRWA as Water Rights/Source Water Specialist in early 2016. He previously worked for twenty-three years at the Kansas Dept. of Agriculture, Division of Water Resources and most recently was New Application Unit Supervisor.*

