
Plan for the Use of the Administrative Penalty Authority

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Contents

- A. Introduction.....1
 - Compliance is critical to managing water for Minnesota’s economies and environment.....1
 - Outreach and education.....2
 - Water use conflicts and well interferences.....2
 - Initial compliance assessment, evaluation and communication.....2
 - DNR’s enforcement responsibilities3
- B. Administrative penalty order authority3
 - Overview.....3
 - Amount of penalty.....4
 - Additional factors4
 - Content of order5
 - Statute of limitations.....5
- C. Process for implementing APO authority5
 - Enforcement team.....6
 - APO and correction of violation6
 - Compliance verification.....6
 - Right to appeal7
 - Penalty due; interest assessed7
 - Referral for collection of penalty.....7
 - Reporting, monitoring and documentation8
 - Multiple repeat offenses8
- D. Administrative penalty order penalty calculation9
 - Deviation from compliance9

Potential for harm and actual damage.....9

Economic gain.....9

Other factors as justice may require 10

E. Plan development and revision 10

Appendix A. Definitions 11

A. Introduction

The 2014 Minnesota Legislature authorized the Department of Natural Resources (DNR) to issue an administrative penalty order (APO) for violations of Minnesota Statutes, sections 103G.271 and 103G.275 (Minnesota Statutes, section 103G.299). The APO authority is an enforcement tool to promote compliance with water appropriation law so that Minnesota's water resources are protected for current and future needs.

The law also directed the DNR to develop a plan for using APO authority. This document is DNR's plan for issuing an APO to a person or entity who appropriates water without a required permit. Changes to language in Minnesota Statute 103G.299 during the 2023 legislative session led to this plan update. A draft of the original plan was announced in the State Register and published for a 30-day public comment period. While not required by the statute change, this plan revision was shared with stakeholders through an informal 30-day comment period. DNR staff carefully considered the suggestions shared by the stakeholders, so that this plan could be improved through stakeholder input. This document provides for clear and consistent application of the DNR's APO authority. The primary goal of the APO authority is to enhance the protection of Minnesota's water resources by encouraging compliance with the state's water appropriation laws.

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

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, and enforcement. Compliance with the state's water appropriation permit regulations helps to ensure the best use of Minnesota's water resources for economic, environmental and social interests. The permit program provides for equity and fairness among water users; applies the best available information to inform permit decisions; and provides protection for water quantity, quality and ecological benefits.

The vast majority of water users in Minnesota comply with the law and their water use permits. For those who use water without a required permit, the DNR will work with the appropriator to come into compliance. The DNR has multiple ways to gain compliance, including several enforcement tools. Only the APO tool is addressed in this document. It is important that water users comply with water laws because compliance with these laws:

- avoids overuse or contamination problems, which may be costly to resolve.
- provides accurate and useful data for determining the availability of water resources.
- avoids affecting residential water supplies or causing water use conflicts with legal water users, both of which may cause hardship.
- protects natural resources that Minnesotans value and that benefit the state's economy; and
- assures equality and fairness for all individuals, communities and businesses that use water.

The Administrative Penalty Order Plan (Plan) outlines a set of actions that the DNR can take to achieve compliance with water appropriation laws.

Outreach and education

The DNR continues to engage in outreach and education efforts focused on Minnesota water laws, DNR's water appropriation permit program, and enhanced public understanding of how the DNR manages the state's water resources. The DNR has been:

- Coordinating work on three Groundwater Management Areas and is engaging in regular meetings with stakeholder groups and permit holders;
- Continuing to use the Preliminary Well Construction Assessment process that informs individuals about groundwater resources before wells are drilled;
- Utilizing the Minnesota DNR Permitting and Reporting System (MPARS) that provides easy access to permit applications, water use reporting, DNR hydrologists, and related documents for permit holders;
- Participating in water-related industry seminars and conferences to share information about the water appropriation permit regulatory program; and
- Sharing information about our APO plan and general compliance and enforcement processes through our website, newsletters and presence at conferences, seminars and forums.

Water use conflicts and well interferences

If permit holders are operating within the terms of their permits, but the DNR determines the water appropriation is causing a well interference or water use conflict, there are other separate and distinct processes to resolve these issues. In these situations, well interferences and water use conflicts are typically resolved through specifications in Rule rather than through a compliance and enforcement process. The use of an APO is reserved for serious and/or repeat violations including using water without a required permit and for violations of conditions of an active permit. If a permitted water appropriator does not participate in a resolution process required by the DNR for a well interference or water use conflict, the DNR then may pursue methods, such as the APO, to compel compliance. If an unpermitted water appropriation causes a well interference or water use conflict, the DNR will consider that impact in any follow-up enforcement action, including any decision to issue an APO.

