

Enforcement Response Plan Construction Site Runoff Control



PROTECT OUR WATER

MĀLAMA I KA WAI

STATE OF HAWAII DEPARTMENT OF TRANSPORTATION

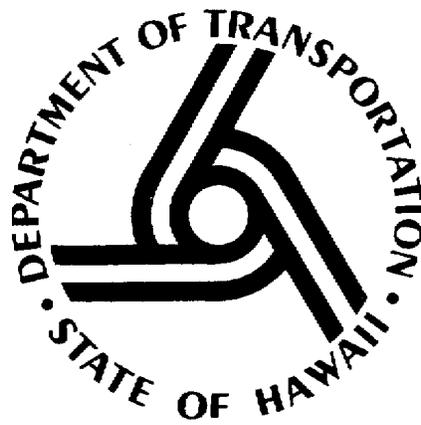
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Hawaii State Department of Transportation
Highways Division, Oahu District
Storm Water Management Program
NPDES Permit No. HI S000001
April 2015

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Enforcement Response Plan Construction Site Runoff Control

State of Hawaii Department of Transportation
Highways Division, Oahu District



April 2015
Version: Final

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TABLE OF CONTENTS

| | |
|--|------|
| LIST OF APPENDICES | v |
| LIST OF FIGURES | vi |
| LIST OF TABLES | vii |
| ACRONYMS AND ABBREVIATIONS | viii |
| 1. INTRODUCTION | 1-1 |
| 1.1 Purpose | 1-1 |
| 1.2 Enforcement Policy | 1-1 |
| 1.2.1 Contract Construction Projects | 1-3 |
| 1.2.2 Encroachment Permit Construction Projects | 1-3 |
| 1.3 Enforcement Authority..... | 1-3 |
| 1.3.1 Hawaii Standard Specifications for Road and Bridge Construction..... | 1-3 |
| 1.3.2 Project Special Provisions..... | 1-6 |
| 1.3.3 Hawaii Revised Statutes | 1-6 |
| 1.3.4 Construction Best Management Practices Field Manual | 1-6 |
| 1.3.5 Maintenance Activities Best Management Practices Field Manual | 1-7 |
| 1.3.6 Storm Water Permanent Best Management Practices Manual | 1-7 |
| 2. CONTRACT CONSTRUCTION ENFORCEMENT | 2-1 |
| 2.1 Violations and Methods of Discovery | 2-1 |
| 2.2 Enforcement Actions..... | 2-2 |
| 2.2.1 Verbal Notification | 2-4 |
| 2.2.2 Notice of Non-Compliance | 2-4 |
| 2.2.3 Assessment of Liquidated Damages | 2-7 |
| 2.2.4 Costs of Labor and Materials | 2-8 |
| 2.2.5 Withholding of Payments or Partial or Total Suspension of Work | 2-8 |
| 2.2.6 Referrals to DOH | 2-8 |
| 2.2.6.1 Field Office Inspection Referrals | 2-8 |
| 2.2.6.2 Independent Inspection Reporting | 2-9 |
| 2.2.7 Terminate for Cause..... | 2-10 |
| 3. ENCROACHMENT PERMIT CONSTRUCTION ENFORCEMENT | 3-1 |
| 3.1 Violations and Methods of Discovery | 3-2 |
| 3.2 Enforcement Actions..... | 3-2 |
| 3.2.1 Verbal or Written Notification..... | 3-3 |
| 3.2.2 Verification of Corrective Actions..... | 3-3 |
| 3.2.3 Revoking Encroachment Permit | 3-3 |
| 3.2.4 Referrals to DOH | 3-3 |
| 3.2.4.1 Maintenance Inspection Referrals | 3-4 |
| 3.2.4.2 Independent Inspection Reporting | 3-4 |

LIST OF APPENDICES

| <u>Appendix</u> | <u>Title</u> |
|-----------------|--|
| A | Notice of Non-Compliance Memorandum Sample |
| B | Enforcement Letter Sample |
| C | Liquidated Damages Calculation Spreadsheet |
| D | Written Request for Enforcement Action to DOH Sample |

LIST OF FIGURES

| <u>Figure</u> | <u>Title</u> | <u>Page</u> |
|---------------|---|-------------|
| Figure 1-1. | Organization Chart for the Construction Site Runoff Control Program. | 1-2 |
| Figure 2-1. | Organization Chart for Contract Construction Projects. | 2-1 |
| Figure 2-2. | Flow Chart for Non-Compliances. | 2-3 |
| Figure 3-1. | Organization Chart for Encroachment Permit Construction Projects. | 3-1 |

LIST OF TABLES

| <u>Table</u> | <u>Title</u> | <u>Page</u> |
|--------------|---|-------------|
| Table 2-1. | Timeframes for Addressing Non-Compliances..... | 2-5 |
| Table 2-2. | Liquidated Damage Schedule for Non-Compliances..... | 2-6 |

ACRONYMS AND ABBREVIATIONS

| | |
|------------|--|
| BMP | Best Management Practice |
| DOH | State of Hawaii Department of Health |
| DOT-HWYS | State of Hawaii Department of Transportation, Highways Division, Oahu District |
| ERP | Enforcement Response Plan |
| HRS | Hawaii Revised Statutes |
| LD | Liquidated Damages |
| MS4 | DOT-HWYS' Municipal Separate Storm Sewer System |
| MS4 Permit | DOT-HWYS' NPDES Permit No. HI S000001 |
| NGPC | Notice of General Permit Coverage |
| NOI | Notice of Intent |
| NPDES | National Pollutant Discharge Elimination System |
| PS&E | Plans, Specifications & Estimates |
| ROW | Right-of-Way |
| SSBMP | Site-Specific Best Management Practice |
| SWPPP | Storm Water Pollution Prevention Plan |

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1. INTRODUCTION

This Enforcement Response Plan (ERP) was developed to satisfy Part D.1.d.(5) of the State of Hawaii Department of Transportation, Highways Division, Oahu District's (DOT-HWYS) National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) Permit No. HI S000001, effective October 28, 2013 (hereinafter referred to as the "MS4 Permit"). Specifically, Part D.1.d.(5).(ii) requires that DOT-HWYS develop and implement an ERP, within one year of the effective date of the MS4 Permit (by October 27, 2014).

The following is a brief summary of each section included in this ERP:

- **Section 1** - Provides an introduction and background of DOT-HWYS' Construction Site Runoff Control Program.
- **Section 2** - Documents how DOT-HWYS will execute corrective and enforcement actions on contract construction projects.
- **Section 3** - Documents how DOT-HWYS will execute corrective and enforcement actions on encroachment permitted construction projects.

1.1 PURPOSE

Discharges of pollutants from DOT-HWYS construction projects and into DOT-HWYS' MS4 are prohibited by State and Federal law. This ERP is part of the DOT-HWYS Construction Site Runoff Control Program and describes DOT-HWYS' procedures for enforcement and follow-up actions, including assessment of penalties, when a construction project is not in compliance with the MS4 Permit, policies, standards, requirements, and/or applicable permits. Furthermore, implementation of the ERP will ensure a consistent response by DOT-HWYS for compliance with the MS4 Permit and provides the framework for DOT-HWYS to impose enforcement on construction projects if necessary.

1.2 ENFORCEMENT POLICY

DOT-HWYS' policy is to ensure all contract and encroachment permit construction projects implement Best Management Practices (BMPs) to prevent the discharge of pollutants from construction project sites in accordance with the MS4 Permit, policies, standards, and project-specific requirements and permits. As allowed by the various mechanisms described below in Section 1.3, Enforcement Authority, DOT-HWYS is authorized to take enforcement action for non-compliances in accordance with this ERP.

The organizational structure for the Construction Site Runoff Control Program is provided in Figure 1-1.

