

DRAFT

Plan for the Use of Administrative Penalty Authority

Minnesota Department of Natural Resources

500 Lafayette Road, St. Paul, Minnesota 55155

Prepared for Public Comment, November 2014

This report was prepared in response to Minnesota Statutes, section 103G.299, subdivision 12:

Plan for use of administrative penalties.

The commissioner must prepare a plan for using the administrative penalty authority in this section. The plan must include explanations for how the commissioner will determine whether violations are minor, moderate, or severe. The commissioner must provide a 30-day period for public comment on the plan. The plan must be finalized within six months after the effective date of this section.

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DNR's Mission Statement

We will work with citizens to conserve and manage the state's natural resources, to provide outdoor recreation opportunities, and to provide for commercial uses of natural resources in a way that creates a sustainable quality of life.

DRAFT

Plan for the Use of Administrative Penalty Authority

Minnesota Department of Natural Resources

A. Introduction

The 2014 Minnesota Legislature provided the Department of Natural Resources (DNR) the authority in Minnesota Statutes, section 103G.299 to issue an administrative penalty order (APO) to a person for water appropriation activities without a required permit. The APO authority is intended as an enforcement tool to gain compliance with water appropriation law so that Minnesota's water resources are protected for current and future needs.

The law also directs the DNR to develop a plan for using APO authority, which is described in this document. Both the original plan and future plan revisions will be shared with the public through 30-day comment periods. DNR staff will carefully consider the suggestions shared by the public so the final plan may be improved through public input.

Compliance is critical to managing water for Minnesota's economies and environment

Compliance with the state's regulatory programs helps to ensure the best use of Minnesota's water resources for economic, environmental and social interests. Lack of compliance with water appropriation permit requirements is relatively common, indicating that better compliance incentives may be needed. As Minnesota experiences

more situations of scarcity, well interferences and water use conflicts, the need to investigate violations also increases.

Increased compliance provides:

- Equity and fairness among water users
- The best information to be used to inform permit decisions; and
- Better protection for water quantity, quality and ecological benefits.

Historically traditional enforcement tools have been ineffective in preventing egregious or repeat violators of water use laws. Under the past penalty structure, appropriating water without a permit is a misdemeanor. Illegal water users could be issued a “cease and desist order” and failure to comply with that order was also a misdemeanor. However, there had been no civil process that could be used to encourage compliance as there is with public water permit violations. Utilizing the traditional methods of enforcing water law violations, the DNR has little or no leverage to encourage a habitual violator to stop from their illegal use of water.

DNR’s Water Appropriation Permit program

Water laws are essential tools used to protect Minnesota’s water resources so that our economies and ecosystems have adequate water supplies now and in the future. The DNR plays an important role in ensuring sustainable water use through its water appropriation permit program, information collection and analysis, education, technical assistance opportunities, and enforcement. This Draft Administrative Penalty Order Plan (Plan) outlines a set of actions that DNR may take to achieve compliance with water appropriation laws to protect the availability and quality of our water resources for all users.

Compliance is the Goal

The majority of water users comply with the law. For those who use water without a required permit, DNR was given authority to achieve compliance through the assessment of monetary penalties in order to establish a consequence for the illegal unpermitted activity. Minnesota Statutes, section 103G.299 requires penalties to remove any economic benefit a party received from violating the law. Those who take the waters of the state illegally:

- Lack the regulatory oversight to ensure they are not causing overuse or contamination problems, which may be costly for the state or citizens to resolve;
- May be adversely affecting residential water supplies or causing a water use conflict with legal water users, both of which may cause financial hardship;
- Have the potential to harm natural resources that Minnesotans value and that benefit the state’s economy; and
- Create a system of inequality that is unfair to the individuals and businesses that follow the law.

Compliance with water laws help to ensure that Minnesota's water resources are protected for current and future needs.