Initial compliance assessment, evaluation and communication

When DNR first becomes aware of a potential violation, we investigate the situation to determine compliance. This often starts with a phone call to the water appropriator to ask about their water use. The process might also include review of aerial photos in cases of irrigation, or water-use and other types of records. DNR's investigation may include asking the person to complete a water use record so it can be determined whether a permit is needed or if an existing permit needs an amendment to reflect the appropriate volume or pump rate.

If a violation appears likely, the DNR will notify the person of the alleged violation(s) and clearly communicate the steps necessary to comply. The person will also be given the opportunity to respond to the allegations, within a reasonable amount of time, prior to any potential enforcement action.

DNR's enforcement responsibilities

The DNR is directed under Minnesota Statutes, section 103G.134, 141, 2372, 299, and 2991 to enforce all violations of water resource protection laws including the use of surface water and groundwater without an appropriation permit. The range of administrative and enforcement actions available to the DNR include:

- access to information and property
- civil restoration orders
- notices of violation
- schedules of compliance
- stipulation agreements
- administrative penalty orders
- cease and desist orders
- court order requiring actions or prohibiting actions
- denial or refusal to reissue a permit
- suspension or revocation of issued permits
- misdemeanor penalties

The DNR determines appropriate enforcement action in accordance with Minnesota Statutes, section 103G.2372. Minnesota Statutes, sections 103G.2372 and 103G.251, empower the DNR to issue civil restoration orders to require a person to correct a violation. 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.

The DNR may issue an APO for using water without a permit, requiring the violation to be corrected and assessing a monetary penalty. If the violation is not corrected as defined in Minnesota Statutes, section 103G.299, the DNR may issue an additional APO or take other enforcement action. The criteria for use of remedies other than, or in addition to, an APO are outlined in statute.

B. Administrative penalty order authority

Overview

The DNR has authority to issue an APO and assess a monetary penalty for appropriation of water of the state without the required permit. APO authority gives the DNR an administrative action and compliance tool in addition to more traditional enforcement measures. APO authority provides the DNR leverage to encourage a person without the required permit to comply with applicable regulations. Significant financial benefits can be gained from noncompliant water use. Without the ability to assess appropriate penalties, some persons simply choose to pay fines that are minimal compared to their financial gain from pumping without a permit. Effective application of APO authority serves to clearly inform people of the requirements under Minnesota's water appropriation law and of the consequences of violations. The APO tool can promote compliance and thus helps provide fairness among all water users.

The DNR will only use its APO authority for serious or repeated violations.

More than one APO may be issued to the same person if they have concurrent and separate water appropriation violations.

The APO is expected to continue to be used infrequently. As in the past, DNR's first and most desired option is to work with water appropriators to prevent violations in the first place.

Amount of penalty

Minnesota Statutes, section 103G.299 provides considerations for determining the amount of any penalty. The maximum penalty is \$40,000. Non-forgivable penalties may be assessed for serious or repeated violations.

In determining the amount of a penalty, the DNR will consider:

- gravity of the violation, including potential for or actual damage to the public interest or natural resources of the state.
- history of past violations.
- number of violations.
- economic benefit gained by the person by allowing or committing the violation; 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 a violation, the DNR will consider both the extent of the potential for harm or actual damage from the violation and the deviation from compliance with the rule or statute violated by the person.

Potential for harm is based on the potential to cause an adverse impact. Assessing actual damage and potential for harm will be based on information available at the time, including:

- potential impacts to human health and safety, including loss of access to the same quantity and quality of water that was available prior to the illegal activity.
- value and importance of the water resources potentially impacted.
- spatial extent of the harm and the magnitude of the impact on the quantity and/or quality to water resources DNR is required 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 available to them before the illegal activity as well as any economic losses they may have suffered; and
- reversibility of the damage caused by the illegal activity to people and natural resources.

Additional factors

The DNR will consider each and every situation on its own merit. In determining the enforcement tool and penalty amount, if applicable, the DNR will consider the following additional factors:

- Permit status

- Drought conditions and severity in the area where the permit holder operates
- Compliance with a permit suspension or limitation
- Water conservation efforts, efficiency measures, and irrigation endorsements for the Minnesota Ag. Water Quality Certification
- Local aquifer levels, groundwater availability and trends, if known
- Well interferences caused with higher priority water supplies, like drinking water
- Availability and protection of domestic water supplies
- Impacts to natural resources in the area including but not limited to: trout streams, calcareous fens, water levels and flows, fish and wildlife habitat
- Other case and location-specific factors and context

Serious violations may include, but are not limited to:

- Violations that impact drinking water supply quality and/or availability
- Violations that result in reductions in groundwater levels that impact water supplies for people, businesses, and groundwater-dependent natural resources
- Appropriation of water while a permit is temporarily suspended

Content of order

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

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

Statute of limitations

According to Minnesota Statutes, section 541.07, clause (2), the DNR has two years in which to commence an administrative penalty order action after the violation is discovered. The DNR's goal is to complete 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.