Construction Site Runoff Control Program

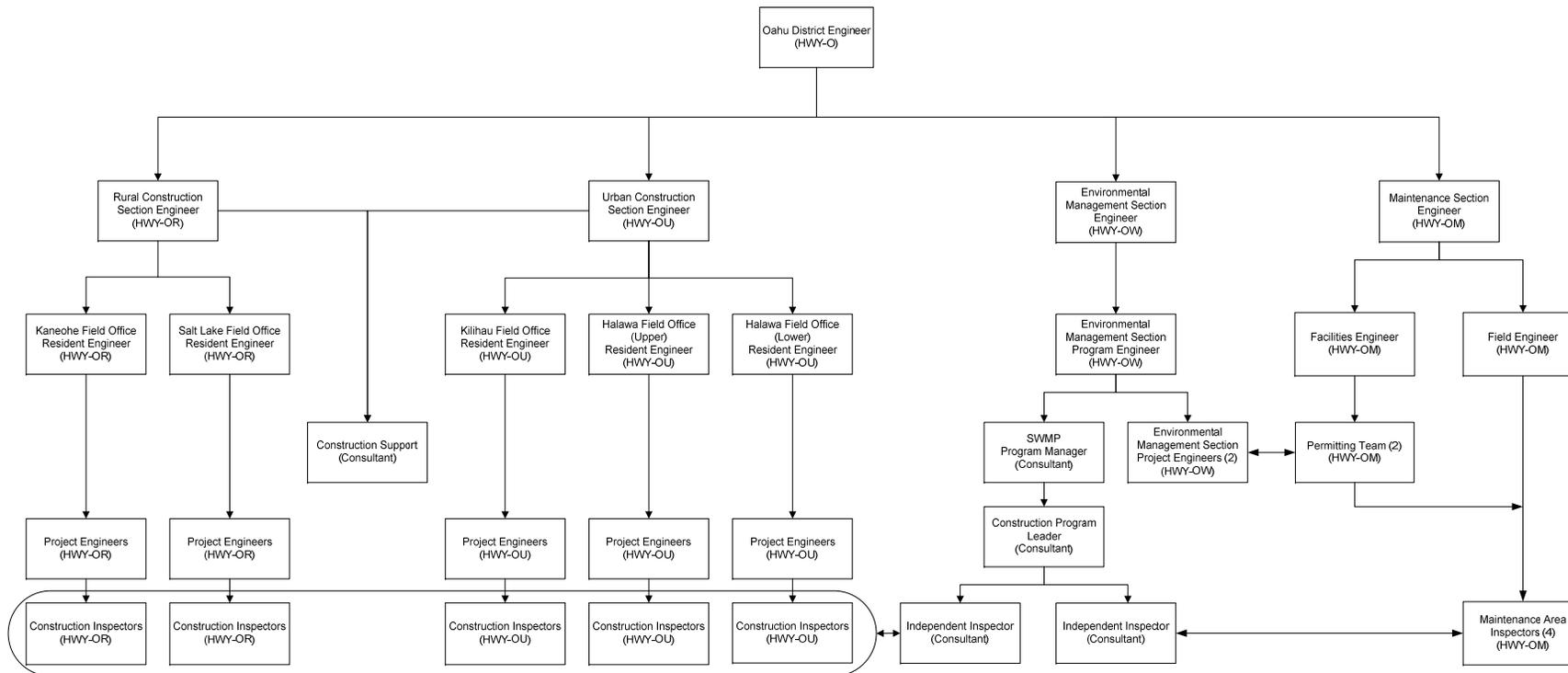


Figure 1-1. Organization Chart for the Construction Site Runoff Control Program.

1.2.1 Contract Construction Projects

Contract construction projects are administered by DOT-HWYS' personnel and performed by private contractors. The plans, specifications, and estimates (PS&E) of contract projects vary in complexity and size.

1.2.2 Encroachment Permit Construction Projects

Encroachment permits are issued for construction projects that will occur within DOT-HWYS' right-of-way (ROW) and are not under the authority (funding) of or administered by DOT-HWYS. Encroachment construction projects are required to obtain a *Permit to Perform Work Upon State Highways* prior to construction activities commencing.

DOT-HWYS also issues the following permits for projects that discharge or connect to the MS4:

- *Permit to Discharge into the State Highways Drainage System* – permit issued for storm water discharges associated with industrial activities, storm water discharges associated with construction activities, construction activity dewatering, hydrotesting, or other discharge.
- *Permit for Connection to the State Highways Drainage System* – permit issued for connecting to the State Highways drainage system.

1.3 ENFORCEMENT AUTHORITY

Contract construction projects and encroachment permit construction projects are required to implement BMPs to prevent the discharge of pollutants in accordance with the MS4 Permit, policies, standards, requirements, and/or applicable permits. In accordance with this ERP, and in addition to any project specific requirements and applicable permits, DOT-HWYS may use the mechanisms and guidance documents described below for enforcement authority on construction projects.

1.3.1 Hawaii Standard Specifications for Road and Bridge Construction

Standard Specifications Section 108.10 Suspension of Work:

(A) Suspension of Work. The Engineer may, by written order, suspend the performance of the work, either in whole or in part, for such periods as the Engineer may deem necessary, for any cause, including but not limited to:

- (1) Weather or soil conditions considered unsuitable for prosecution of the work.*
- (2) Whenever a redesign that may affect the work is deemed necessary by the Engineer.*
- (3) Unacceptable noise or dust arising from the construction even if it does not violate any law or regulation.*

(4) Failure on the part of the Contractor to:

- (a) Correct conditions unsafe for the general public or for the workers.*
- (b) Carry out orders given by the Engineer.*
- (c) Perform the work in strict compliance with the provisions of the contract.*
- (d) Provide adequate supervision on the jobsite.*

(5) The convenience of the State.

(B) Partial and Total Suspension. *Suspension of work on some but not all items of work shall be considered a “partial suspension”. Suspension of work on all items shall be considered “total suspension”. The period of suspension shall be computed from the date set out in the written order for work to cease until the date of the order for work to resume.*

Standard Specifications Section 108.11 Termination of Contract for Cause:

- (A) Default.** *If the Contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, or commits any other material breach of this contract, and further fails within seven days after receipt of written notice from the Engineer to commence and continue correction of the refusal or failure with diligence and promptness, the Engineer may, by written notice to the Contractor, declare the Contractor in breach and terminate the Contractor’s right to proceed with the work or the part of the work as to which there has been delay or other breach of contract. In such event, the State may take over the work, perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plants as may be on the site of the work and necessary therefore. Whether or not the Contractor’s right to proceed with the work is terminated, the Contractor and the Contractor’s sureties shall be liable for any damage to the State resulting from the Contractor’s refusal or failure to complete the work within the specified time.*
- (B) Additional Rights and Remedies.** *The rights and remedies of the State provided in this contract are in addition to any other rights and remedies provided by law.*
- (C) Costs and Charges.** *All costs and charges incurred by the State, together with the cost of completing the work under contract, will be deducted from any monies due or which would or might have become due to the Contractor had it been allowed to complete the work under the contract. If such expense exceeds the sum which would have been payable under the contract, then the Contractor and the surety shall be liable and shall pay the State the amount of the excess.*

In case of termination, the Engineer will limit any payment to the Contractor to the part of the contract satisfactorily completed at the time of termination. Payment will not be made until the work has satisfactorily been completed and all required documents, including the tax clearance required by Subsection 109.11 – Final Payment are submitted by the Contractor. Termination shall not relieve the Contractor or Surety from liability for liquidated damages.

(D)Erroneous Termination for Cause. If, after notice of termination of the Contractor’s right to proceed under this section, it is determined for any reason that good cause did not exist to allow the State to terminate as provided herein, the rights and obligations of the parties shall be the same as, and the relief afforded the Contractor shall be limited to, the provisions contained in Subsection 108.12 – Termination for Convenience.

Standard Specifications Section 109.10 Withholding of Payment for Unsatisfactory Progress:

If the Contractor is progressing or performing the work unsatisfactorily, the Engineer, upon written notice to the Contractor, may withhold sums not exceeding 5 percent of the total contract price from subsequent progress payments.

The Engineer may deduct from any amounts due to the Contractor sums assessed as liquidated damages as well as any other charges against the Contractor allowed by law or the contract documents.