The goal of the APO plan is to:

- clearly follow the law as written
- be transparent and easily understood by the public and water users
- allow for clear and consistent application across Minnesota
- allow for adaptability and improvement as information changes and the program evolves
- solicit public comment that improves the final Plan, as well as future revisions achieve 100% compliance with the state's laws on water use

B. Definitions

For purposes of this plan the following terms have the meaning given them.

"Appropriating" means withdrawal, removal, or transfer of water from its source regardless of how the water is used.

"Commissioner" means the Commissioner of the Minnesota Department of Natural Resources or the Commissioner's designee.

"Department" means the Minnesota Department of Natural Resources.

"Director" means the Director of the Division of Ecological and Water Resources of the Minnesota Department of Natural Resources or the Director's designee.

"Division" means the Division of Ecological and Water Resources of the Minnesota Department of Natural Resources.

"History of past violations" refers only to violations of the water appropriation permit program and no other regulatory programs of the DNR, state or other entities. Past violations are any committed by the person after January 1, 2015, including those that have occurred at different location(s) or parcel(s).

"Number of violations" refers only to violations with the DNR's water appropriation permit program and no other regulatory programs of the DNR, state or other entities. Violations considered are any committed by the person, including those that have occurred at different location(s) or parcel(s).

"Plan" refers to this document, the administrative order penalty plan required in Minn. Stat. section 103G.299

"Person" is defined for purposes of this plan by Minnesota Statutes, section 103G.271, subdivision 1(a) and (b) as any entity needing a water appropriation permit, including the state,

an individual, partnership, or association, private or public corporation, county, municipality, or other political subdivision of the state.

“Potential for harm” will consider:

- Impacts to human health and safety, including access to the same quantity and quality of water as prior to the illegal activity;
- The value and importance of the water resources potentially impacted;
- The spatial extent of the harm and the magnitude of the impact on the quality and/or quantity to water resources DNR is legally bound to protect;
- Impacts to other water users who are in compliance with the law, including their access to the same quantity and quality of water as prior to the illegal activity as well as any economic losses they may have suffered; and
- The reversibility of the damage caused by the illegal activity to people and natural resources.

“Public interest” is defined as all the benefits derived from protecting waters of the state in Minnesota Statutes, chapter 103G.

C. Tool for compliance

The emphasis of the Plan is on compliance rather than punishment. While it provides ample procedural safeguards to regulated parties, including the right to an expedited hearing before an administrative law judge, the emphasis of the Plan is on administrative action and compliance rather than litigation. Given the limited resources available to regulators, the enforcement process should return a violation to compliance as quickly and efficiently as possible. Effective enforcement serves to clearly inform the public of the requirements and consequences of violations and, as a result, provides deterrence to future noncompliance.

Effective enforcement

Using the traditional methods of enforcing water appropriation law violations, the DNR has little or no leverage to encourage a determined law-breaker to stop violating the law or restore the damage they have done to the state’s water resources.

A recent example illustrates this challenge. In this case, eight citations were issued for pumping without a water appropriation permit. The party involved simply paid the citations and continued to appropriate water illegally because the total cost was minimal (\$3,100) relative to the financial benefit of using the water. Without APO as an enforcement tool, it would be reasonable to expect this type of action to continue and possibly increase due to the significant financial benefits gained from water use.

Enforcement process

The enforcement process begins when DNR staff determine that water appropriation without a required DNR permit has or may have occurred. The DNR may discover violations through a

complaint from a citizen, onsite inspection, compliance efforts, or through activities of other governmental agencies.

The DNR determines appropriate enforcement action in accordance with Minnesota Statutes, section 103G.2372. The DNR supports this determination through facts established during an investigation and documentation process. Once DNR staff determines that an appropriation of water without a permit has taken place, they will advise the District Manager and APO Coordinator concerning the seriousness of the violation and work with Division of Enforcement (Enforcement) staff to recommend an appropriate enforcement response.