C. Process for implementing APO 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. DNR will use its APO authority for water appropriation activities without a required permit.

Enforcement team

If the person does not comply when noticed or the violation is serious or repeated, a team of DNR staff members will be convened in order to review the case and develop an APO. The enforcement team exists to assure the consistent administration of APO authority. The enforcement team includes the:

- Division Director and/or Deputy Director of the Division of Ecological and Water Resources
- Conservation Assistance and Regulation Section Manager of the Division of Ecological and Water Resources
- APO Coordinator
- DNR Legal Counsel
- Staff who were involved in conducting the review of the violation(s) and their supervisors

APO issuance, penalty, and correction of violation

Prior to the APO, the DNR will notify the person of the alleged violation(s) and clearly communicate the steps necessary to comply. The person will also be given the opportunity to respond to the allegations. The DNR will consider this information prior to taking enforcement action.

The DNR will send an APO to the person(s) alleged to have violated the law. The recipient must correct the violation(s) and provide evidence that the violation has been fully corrected within 30 days. When the DNR receives written notification and evidence of correction within 30 days, the DNR will review the information and decide if the violation has been fully corrected. DNR will issue its determination to the person in writing. APOs may have penalties that are forgivable, nonforgivable, or a combination of both. If the DNR determines that the information provided is not sufficient to show that the violation has been corrected or that appropriate steps have been taken toward correcting the violation, any forgivable penalty amount must be paid by the 20th day after receiving the DNR's determination of adequacy.

Failure to correct violations may be grounds for an additional APO or other enforcement action. Any nonforgivable penalty is due and payable to the DNR by the 30th day after the APO was received.

Compliance verification

Once a person has submitted written evidence of correction of the violation(s), compliance must be verified. The DNR will:

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

After a determination that a violation(s) has been corrected, the alleged violator will be notified in writing. The DNR may also additionally contact the appropriator by phone or email if an expeditious notification is beneficial to any party.

Right to appeal

The recipient of an APO 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 all parties requesting the hearing 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 2.

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 DNR by the Office of Administrative Hearings.

If a hearing has been held, the DNR cannot 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 of the administrative law judge, and the Commissioner must consider the comments. The person receiving the final order is entitled to judicial review of the decision. A petition for judicial review must be filed with the Court of Appeals as provided in Minnesota Statutes, sections 14.63 to 14.69.

All contested cases will be conducted and decided in accordance with the Administrative Procedure Act in 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.

Penalty due; interest assessed

Unless the alleged violator requests review of the APO in an expedited administrative hearing, any non-forgivable penalty is due and payable to the DNR by the 30th day after the order was received. For forgivable

penalties, if the alleged violator submits written evidence within 30 days after the order was received that the violation was fully corrected, but DNR staff determine it was not, the violator has 20 days after receipt of the letter of determination from DNR to pay the penalty.

Interest begins to accrue on the penalty on the 31st day after the violator received the order, or the 21st day after the violator receives the letter of determination that the violation has not been fully corrected, using the rate established by the State Court Administrator according to Minnesota Statutes, section 549.09.

Referral for collection of penalty

All penalties and interest assessed under an APO must be paid by the violator within the specified time and made payable to the Minnesota Department of Natural Resources. Any penalty or interest not received in the specified time may be collected by lawful means.

Reporting, monitoring and documentation

Effective compliance reporting and monitoring will ensure that proper enforcement action is taken, and that a record is maintained of these actions. When the DNR cites violations, staff will follow established record keeping procedures to assess and note the following to the extent known or available:

- 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.

Multiple repeat offenses

Repeat offenses may be addressed through issuance of multiple APOs or other enforcement tools such as a stipulation agreement, if the corrective actions specified in the previous APO are not met and/or the person continues to violate water appropriation laws. To be considered a repeat violation, the subsequent violation must be water appropriation without the required permit, although it need not be based on identical facts. Additional penalty amounts will be assessed if a person was issued other APOs, citations, cease and desist orders, or other enforcement actions for violation of water appropriation and use laws. In these cases, the person has been informed in the past about permitting requirements yet knowingly violated the law again.

When evaluating repeat violations, the law directs the DNR to consider these:

- Similarity to previous violation(s)
- Time elapsed since the last violation
- Number of previous violations, and
- Response of the person to the most recent previous violation.

If repeat APOs fail to bring a person into compliance, the law provides recourse in some situations. When two or more APOs have been issued to a person, the DNR may suspend, revoke or withhold issuance of permits not related to the APO (Minnesota Statutes, section 103G.299, subdivision 9).