If the Contractor refuses or fails to comply with the equal employment opportunity, affirmative action, non-discrimination, labor compliance, training, implementing and maintaining satisfactorily the BMP and NPDES standards and disadvantaged business enterprise requirements, the Engineer at its sole discretion and upon written notice to the Contractor may withhold any or all of the monthly progress payments that are due or to become due.

With the approval of the State, the Contractor may withdraw from time to time the whole or any portion of the sum withheld after endorsing over to the State and depositing with the State any general obligation bond of the State or its political subdivisions suitable to the State. But in no case will the bond have a face value less than the value of the amount to be withdrawn. The State may sell the bond and use monies directly withheld from progress payments or the final payment.

Standard Special Provision Section 209 Temporary Water Pollution, Dust and Erosion Control (dated 2/10/2014):

- Per Section **209.02 Materials**. *Comply with applicable materials described in Chapters 2 and 3 of the current HDOT “Construction Best Management Practices Field Manual”.*

- Per Section **209.03(B) Construction Requirements**. *The Contractor's failure to satisfactorily address these Site-Specific BMP deficiencies, the Engineer reserves the right to employ outside assistance or use the Engineer's own labor forces to provide necessary corrective measures. The Engineer will charge the Contractor such incurred costs plus any associated project engineering costs. The Engineer will make appropriate deductions from the Contractor's monthly progress estimate. Failure to apply Site-Specific BMP measures may result in one or more of the following: assessment of liquidated damages, suspension, or cancellation of Contract with the Contractor being fully responsible for all additional costs incurred by the State.*
- Per Section **209.05 Payment**. *No progress payment will be authorized until the Engineer accepts in writing Site-Specific BMP or when the Contractor fails to maintain project site in accordance with accepted BMP.*
- Per Section **209.05 Payment**. *For all citations or fines received by the Department for non-compliance, including compliance with NPDES Permit conditions, the Contractor shall reimburse State within 30 calendar days for full amount of outstanding cost State has incurred, or the Engineer will deduct cost from progress payment.*
- Per Section **209.05 Payment**. *The Engineer will assess liquidated damages up to \$27,500 per day for non-compliance of each BMP requirement and all other requirements in this section.*

1.3.2 Project Special Provisions

Depending on the nature and the location of the project, additional project specific requirements may apply.

1.3.3 Hawaii Revised Statutes

Hawaii Revised Statutes (HRS), Chapter 342D, provides the State of Hawaii Department of Health (DOH) the authority to implement and enforce the conditions of NPDES Permits for construction projects holding Notice of General Permit Coverage (NGPC) or NPDES Individual Permits.

1.3.4 Construction Best Management Practices Field Manual

The Construction BMP Field Manual (dated January 2008) provides guidance on BMP installation and maintenance procedures for construction activities and focuses on the areas of site management, erosion control, and sediment control. It is intended for use by DOT-HWYS' personnel involved in construction projects and consultants or contractors involved in projects which require work within DOT-HWYS' rights-of-way (ROW) or projects which connect or discharge to DOT-HWYS' MS4.

1.3.5 Maintenance Activities Best Management Practices Field Manual

The Maintenance Activities BMP Field Manual provides guidance on BMPs to keep storm drains and streams clean during maintenance activities, including spills and emergencies. It is intended for use by DOT-HWYS' personnel involved in maintenance activities, including routine maintenance. However, the BMPs included in the Maintenance Activities BMP Field Manual may also be applicable on construction projects.

1.3.6 Storm Water Permanent Best Management Practices Manual

The Storm Water Permanent BMP Manual (dated March 2007) provides procedures and guidelines to ensure that permanent BMPs are being considered and implemented throughout all phases of DOT-HWYS' project development, including planning, design, construction, and maintenance. Construction projects are subject to DOT-HWYS' review to determine if storm water permanent BMPs are required. If applicable, the storm water permanent BMPs shall be designed consistent with the Storm Water Permanent BMP Manual and constructed according to the approved project plans.

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2. CONTRACT CONSTRUCTION ENFORCEMENT

DOT-HWYS' policy is to ensure all contract construction projects implement BMPs to prevent the discharge of pollutants from contract construction project sites in accordance with standards and provisions as described in the Hawaii Standard Specifications for Road and Bridge Construction, Standard Special Provisions, Project Plans and Special Provisions, and DOT-HWYS' Construction BMP Field Manual. As allowed by these standards and provisions, DOT-HWYS is authorized to take enforcement actions against Contractors for non-compliances in accordance with this ERP.

The Organizational Chart for Contract Construction Projects is provided in Figure 2-1.

Contract Construction Projects

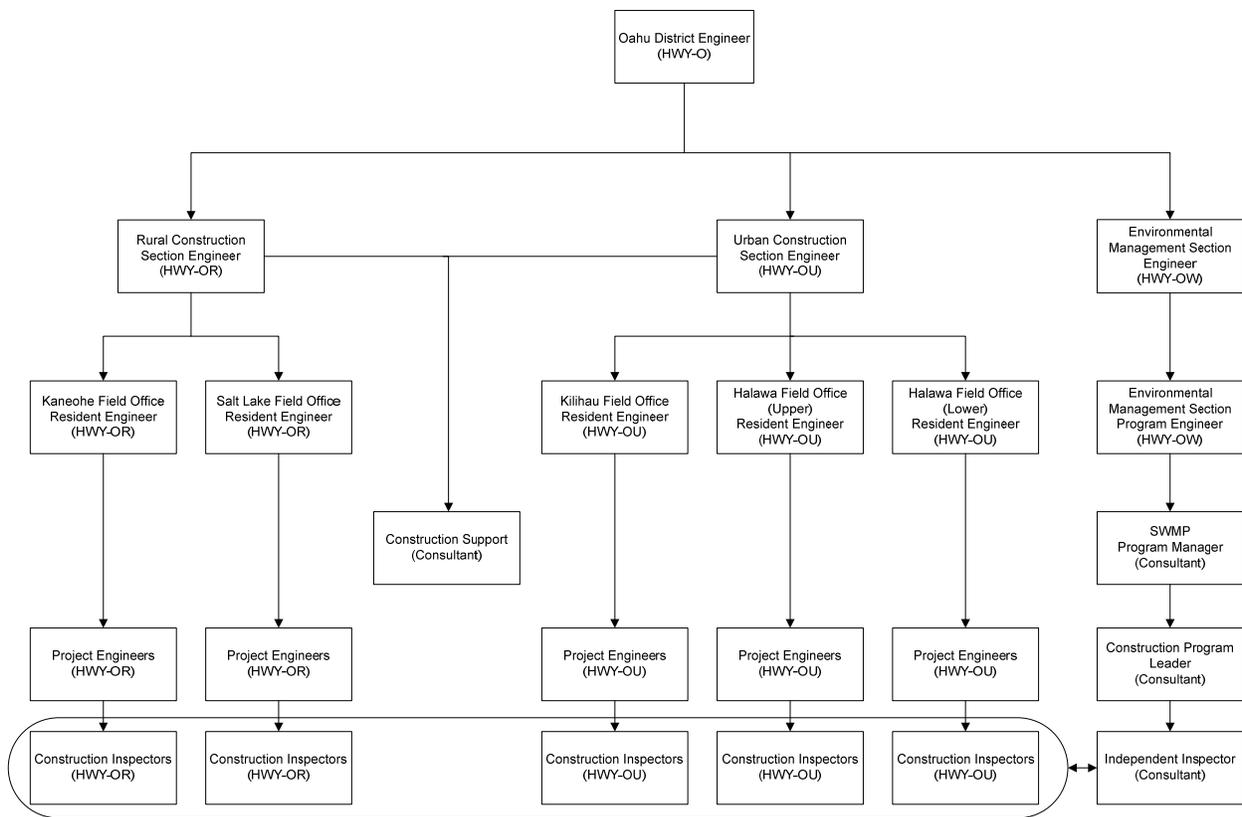


Figure 2-1 Organization Chart for Contract Construction Projects.

2.1 VIOLATIONS AND METHODS OF DISCOVERY

Violations arise when the Contractor is not in compliance with the applicable contract documents and permits, when the Contractor fails to address non-compliances as directed by DOT-HWYS, and/or when the Contractor discharges pollutants from DOT-HWYS' construction sites.