Enforcement tools

The DNR is empowered under Minnesota Statutes, section 103G.2372, to enforce all violations of water resource protection laws, including use of surface water and groundwater without an appropriation permit. The remedies available are not exclusive and the DNR may employ them in sequence or concurrently as circumstances and law indicates. The complete range of administrative and enforcement actions available to the DNR include: access to information and property, civil restoration order, administrative penalty orders, cease and desist orders, injunctive relief, denial or refusal to reissue a permit, suspension or revocation of issued permits, and misdemeanor penalties. In addition to these actions, which are found in statute, the Commissioner may also attempt to resolve violations through a stipulation agreement or settlement.

Where the Enforcement Division has issued a criminal citation for a violation, the appropriate City or County Attorney will prosecute the case as a misdemeanor. Minnesota Statutes, sections 103G.2372 and 103G.251 also empower the DNR to issue civil restoration orders to require a person to correct a violation. A restoration order may be issued whether or not the alleged violator has applied for a permit. Minnesota Statutes, sections 103G.251 and 103G.311 specify the procedures to be followed in issuing a restoration order and ensures the alleged violator's right to demand a public hearing.

In addition to criminal penalties, APO may be issued by the DNR for using water without a permit, requiring the violation to be corrected and assessing an administrative monetary penalty. If the violation is not corrected, the Division may issue an additional penalty order or take other enforcement action. The criteria for use of remedies other than, or in addition to, an APO are indicated in statute.

Permit actions

Minnesota Statutes, sections 103G.301 through 103G.315 allow the DNR to deny or refuse to renew an application for a permit if the actions violate law. The Commissioner may condition the permit or renewal of a permit on a demonstration by the applicant that actions have been taken to comply with law. The Commissioner may also suspend, modify, or revoke a permit.

Reporting, monitoring and documentation

An effective reporting and monitoring system, including adequate documentation of violations, is essential to ensure compliance with law and regulations. This system should also ensure that the DNR takes proper enforcement action, and that the DNR maintains a record of the outcome of enforcement actions.

When the DNR cites violations, staff should assess and note the following to the extent known or available:

- the cause of the violation,
- frequency of the violation,
- magnitude and duration of the violation;
- whether the violation presents an actual or imminent risk to public health and safety, or the natural resources of the state;
- past violations; and
- past and present corrective action efforts.

The DNR has established record keeping procedures and a reporting system to monitor the status of enforcement actions and compliance, and developed regular reports on enforcement activities. All information in the DNR's files on enforcement matters is open and readily accessible to the public. Data classified as confidential, private or nonpublic under State or Federal law is not available to the public.

D. Administrative penalty order authority

The law grants the DNR authority to issue APOs for appropriation of water of the state without the necessary permit and allows for the assessment of a monetary penalty. The administrative penalty order identifies violations and imposes a penalty based on the potential for harm and deviation from compliance, as well as for history of past violations.

Amount of penalty

Minnesota Statutes, section 103G.299 provides criteria for determining the amount of any penalty. The maximum penalty is \$20,000 for each person and violation. In the case of a minor potential for harm and deviation from compliance, the penalty will be no more than \$1,000; for a moderate potential for harm and deviation from compliance, the penalty will be no more than \$10,000; and for a severe potential for harm and deviation from compliance, the penalty will be no more than \$20,000.

In determining the amount of a penalty the DNR may consider:

- potential for harm and deviation from compliance
- the gravity of the violation, including potential for or actual damage to the public interest or natural resources of the state;
- the history of past violations;

- the number of violations;
- the economic benefit gained by the person by allowing or committing the violation based on data from local or state bureaus or educational institutions; and
- other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

In determining the gravity of the violation, the DNR will consider both the extent of the potential for harm from the violation and the deviation from compliance with the rule or statute violated by the individual. To determine a penalty, the DNR will use the "Administrative Penalty Order Calculation Worksheet" included as Appendix A.