D. Administrative penalty order penalty calculation

Minnesota Statutes, section 103G.299 contains considerations for determining a penalty amount. The DNR utilizes internal guidance to comply with the statutory requirements. It identifies environmental factors associated with actual and potential for harm. Both actual and potential harm are considered in determining a penalty amount for the alleged violation. When more than one natural resource factor is impacted or affected, this will likely increase the penalty amount.

Deviation from compliance

Compliance with Minnesota Statutes, sections 103G.271 and 103G.275 means that a person has the appropriate permit for appropriating or using waters of the state and is complying with the terms of that permit. Each past APO, citation, notice of violation, cease and desist order, or other enforcement action issued to this person for water appropriation violations represents increasing deviation from compliance.

Potential for harm and actual damage

DNR's water appropriation permit program serves to evaluate the risks of impacts to natural resources from a proposed project. Through the permit application review process, the DNR considers alternatives so that impacts are avoided or minimized. When a person appropriates or uses water without evaluation under the permit program, they are putting Minnesota's natural resources and other water users, including domestic water supplies, at risk.

When calculating the potential for harm to natural resources of the State, the DNR will consider the risk of harm caused by the violation. Because water appropriation laws and regulations are preventive, the threshold for a penalty is potential for harm. Therefore, a penalty may be assessed solely on the potential for harm even if there is not documentation of actual harm. Where actual damage from a violation is observed, the potential for harm has been realized and the penalty will reflect this fact.

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, interest gained on funds not expended when they were due, or interest gained on funds realized from the violation. The interest rate specified in Minnesota Statutes, section 549.09 will be used when appropriate.

Other factors as justice may require

Individual cases often include unique facts and issues. Under this section, the penalty may be adjusted upward or downward 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.

E. Plan development and revision

In 2014, Minnesota Statute section 103G.299 directed the DNR to prepare a plan for the use of the APO and provide a 30-day period for public comment on the plan. The DNR solicited comments by publishing an announcement of the draft plan in the State Register and distributing information to the following interested parties via email:

- Minnesota Corn Growers Association
- Minnesota County Attorneys Association
- Freshwater Society
- Irrigation Association of Minnesota
- League of Minnesota Cities
- Minnesota Rural Water Association
- Minnesota Water Well Association
- University of Minnesota Irrigation Specialist
- State Agency Representatives
- Staff in the DNR's divisions of Ecological and Water Resources and Enforcement

While not required by the 2023 statute change, the 2023-24 plan revision was discussed with stakeholders in various meetings, a draft was shared and an informal comment period was held from November 2023 through mid-April 2024. Stakeholders included agricultural groups, industry, municipalities, tribal nations, and environmental groups. Comments and input were considered as an important component to the 2023-24 APO plan revision.

The APO Plan is not a static document but will be updated as appropriate or as laws change. The DNR may make substantive revisions to this plan in whole or in part and share those changes with interested and affected stakeholders.

Appendix A. Definitions

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

"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.

"Deviation from compliance" means past or current appropriation(s) or use(s) of waters of the state without the appropriate permit(s) after December 31, 2014. A history of past violations in addition to the current violation represents a moderate or severe deviation from compliance.

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

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

"Economic gain from illegal activities" means any financial gains from performing the illegal activity. When the gain is quantifiable, it is considered in calculating penalties under this plan.

"History of past violations" refers to only violations of DNR water appropriation permit requirements, including those that have occurred at different location(s) or parcel(s). The history of past violations in this context characterizes an increasing deviation from compliance.

"Number of violations" refers only to violations of the DNR's water appropriation permit. Violations considered are any committed by the person, including those that have occurred at different location(s) or parcel(s).

"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, association, private or public corporation, county, municipality, or other political subdivision of the state.

"Plan" refers to this document.

"Potential for harm" means the potential to cause an adverse impact. The potential for harm increases based on the cumulative effect of multiple factors. Potential for harm will be assessed based on information available at the time. The DNR will assess the following factors:

- potential impacts to human health and safety, including loss of access to the same quantity and quality of water that was available prior to the illegal activity;
- value and importance of the water resources potentially impacted;

- spatial extent of the harm and the magnitude of the impact on the quantity and/or quality 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
- 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.

“Violation” for purposes of this plan is defined in Minnesota Statutes, section 103G.299 as any actions that are not in concurrence with Minnesota Statutes, sections 103G.271 and 103G.275.

“Water use conflict” describes a situation where the available supply of water in a given area is limited to the extent that there are competing demands among existing and proposed users that exceed the reasonably available waters. Existing and proposed appropriations could, in this situation, endanger the supply of waters of the state so that the public health, safety, and welfare would be impaired. This is described in Minnesota Rules, part 6115.0740.

“Well interference” is a phrase used to describe a situation in which a public water supply or domestic well owner loses access to water because a high-volume water appropriation is taking place nearby, causing water levels to recede below the pump of the affected well. This is detailed in Minnesota Rules, part 6115.0730.