Categories of non-compliances include BMP deficiencies and failure to meet administrative requirements. Non-compliances may be identified through the following sources:

- DOT-HWYS' personnel conducting routine activities such as driving to or from construction sites or when inspecting other activities at a site.
- Project and permit required inspections/monitoring or independent inspections.
- Contractor Compliance Activities, such as conducting and submitting inspection reports, or preparing, implementing, and updating SWPPPs or SSBMP Plans.
- Public complaints.
- Regulatory Agency inspections or audits.

2.2 ENFORCEMENT ACTIONS

Enforcement actions are legal mechanisms to address and correct violations and deter future non-compliance. Enforcement actions are discretionary in nature and are not the primary tool to ensure compliance. The enforcement methodology described in this section is a generalized scheme detailing the common enforcement process for common violations. DOT-HWYS reserves the right to implement any enforcement action based on the facts of the violation. A Flow Chart for Non-Compliances is provided in Figure 2-2.

DOT-HWYS has multiple methods for taking an enforcement action based on the nature of violation. DOT-HWYS' procedures for enforcement actions for contract construction projects may include the following:

- (1) Verbal Notification
- (2) Notice of Non-Compliance
- (3) Assessment of Liquidated Damages
- (4) Costs of Labor and Materials
- (5) Withholding Payments, Partial, or Total Suspension of Work
- (6) Referrals to DOH
- (7) Terminate for Cause

Enforcement actions may follow the sequence listed above, however, depending on the severity and duration of the non-compliances, enforcement may begin at any step. In general, the lowest level of enforcement action necessary to correct a violation and prevent future violations of a similar nature will be taken by DOT-HWYS. A description of each enforcement action is discussed in Sections 2.2.1 through 2.2.7.

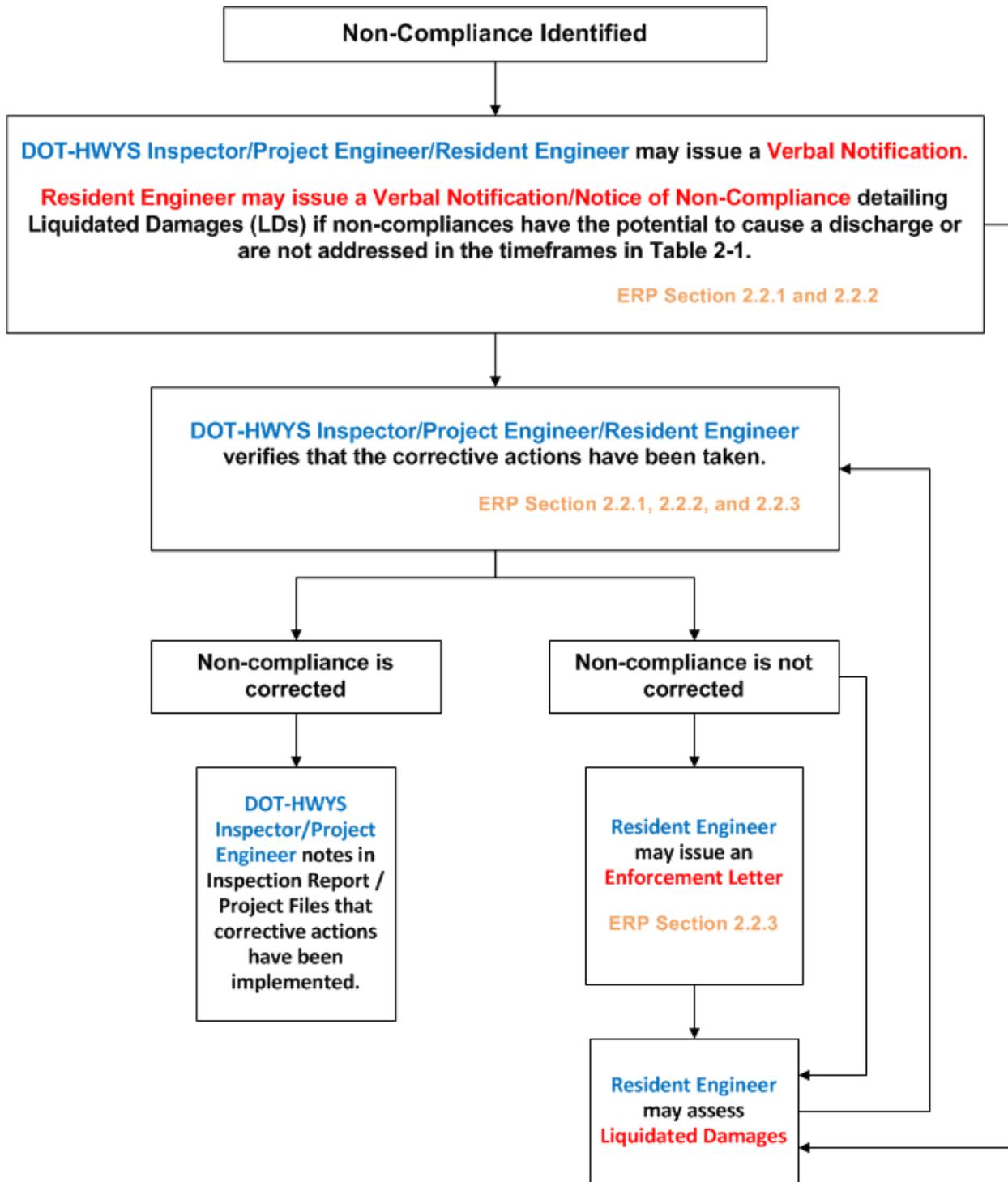


Figure 2-2 Flow Chart for Non-Compliances.

2.2.1 Verbal Notification

The Inspector, Project Engineer, or Resident Engineer may issue a Verbal Notification to the Contractor for any non-compliance. At the discretion of the Project Engineer or Resident Engineer, the Verbal Notification may be given in conjunction with a *Notice of Non-Compliance* when non-compliances are identified. The Verbal Notification may be documented in the BMP Inspection Report and, as applicable, in the Notice of Non-Compliance. Verification that non-compliances have been addressed will be performed upon notification from the Contractor or at the discretion of DOT-HWYS.

A Verbal Notification may be issued:

- Upon discovery of any non-compliance found during an inspection.
- Upon review of the project's administrative requirements.

2.2.2 Notice of Non-Compliance

The *Notice of Non-Compliance* may be issued at the discretion of the Project Engineer/Resident Engineer and may follow a Verbal Notification. A hard copy and an electronic copy of the *Notice of Non-Compliance* will be issued to the Contractor's designated representative(s) responsible for water pollution, dust, and erosion controls on the project site per Standard Special Provisions 209.03(A)(2)(d) (dated 2/10/2014) and a hard copy will be kept in the project files.

The *Notice of Non-Compliance* should describe the types of non-compliances found, the locations of the BMP deficiencies, a schedule for the non-compliances to be brought back into compliance, and liquidated damages that will result if the non-compliances are not addressed in the timeframe noted. Verification that non-compliances have been addressed will be performed upon notification from the Contractor or at the discretion of DOT-HWYS.

A *Notice of Non-Compliance* will be issued when:

- Corrective actions are not taken after a Verbal Notification is issued.
- Contractors are non-responsive to DOT-HWYS' directives.
- Non-compliances have the potential to cause a discharge.
- Non-compliances are discovered prior to a weekend, holiday, or non-workday and have the potential to discharge pollutants during a rainfall event. The Resident Engineer will consider issuing a *Notice of Non-Compliance* to alert the Contractor that there are non-compliances that need to be addressed by the end of that day.

Table 2-1 indicates the timeframes that the Contractor has to bring various BMP deficiencies back into compliance. Table 2-2 outlines the amount of liquidated damages per calendar day that the Contractor will be assessed for each non-compliance not properly and sufficiently addressed within the specified timeframe. The timeframes and liquidated damages reflected in Table 2-1 and Table 2-2 are applicable for all contract construction projects and may be applied at the discretion of the Resident Engineer.

A sample *Notice of Non-Compliance Memorandum* is provided in Appendix A.