Potential for harm will consider:

- Impacts to human health and safety, including access to the same quantity and quality of water as prior to the illegal activity;
- The value and importance of the natural resources potentially impacted;
- The spatial extent of the harm and the magnitude of the impact on the quality and/or quantity to natural resources DNR is legally bound to protect;
- Impacts to other water users who are in compliance with the law, including their access to the same quantity and quality of water as prior to the illegal activity as well as any economic losses they may have suffered; and
- The reversibility of the damage caused by the illegal activity to people and natural resources.

Content

An order assessing an administrative penalty under this section must include:

- a concise statement of the facts alleged to constitute a violation;
- a reference to the section of the statute, rule, or order that has been violated;
- a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and
- a statement of the person's right to review of the order.

The act provides for an expedited hearing process in case of appeal.

E. Use of administrative penalty order authority

Administrative penalty orders may be used as a remedy for violations of the statutes set forth in Minnesota Statutes, sections 103G.271 and 103G.275, and any rules adopted under those sections for water appropriation activities without a required permit.

Issuance

The written delegation maintained in the Commissioner's office may authorize designated DNR staff to issue administrative penalty orders.

Report of issuance of penalty orders and other enforcement actions

The Director will provide fiscal year reports to the Commissioner on administrative penalty orders and other enforcement actions.

Correction of violation

The DNR is authorized to include in an order assessing an administrative penalty a requirement that the violation(s) be corrected within 30 days from the date the individual receives the order. A person who receives an APO must correct the violation(s) within 30 days, unless the DNR issues a written extension of the deadline to address extenuating circumstances, as determined by the Department. The individual must promptly provide to the DNR evidence that the violation(s) have been corrected, including any evidence which is reasonably requested by the DNR.

Correction of violations does not relieve the individual from the requirement to pay the penalty. Failure to correct violations may be grounds for an additional administrative penalty order or other enforcement action.

Enforcement team

To maintain the consistency of administration of this authority as detailed in this Plan, an enforcement team will be created to review each case before the order is delivered. The enforcement team will consist of the:

- Deputy Director of the Department of Ecological and Water Resources
- Operations Manager of the Division of Enforcement
- APO Coordinator
- staff who were involved in conducting the review of the violation(s) and their supervisors

The enforcement team exists to assure the public of a consistent application of APO.

Repeat violations

For a violation after the initial violation, in determining the amount of the penalty, the DNR must consider the factors for an initial penalty above and also the:

- similarity to previous violations;
- time elapsed since the last violation;
- number of previous violations; and
- response of the party to the most recent previous violation.

The DNR will use the "Administrative Penalty Order Calculation Worksheet" (Appendix A), to determine the penalty amount for repeat violations. To be considered a repeat violation, the subsequent violation must be of a similar type as the prior violation, although it need not be based on identical facts.

Compliance verification

Once a regulated party has resolved a violation, the DNR must verify compliance. Staff:

- will review and evaluate all information related to the APO to determine if the violation has been corrected;
- may direct compliance verification by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
- will document compliance verification.

The DNR will determine whether a violation has been corrected and notify the violator of the determination. Ordinarily, the DNR will mail written notice of the Department's determination of compliance to the violator within ten working days after receipt of the information; or within ten working days after the 31st day after the DNR issued the penalty order, whichever is later.

The DNR will establish record keeping procedures, as necessary, to follow the status of the APO and reporting to the Commissioner.

Penalty due; interest assessed

Unless the violator requests review of the APO in an expedited administrative hearing, the penalty is due and payable to the DNR on the 31st day after the order was received regardless of whether the violator has performed the corrective action required in the order.

Interest begins to accrue on the penalty on the 31st day after the violator received the order using the rate established by the State Court Administrator according to Minnesota Statutes, section 549.09.

Referral for collection of penalty

All penalties, interest, costs, attorney fees and litigation expenses collected under an APO must be paid by the violator within a specified time by certified or cashier's check made payable to the Minnesota Department of Natural Resources. Any penalty, interest, costs, attorney fees and litigation expenses not timely paid to the DNR may be collected by lawful means, including those specified in the Minnesota Revenue Recapture Act in Minnesota Statutes, sections 270A.01 to 270A.12. In addition, or alternatively, the DNR may, within 30 days of the violator's failure to make timely payment, refer the matter for collection to the Office of the Attorney General.