Table 2-1 Timeframes for Addressing Non-Compliances (BMP Deficiencies).

| Type of Non-Compliance | Description | Timeframe to Complete | Exceptions | Exception Timeframe |
|---|---|--|---|-------------------------------|
| Track Out | Any time vehicles leaving a construction site track sediment/gravel off-site (e.g., onto the roadway) | End of same work day as it occurs | Track out occurs during non-working hours | End of the next work day |
| Drain Inlet Protection | Inlet protection BMPs require maintenance | End of same workday during which it is found | Infeasible to complete by close of workday during which it is found | End of the following work day |
| Routine Maintenance | Maintenance of BMPs that were installed per accepted BMP Plan | Close of the next work day | None | Not Applicable |
| Significant Repair | Repair to BMPs that were heavily damaged (e.g., damaged due to a storm event or other major event) | No later than 7 calendar days from time of discovery | Infeasible to complete within 7 calendar days | As soon as practicable |
| New Sediment Erosion Control BMP | Installation of additional BMPs that were not on the accepted BMP Plan (this requires an amendment) | No later than 7 calendar days from time of discovery | Infeasible to complete within 7 calendar days | As soon as practicable |
| Replacement Sediment Erosion Control BMP | Major replacement of BMPs already installed | No later than 7 calendar days from time of discovery | Infeasible to complete within 7 calendar days; not considered Routine Maintenance | As soon as practicable |
| Stabilization (Non-Vegetative) | Installation of temporary non-vegetative stabilization measures to prevent erosion | 7 calendar days | Discharging to Non-impaired waters | 14 calendar days |
| Stabilization (Vegetative) | All activities necessary to initially seed or plant the area to be stabilized | 7 calendar days | Discharging to Non-impaired waters | 14 calendar days |

Table 2-2 Liquidated Damage Schedule for Non-Compliances.

| Non-Compliance | Amount |
|---|--|
| Failure to submit a Notice of Intent or otherwise obtain a permit. | \$1,000 per calendar day per violation |
| Failure to comply with the conditions specified in the Notice of General Permit Coverage (NGPC) or Individual NPDES Permit, or any other applicable permit. | \$1,000 per calendar day per violation |
| Failure to submit an acceptable Site-Specific BMP (SSBMP) Plan or an acceptable Storm Water Pollution Prevention Plan (SWPPP) for any project in accordance with applicable permits and guidance documents. | \$1,000 per calendar day per violation |
| Failure to have the accepted SSBMP Plan and Amendments or the accepted SWPPP and Amendments available at a project construction site. | \$1,000 per calendar day per violation |
| Failure to install a BMP specified by the SSBMP Plan or SWPPP, or permit. | \$2,000 per calendar day per violation |
| Failure to properly install or maintain appropriate Site-Specific BMPs in accordance with applicable plans, permits, and guidance documents. | \$2,000 per calendar day per violation |
| Failure to have an accepted Amendment to the SSBMP Plan or an accepted Amendment to the SWPPP prior to implementation of the proposed BMPs. | \$2,000 per calendar day per violation |
| Failure to conduct required inspections. | \$1,000 for each of the first ten violations, \$2,500 for each of the next ten violations, \$5,000 for each subsequent violation |
| Failure to submit required reports such as BMP inspection reports, rain gage data logs, etc. | \$500 per calendar day for the first ten days of each violation, \$1,000 per calendar day for the next ten days of each violation, \$2,500 per calendar day for each subsequent day of violation |
| Failure to submit or re-submit plans for approval in the timeframe specified by the Engineer. | \$500 for each calendar day of violation |
| Any non-compliance with the applicable plans, permits, and guidance documents. | Up to \$27,500 per calendar day per violation |
| Any violation resulting in a polluted discharge. | Up to \$27,500 per calendar day per violation |

Note: Liquidated Damages shown in Table 2-2 will be applied at the discretion of the Resident Engineer.

2.2.3 Assessment of Liquidated Damages

At the discretion of the Resident Engineer, the Contractor may be assessed liquidated damages by issuance of an *Enforcement Letter*. An *Enforcement Letter* may be issued, with or without a previous Verbal Notification or *Notice of Non-Compliance*.

Liquidated damages may be assessed for the following:

- Non-compliances have not been corrected in the timeframe noted in Table 2-1.
- Corrective actions are not taken after a Verbal Notification and/or *Notice of Non-Compliance* is issued.
- Contractors are non-responsive to DOT-HWYS' directives.
- Repeated non-compliance.
- Non-compliances have the potential to cause a discharge.
- Corrective actions are not completed by the end of the work-day for non-compliances discovered prior to a weekend, holiday, or non-workday that have the potential to discharge pollutants during a rainfall event.
- A polluted discharge has occurred.

The number of days used for the liquidated damages calculation may start on the day that the non-compliance was required to be corrected, or at the discretion of the Resident Engineer, and shall end on the day that the non-compliance is corrected and verified. If DOT-HWYS' personnel are not able to go out in the field to verify that the BMP deficiencies are corrected in the timeframe specified, the Contractor can send photographs showing the corrected deficiency via e-mail to the DOT-HWYS' Inspector and Project Engineer along with documentation on how the deficiency was corrected. The DOT-HWYS' Inspector or Project Engineer may also return to the site the next business day to verify the corrective actions are acceptable. If the corrective actions are acceptable, then the clock stops on the day that the documentation was received. The Resident Engineer may also verify that non-compliances have been addressed.

The *Enforcement Letter* shall indicate the amount of liquidated damages that are assessed for the non-compliances which will be deducted from the Contractor's next progress payment. The *Enforcement Letter* will be sent electronically via e-mail and a hard copy to the Contractor's designated representative(s) responsible for water pollution, dust, and erosion controls on the project site per Standard Special Provision 209.03(A)(2)(d) (dated 2/10/2014). A hard copy will be kept in the project files. A sample *Enforcement Letter* is provided in Appendix B.

The *Liquidated Damage Calculation Spreadsheet* was developed to assist the Resident Engineer in calculating fines. The *Liquidated Damages Calculation Spreadsheet* is provided in Appendix C.

2.2.4 Costs of Labor and Materials

The Contractor has a set timeframe to correct BMP deficiencies as specified in Table 2-1. If, however, the Contractor fails to correct the BMP deficiencies within the timeframe specified and DOT-HWYS corrects the BMP deficiencies using outside assistance or DOT-HWYS' personnel, the Contractor will be assessed the actual costs for materials and labor needed to provide necessary corrective measures. These costs will be assessed in addition to the liquidated damages calculated per this ERP. The Resident Engineer will make appropriate deductions from the Contractor's monthly progress payments.

2.2.5 Withholding of Payments or Partial or Total Suspension of Work

DOT-HWYS may choose to withhold payment and/or stop work if the Contractor fails to be in compliance with the MS4 Permit, Standard Specifications and Special Provisions, project-specific requirements, and any other applicable permit and regulatory requirements.

In the event that there is a situation where a discharge of pollutants could occur at any moment, or a discharge has occurred or is occurring, DOT-HWYS must be prepared to and may do the following:

- Issue a Partial Stop Work Order to stop the construction activity that is potentially causing the discharge.
- Isolate and contain the discharge.
- Investigate to determine the extent of the discharge.
- Inspect BMPs to identify areas of non-compliance and areas where additional BMPs are required.
- Correct non-compliances and install additional BMPs as appropriate.
- Document non-compliances and corrective action taken.
- If a Stop Work Order is issued, a Resume Work Order may be issued upon completion of successful corrective action.

2.2.6 Referrals to DOH

DOT-HWYS will refer non-compliance to DOH as required by the MS4 Permit. The following sections describe the process for referring non-compliance to DOH when identified by DOT-HWYS personnel and/or the independent inspector.

2.2.6.1 Field Office Inspection Referrals

Part D.1.d.(6) of the MS4 Permit requires DOT-HWYS to refer non-compliances and non-filers to DOH. In the event that DOT-HWYS has exhausted its use of sanctions and cannot bring a construction site or construction operator into compliance with its policies, standards, or the MS4

Permit, or otherwise deems the site to pose an immediate and significant threat to water quality, the DOH will be notified as follows:

- Provide an e-mail notification to cleanwaterbranch@hawaii.gov, Attn: Enforcement Section Supervisor within 1 week of the determination.
- Submit a written notification and a copy of all inspection checklists, notes and related correspondence in pdf form within 2 weeks of the determination.
- In the event that a non-permitted project requires an NPDES Permit due to the Contractor's means and methods, submit written notification within 2 weeks of discovery.

Additionally, if DOT-HWYS believes that a situation of non-compliance has the potential to significantly impact public health or the environment, the case will be also be referred to DOH and may elicit concurrent enforcement actions. A sample of the *Written Request for Enforcement Action* is provided in Appendix D.

2.2.6.2 Independent Inspection Reporting

Part D.1.d.(4)(ii) of the MS4 Permit requires independent inspection reporting procedures to include, at a minimum, notification of any critical deficiencies to the DOH. Critical deficiencies shall mean those deficiencies that pose an immediate threat for the discharge of pollutants to the storm drain systems, surface waters, or State waters. Critical deficiencies include, but are not limited to, the following examples:

- Any observed discharge, or evidence of discharge, of untreated storm water or non-storm water to the storm drain system, surface waters, or State waters generated by the construction activity.
- Absence of linear barriers and/or perimeter controls required by the BMP Plan.
- There are identified storm drain inlets, surface waters, or State waters within or adjacent to the project site in close proximity to disturbed soil areas without control measures in place that pose an immediate threat of untreated storm water discharges.
- Work in an active stream channel or other surface water body without proper implementation of required BMPs.
- Presence of any spilled oil or hazardous materials near an unprotected storm drained inlet, surface waters, or State waters.

The following reporting procedures have been developed for independent inspections conducted under Part D.1.d.(4)(ii) of the MS4 Permit:

1. Conduct inspections of BMPs on DOT-HWYS' contract construction projects.
2. If the inspector identifies a critical deficiency during the site visit, the deficiency shall be corrected or addressed before the close of business on the day of the inspection when the deficiency is identified.

3. Inspector provides a post-inspection briefing to construction project personnel (e.g., DOT-HWYS' Project Engineer, DOT-HWYS' Construction Inspector, Construction Manager, Contractor's Representative) summarizing the BMP deficiencies identified.
4. Inspector completes the *Independent (Third Party) Inspection Checklist* and submits the checklist with accompanying photographs to the DOT-HWYS personnel.
5. The DOT-HWYS' personnel notifies the contractor of any deficiencies identified by the inspector.
6. DOT-HWYS' personnel verify that the deficiencies have been addressed and document the date deficiencies were corrected and the corrective actions taken.
7. The inspector notifies DOT-HWYS' Oahu District Environmental Management Section of the critical deficiency and corrective action taken.
8. DOT-HWYS' Oahu District Environmental Management Section notifies the DOH of the critical deficiency, which includes a copy of the inspection report and photo documentation.

2.2.7 Terminate for Cause

In a situation of continued non-compliance or where the Contractor's actions have resulted in an immediate or imminent threat to public safety and water quality, DOT-HWYS has the option to terminate the contract for cause per Standard Specifications Section 108.11 Termination of Contract for Cause.

3. ENCROACHMENT PERMIT CONSTRUCTION ENFORCEMENT

DOT-HWYS’ policy is to ensure encroachment permit construction projects implement BMPs to prevent the discharge of pollutants from encroachment permitted projects to DOT-HWYS’ MS4 in accordance with the *Permit to Perform Work Upon State Highways*, DOT-HWYS’ Construction BMP Field Manual, the accepted SSBMP Plan or SWPPP, and other applicable permits. As allowed by the *Permit to Perform Work Upon State Highways*, DOT-HWYS is authorized to take enforcement actions against permit holders for non-compliances in accordance with this ERP.

The Organizational Chart for Encroachment Permit Construction Projects is provided in Figure 3-1.

Encroachment Permit Construction Projects

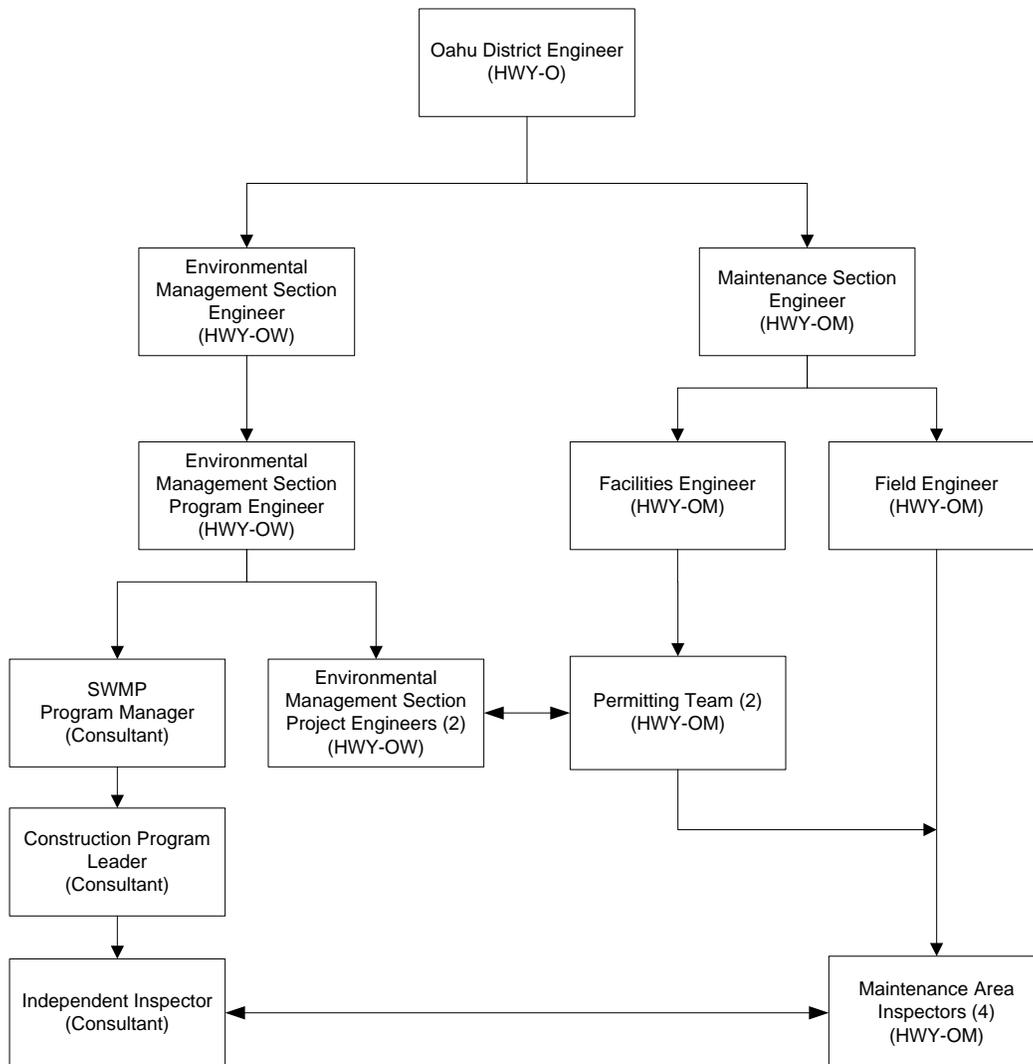


Figure 3-1 Organization Chart for Encroachment Permit Construction Projects.

3.1 VIOLATIONS AND METHODS OF DISCOVERY

Violations arise when the permit holder discharges or has the potential to discharge pollutants from its encroachment permit project due to non-compliance with the *Permit to Perform Work Upon State Highways*; and/or fails to submit, amend as appropriate, and/or maintain an accepted SSBMP Plan or SWPPP.