Multiple repeat offenses

If repeat APOs fail to bring a person into compliance, the law provides recourse in some situations. When two or more penalties have been issued to a person and that person holds a DNR water appropriation permit or has submitted a permit application for using water from a source not related to the APO, DNR may suspend, revoke or withhold issuance of the permit (Minnesota Statutes, section 103.299, subdivision 9).

Statute of limitations

According to Minnesota Statutes, section 541.07, clause (2), the DNR has two years in which to complete an administrative penalty order action after the violation is discovered. However, DNR staff have a goal of completing the action as soon as reasonably practical, recognizing that situations in which data must be gathered, field investigations must be completed and/or modeling must be performed will require adequate time to complete the work and communicate with the person(s) involved.

F. Hearing request

The recipient of an administrative penalty order has the right to challenge the order by requesting an expedited administrative hearing. Deadlines for requesting a hearing are described in Minnesota Statutes, section 103G.299, subdivision. 6:

- A person may request an expedited hearing with an administrative law judge within 30 days after receiving an APO or within 20 days after receiving notice that the commissioner has determined that a violation has not been corrected.
- Hearing requests will follow the procedures detailed in Minnesota Rules, parts 1400.8510 to 1400.8612.
- The hearing request must state the reasons for seeking review of the order.
- The DNR must tell a person the time and place of the hearing at least 20 days before the hearing.
- The expedited hearing must be held within 30 days after a request for hearing has been filed with the Commissioner unless the parties agree to a later date.

The administrative law judge must issue written recommendations to the Commissioner within 30 days following the close of the hearing record. The administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines the amount of the penalty is unreasonable based on the factors in Minnesota Statutes, section 103G.299, subdivision 6, clause (c).

If the administrative law judge makes a finding that the hearing was requested solely for purposes of delay or that the hearing request was frivolous, the DNR may add to the amount of the penalty the hearing costs charged to the Department by the Office of Administrative Hearings.

If a hearing has been held, the DNR may not issue a final order until at least five days after receipt of the report from the administrative law judge. The person to whom an order is issued may, within those five days, comment to the Commissioner on the recommendations, and the Commissioner must consider the comments. The final order may be appealed in the manner provided in Minnesota Statutes, sections 14.63 to 14.69.

Independence of the Commissioner

To provide for the issuance of an unbiased final administrative penalty order, the DNR has a procedure for separating staff involved in the issuance of the APO from staff involved in the expedited hearing process. Staff who issued the APO are the "enforcement team"; staff who advise the Commissioner are the "advisory team."

When an APO is anticipated, DNR identifies members of the enforcement team and the advisory team. The enforcement team represents the DNR if there are any challenges to the APO and conducts any meetings with the violator.

The advisory team consists of the Deputy Commissioner of Natural Resources, DNR legal counsel, an attorney from the Attorney General's Office and one or more Division staff who had no involvement with issuing the APO. To maintain the Commissioner's independence, the advisory team has no involvement with the APO until the administrative law judge's recommendations are issued unless a specific case requires an alternate approach.

To preserve its independence, the advisory team must not discuss the case with the enforcement team, other program staff or attorneys representing the enforcement team, until the appeal process has concluded or the time for appeal has expired.

Mediation

All contested cases will be conducted and decided in accordance with the Administrative Procedure Act (Minnesota Statutes, chapter 14). As an alternative to initiating or continuing with a contested case hearing, the parties, subsequent to agency approval, may enter into a written agreement to submit the issues to arbitration by an Administrative Law Judge.

Collection and district court petition

The Attorney General may enforce monetary penalties that are due and payable in any manner provided by law for the collection of debts and may bring a civil action in district court seeking payment of the penalties and injunctive or other appropriate relief including monetary damages, attorney fees, costs and interest.