Non-compliances include, but are not limited to, the following:

- Failure to submit a NOI or otherwise obtain a permit.
- Failure to comply with the conditions specified in the NGPC or Individual NPDES Permit, or any other applicable permit.
- Failure to submit an acceptable SSBMP Plan or an acceptable SWPPP for any project in accordance with applicable permits and guidance documents.
- Failure to install a BMP specified by the SSBMP Plan or SWPPP or permit.
- Failure to properly install or maintain appropriate Site-Specific BMPs in accordance with applicable plans, permits, and guidance documents.
- Failure to conduct required inspections.
- Failure to comply with the requirements of any other applicable plans, permits and guidance documents.

Non-compliances may be identified through the following sources:

- DOT-HWYS' personnel conducting routine activities such as driving to or from encroachment permit construction sites or when inspecting other activities at a site.
- Project and permit required inspections/monitoring or independent inspections.
- Public complaints.
- Regulatory Agency inspections or audits.

3.2 ENFORCEMENT ACTIONS

Enforcement actions are legal mechanisms to address and correct violations and deter future non-compliance. Enforcement actions are discretionary in nature and are not the primary tool to ensure compliance. The enforcement methodology described below is a generalized scheme detailing the common enforcement process for common violations. DOT-HWYS reserves the right to take or decline any enforcement action based on the facts of the violation.

DOT-HWYS' procedures for enforcement actions for encroachment permit construction projects may include the following:

- (1) Verbal or Written Notification

- (2) Verification of Corrective Actions
- (3) Revoke Encroachment Permit
- (4) Referrals to DOH

Enforcement actions will follow the sequence listed above, however, depending on the severity and duration of the non-compliances, enforcement may begin at any step. In general, the lowest level of enforcement action necessary to correct a violation and prevent future violations of a similar nature will be taken by DOT-HWYS. A description of each enforcement action is discussed below.

3.2.1 Verbal or Written Notification

If a non-compliance is identified by a DOT-HWYS' Maintenance Area Inspector or by the Independent Inspector on an encroachment permit construction project, the Inspector will address the permit holder on site and request corrective action. If the permit holder does not take immediate action to address the non-compliance, a verbal or written notification may be issued to the permit holder. After a verbal or written notification is issued, the permit holder is required to initiate and complete corrective action within twenty-four (24) hours of the inspection.

The verbal or written notification may be issued at the discretion of the Maintenance Area Inspector or Independent Inspector. Additionally, the Maintenance Area Inspector may notify the consultant designer who developed the SSBMP Plan or SWPPP, and the owner of the project.

3.2.2 Verification of Corrective Actions

Follow-up inspections and verifications will be conducted by the Maintenance Area Inspector on the next business day to confirm that non-compliances have been corrected in the required timeframe.

3.2.3 Revoking Encroachment Permit

After a verbal notification is issued to the permit holder and if corrective action is not taken to address the non-compliance within twenty-four (24) hours of the inspection, the encroachment permit may be revoked by DOT-HWYS. Once the permit is revoked, access to the ROW is no longer allowed. If the permit is revoked, the ROW must be restored to its original or better condition.

3.2.4 Referrals to DOH

DOT-HWYS will refer non-compliance to DOH as required by the MS4 Permit. The following sections describe the process for referring non-compliance to DOH when identified by DOT-HWYS' personnel and/or the independent inspector.

3.2.4.1 Maintenance Inspection Referrals

Part D.1.d.(6) of the MS4 Permit requires that DOT-HWYS refer non-compliance and non-filers to DOH. In the event DOT-HWYS has exhausted its use of sanctions and cannot bring a construction site or construction operator into compliance with its policies, standards, or the MS4 Permit, or otherwise deems the site to pose an immediate and significant threat to water quality, the DOH will be notified as follows:

- Provide e-mail notification to cleanwaterbranch@hawaii.gov, Attn: Enforcement Section Supervisor within 1 week of the determination.
- Submit written notification and a copy of all inspection checklists, notes and related correspondence in .pdf form within 2 weeks of the determination.

Additionally, if DOT-HWYS believes that a situation of non-compliance has the potential to significantly impact public health or the environment, the case will be also be referred to DOH and may elicit concurrent enforcement actions. A sample of the *Written Request for Enforcement Action* is provided in Appendix D.

3.2.4.2 Independent Inspection Reporting

Part D.1.d.(4).(iii) of the MS4 Permit requires that reporting procedures include, at a minimum, notification of any critical deficiencies to the DOH. Critical deficiencies shall mean those deficiencies that pose an immediate threat for the discharge of pollutants to the storm drain systems, surface waters, or State waters. Critical deficiencies include, but are not limited to, the following examples:

- Any observed discharge, or evidence of discharge of untreated storm water or non-storm water to the storm drain system, surface waters, or State waters generated by the construction activity.
- Absence of linear barriers and/or perimeter controls required by the BMP Plan.
- There are identified storm drain inlets, surface waters, or State waters within or adjacent to the project site in close proximity to disturbed soil areas without control measures in place that pose an immediate threat of untreated storm water discharges.
- Work in an active stream channel or other surface water body without proper implementation of required BMPs.
- Presence of any spilled oil or hazardous materials near unprotected storm drained inlets, surface waters, or State waters.

The following reporting procedures have been developed for inspections conducted under Part D.1.d.(4)(iii) of the MS4 Permit:

1. Conduct inspections of BMPs on construction projects with a *Permit to Perform Work Upon State Highways*, connection permit, encroachment permit, or discharge of surface runoff permit/approval at least once annually or once during the life of the project, whichever comes first.

2. If the inspector identifies a critical deficiency during the site visit, the deficiency shall be corrected or addressed before the close of business on the day of the inspection when the deficiency is identified.
3. Inspector completes the *Independent (Third Party) Inspection Checklist (Short Form)* and submits the checklist with accompanying photographs to the DOT-HWYS' personnel.
4. DOT-HWYS' personnel verify that the deficiencies have been addressed, and document the date deficiencies were corrected and the corrective actions taken.
5. The inspector notifies DOT-HWYS' Oahu District Environmental Management Section of the critical deficiency and corrective action taken.
6. DOT-HWYS' Oahu District Environmental Management Section notifies the DOH of the critical deficiency, which includes a copy of the inspection report and photo documentation.

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Enforcement Response Plan Construction Site Runoff Control
APPENDIX A: NOTICE OF NON-COMPLIANCE MEMORANDUM
SAMPLE

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STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
MEMORANDUM

TO: Contractor ABC
ATTN: John Doe, Project Manager
FROM: James Jones, Resident Engineer
SUBJECT: Notice of Non-Compliance with the Requirements of HDOT's Standard Specifications and Special Provisions Section 209
Honolulu Highway, Haleiwa Stream Bridge Replacement
F.A.P. No. BR-097-1(46)

DATE: July 9, 2014

-
- References:
1. Attached Photographs, Exhibits "A", "B", and "C" of Silt Fence along the Northwest Perimeter of the Site
 2. Attached Photographs, Exhibits "D", "E", and "F" of Debris Build-Up at Inlet Protection Devices at Sta. 10+75
 3. Project Special Provision Section 209, Subsection 209.03(B) and 209.05.
 4. Plan Sheet No. E-7, Erosion Control Plan

A verbal notification was given at the construction site on today, July 9, 2014 at 12:00 p.m. to correct your non-compliances by the end of next work day. You are hereby notified that Liquidated Damages will be assessed for your non-compliances with the requirements of the documents referenced above if they are not brought back into compliance by your follow-up inspection/verification date, July 10, 2014 at 4:00 pm, and they will be calculated as follows starting from July 11, 2014:

- a. Failure to properly install or maintain appropriate Site-Specific BMPs in accordance with applicable plans, permits, and guidance documents - \$2,000/day per violation**
 - Silt Fence is not properly trenched along the northwest perimeter of the site - \$2,000 x # days
 - Debris built up in front of inlet protection devices at Sta. 10+75 - \$2,000 x # days
- b. Failure to have the accepted Site-Specific BMP Plan and Amendments available at the project construction site - \$1,000/day**
 - \$1,000 x # days

If the non-compliances are not back into compliance by the follow-up date, Liquidated Damages will be deducted from the next progress payment(s) in accordance with the provisions of your Contract. Please note that the Liquidated Damages mentioned above are assessed per day until each deficiency is brought back into compliance and/or rectified in accordance with the requirements of the Contract or accepted BMP Plans.