The attorney general may petition the district court to file the administrative penalty order as an order of the court. At any court hearing the only issues a party may contest are procedural and notice issues. Once entered, the administrative penalty order may be enforced in the same manner as a final judgment of the district court. In any judicial action brought by the attorney general, if the state prevails and if the proven violation was willful, the State may be allowed an amount determined by the court to be the reasonable value of all or part of the litigation expenses incurred by the State. In determining the amount, the court will give consideration to the economic circumstances of the defendant.

G. Plan revision

The Commissioner will incorporate any DNR programs that the legislature subsequently grants administrative penalty order authority or any revisions to authority previously granted under the act into this plan automatically by reference without further plan revision.

The DNR may revise this plan in whole or in part by publishing any amendments or the revised plan in the State Register. The publication notice will also solicit public comment for at least 30 days before the effective date of any changes.

Procedure used to develop this plan

Minnesota Statutes, section 103G.299 directs the Commissioner to prepare a plan for the use of the APO and that the Commissioner provides a 30-day period for public comment on the Plan. The Plan must be finalized by January 1, 2015. The DNR followed the statutory procedures for Plan development. The DNR solicited public comment by publishing announcement of the draft plan in the State Register and distributing information about that announcement to many interested parties via email. Copies of the procedures used to solicit comment, notices issued requesting comment, and public comments received on development and revision of the plan will remain on file with the Division.

H. Administrative penalty order calculation worksheet

This worksheet, located in Appendix A, details the process to be followed when calculating the amount of an APO issued under Minnesota Statutes, section 103G.299. The calculation of an APO is a documented procedure completed by DNR staff in the Divisions of Ecological and Water Resources and Enforcement, and is based on the criteria for penalty assessment described law.

If a person has committed more than one violation, a separate penalty will be calculated for each violation. Those penalties are added together for the total penalty amount.

If applying the statutory criteria in the worksheet results in a “tie” between two penalty amounts, the DNR will use the lower amount in the APO.

History of past violations

A person’s first violation for pumping water in excess of 10,000 gallons per day or 1 million gallons per year without a DNR water appropriation permit will result in a \$500 penalty. Subsequent violations of pumping water without a DNR water appropriation permit that take place after January 1, 2015 may be considered when assessing the penalty. Each repeat violation of the law will add a single point to the penalty calculation.

Potential for harm

When calculating the potential for harm to air, water, land, or other natural resources of the State, the DNR will consider the risk of harm caused by the violation. Because DNR water appropriation laws and regulations are preventive, the focus is on potential for harm and not on

actual harm. Where actual harm from a violation is observed, the potential for harm has been realized and the point total will reflect this fact.

Deviation from compliance

When calculating deviation from compliance, the DNR will consider the quantity or extent of the violation, i.e. the impacts to human health, ecological health and the well-being of others. If the penalty is adjusted based on deviation from compliance as specified under this section, those factors must specifically identified in the APO.

Economic gain

Economic benefit may be money the regulated party saved by not complying with the relevant law, or money the regulated party made as a result of violating the law. Economic benefit may include interest gained on funds not expended or expended after the deadline for expenditure. The DNR will use the interest rate specified in Minnesota Statutes, section 549.09 when appropriate.

Other factors as justice may require

Individual cases often include unique facts and issues. Under this section, the penalty may be adjusted based on those unique facts and issues. If the penalty is adjusted based on documentation of other factors, those factors will be specifically detailed in the APO.

Reduce the penalty, if necessary, to \$20,000.

The penalty established in an administrative penalty order cannot exceed \$20,000 for all violations identified in an inspection or review of compliance for each regulated party. If the total penalty calculated exceeds \$20,000 for a regulated party based on a summation of the points calculated in the Worksheet, the penalty will be reduced to \$20,000.

Appendix A. Administrative Penalty Order Calculation Worksheet