Feel free to contact me at 987-6543 if you have any questions regarding this matter.

James Jones
Resident Engineer

Cc: Robert Young (Construction Engineer)
File

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Enforcement Response Plan Construction Site Runoff Control

APPENDIX B: ENFORCEMENT LETTER SAMPLE

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STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
MEMORANDUM

TO: Contractor ABC
ATTN: John Doe, Project Manager
FROM: James Jones, Resident Engineer
**SUBJECT: Non-Compliance with the Requirements of HDOT's Standard Specifications and Special Provisions
Section 209
Honolulu Highway, Haleiwa Stream Bridge Replacement
F.A.P. No. BR-097-1(46)**

DATE: July 15, 2014

-
- References:
1. Attached Photographs, Exhibits "A", "B", and "C" of Silt Fence along the Northwest Perimeter of the Site
 2. Attached Photographs, Exhibits "D", "E", and "F" of Debris Build-Up at Inlet Protection Devices at Sta. 10+75
 3. Project Special Provision Section 209, Subsection 209.03(B) and 209.05.
 4. Plan Sheet No. E-7, Erosion Control Plan

You are hereby notified that Liquidated Damages will be assessed for your non-compliances with the requirements of the documents referenced above. A verbal notification was given at the construction site on July 9, 2014 at 12:00 p.m. to correct your non-compliances by the end of next work day. A follow-up e-mail was sent soon after, but the necessary actions to bring the deficiencies back into compliance were not implemented at the time of the follow-up inspection conducted on the afternoon of July 10, 2014. Therefore, Liquidated Damages will be assessed starting from July 11, 2014 and are calculated as follows:

- a. Failure to properly install or maintain appropriate Site-Specific BMPs in accordance with applicable plans, permits, and guidance documents - \$2,000/day per violation**
 - Silt Fence is not properly trenched along the northwest perimeter of the site - $\$2,000 \times 5 \text{ days} = \$10,000$
 - Debris built up in front of inlet protection devices at Sta. 10+75 - $\$2,000 \times 5 \text{ days} = \$10,000$
- b. Failure to have the accepted Site-Specific BMP Plan and Amendments available at the project construction site - \$1,000/day**
 - $\$1,000 \times 5 \text{ days} = \$5,000$

Therefore, a total of \$25,000 in Liquidated Damages will be deducted from the next progress payment(s) in accordance with the provisions of your Contract. Please note that the Liquidated Damages mentioned above are assessed per day until each deficiency is brought back into compliance and/or rectified in accordance with the requirements of the Contract or accepted BMP Plans.

The Liquidated Damages assessed in this Memorandum may not be the final amount assessed for this non-compliance. HDOT reserves the right to further assess Liquidated Damages to Contractor Name should citations or fines be issued to HDOT for this non-compliance.

Feel free to contact me at 987-6543 if you have any questions regarding this matter.

James Jones
Resident Engineer

Cc: Robert Young (Construction Engineer)
File

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Enforcement Response Plan Construction Site Runoff Control

**APPENDIX C: LIQUIDATED DAMAGES CALCULATION
SPREADSHEET**

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LIQUIDATED DAMAGES CALCULATION WORKSHEET
(select all applicable non-compliances)

NON-COMPLIANCES (Calculated Per Calendar Day Overdue For Each Violation)

| | # Calendar Days Allowed | # Calendar Days to Complete | # of Calendar Days Overdue | Fine per Calendar Day Overdue | # of Violations | Total Fine |
|--|-------------------------|-----------------------------|----------------------------|-------------------------------|-----------------|------------|
| <input checked="" type="checkbox"/> Failure to submit a Notice of Intent or otherwise obtain a permit | | | | \$ 1,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to comply with the conditions specified in the Notice of General Permit Coverage (NGPC) or Individual Permit, or any other applicable permit | | | | \$ 1,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to submit an acceptable Site-Specific BMP (SSBMP) Plan or an acceptable Storm Water Pollution Prevention Plan (SWPPP) for any project in accordance with applicable permits and guidance documents | | | | \$ 1,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to have the accepted Site-Specific BMP (SSBMP) Plan and Amendments or the accepted Storm Water Pollution Prevention Plan (SWPPP) and Amendments available at the project construction site | | | | \$ 1,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to install a BMP specified by the Site-Specific BMP (SSBMP) Plan or Storm Water Pollution Prevention Plan (SWPPP), or permit | | | | \$ 2,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to properly install or maintain appropriate Site-Specific BMPs in accordance with applicable plans, permits, and guidance documents | | | | \$ 2,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to have an accepted Amendment to the SSBMP Plan or an accepted Amendment to the SWPPP prior to implementation of the proposed BMPs | | | | \$ 2,000.00 | | \$ - |

NON-COMPLIANCES (Calculated Per Violation)

| | Fine per Violation | # of Violations | Total Fine |
|--|--------------------|-----------------|------------|
| <input checked="" type="checkbox"/> Failure to conduct required inspections | | | |
| <input checked="" type="checkbox"/> Violations 1 - 10 | \$ 1,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Violations 11 - 20 | \$ 2,500.00 | | \$ - |
| <input checked="" type="checkbox"/> Violations 20+ | \$ 5,000.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to submit required reports such as BMP Inspection Reports, Rain Gage Data Logs, etc. | | | \$ - |
| <input checked="" type="checkbox"/> 1 - 10 Calendar Days | \$ 500.00 | | \$ - |
| <input checked="" type="checkbox"/> 11 - 20 Calendar Days | \$ 1,000.00 | | \$ - |
| <input checked="" type="checkbox"/> 20+ Calendar Days | \$ 2,500.00 | | \$ - |
| <input checked="" type="checkbox"/> Failure to submit or re-submit plans for approval in the timeframe specified by the Engineer | \$ 500.00 | | \$ - |
| <input checked="" type="checkbox"/> Any non-compliance with applicable plans, permits and guidance documents | \$ 27,500.00 | | \$ - |
| <input checked="" type="checkbox"/> Any violation resulting in a polluted discharge | \$ 27,500.00 | | \$ - |

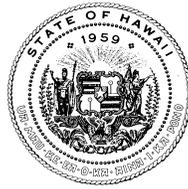
Note: This worksheet and liquidated damages shown in Table 2-2 Liquidated Damage Schedule for Non-Compliances may be used as a guide in assessing liquidated damages at the discretion of the Resident Engineer

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Enforcement Response Plan Construction Site Runoff Control

**APPENDIX D: WRITTEN REQUEST FOR ENFORCEMENT ACTION TO
DOH SAMPLE**

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STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

IN REPLY REFER TO:

TO: THE HONORABLE VIRGINIA PRESSLER, M.D., M.B.A., F.A.C.S..
DIRECTOR OF HEALTH

ATTN: ALEC WONG, P.E., CHIEF
CLEAN WATER BRANCH

FROM: PRATT M. KINIMAKA
OAHU DISTRICT ENGINEER

SUBJECT: REQUEST FOR ENFORCEMENT ACTION
HONOLULU HIGHWAY, HALEIWA STREAM BRIDGE REPLACEMENT
F.A.P. NO. BR-097-1(46)
FILE NO. [____] DATED [_____]

We respectfully submit this request for enforcement action by the Department of Health, Clean Water Branch. The Contractor for the subject project has repeated non-compliances that have not been sufficiently addressed. We have issued repeated warnings and enforcement actions to have them bring their non-compliances back into compliance, however non-compliances still exist.

Attached is a copy of our inspection reports, warning letters, and enforcement letters issued to the Contractor. We have also issued stop work orders, but the Contractor continues to disregard our warnings. We believe that we have done all that we can to remedy this situation and therefore are submitting this request.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Should you have any questions or concerns, please contact Mr. James Jones, Resident Engineer at (808) 987-6543, or Mr. Michael Lee, Project Engineer at (808) XXX-XXXX, of our Oahu District Urban Construction Section. Their fax number is (808) XXX-XXXX.

Enc.

bc: HWY-O
HWY-OU (R. Shin)
HWY-CE
DIR
HWY
DIR-CZ
Parsons Brinckerhoff (L. Sato)