

Plan for the Use of Administrative Penalty Authority

Minnesota Department of Natural Resources

500 Lafayette Road, St. Paul, Minnesota 55155

2015

This plan 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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MNDNR

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2015



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Plan for the Use of Administrative Penalty Authority

Minnesota Department of Natural Resources

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 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. This document is DNR's plan for issuing an APO to a person who appropriates water without a required permit. A draft of this plan was announced in the State Register and published for a 30-day public comment period. Future plan revisions will also be shared with the public through a 30-day comment period. DNR staff carefully considered the suggestions shared by the public, so that this plan could be improved through public input. This document provides for clear and consistent application of the DNR's administrative penalty order authority. The primary goal is to ensure compliance with the state's water appropriation law, not to exact penalties. Thus, as described in this plan, all violators will have an opportunity to come into compliance before penalties are assessed.

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,

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.

technical assistance, and enforcement. Compliance with the state’s water appropriation permit program 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 majority of water users comply with the law and hold a DNR water appropriation permit. For those who use water without a required permit, the DNR will use its APO authority to encourage compliance by establishing a significant monetary penalty. It is important that water users comply with water law because compliance with these laws:

- avoids overuse or contamination problems, which may be costly for the state or citizens to resolve;
- 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.

This 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

Since 2012, the DNR has engaged in significant new outreach and education efforts focused on Minnesota water laws, DNR’s water appropriation permit program, and enhanced public understanding of the need to manage the state’s water resources. DNR has:

- drafted the Groundwater Management Strategic Plan and solicited public input;
- defined three pilot Groundwater Management Areas and is engaging in regular meetings with stakeholder groups and permit holders;
- implemented the Well Construction Preliminary Assessment process that informs individuals about groundwater resources before wells are drilled;
- launched the online Minnesota DNR Permitting and Reporting System (MPARS) that provides easy access to permit applications and related documents for permit holders; and
- participated in well driller trainings held statewide, sponsored by the Minnesota Department of Health and the Minnesota Water Well Association.

DNR will continue to actively engage with the public in the ways noted above and will also:

- share information about our APO plan through our website, newsletters and presence at conferences and forums; and
- continue to improve our written materials and web information about the water appropriation permit process, groundwater management and well construction preliminary assessment.

DNR's enforcement responsibilities

The DNR is directed under Minnesota Statutes, section 103G.2372, 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
- 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. The DNR bases its determination on facts established during an investigation. 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.

In addition to criminal penalties and restoration orders, 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 administrative 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.

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 necessary 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 determined violator to stop breaking the law and restore the damage they have done to the state's water resources. Significant financial benefits can be gained from water use. Without the ability to assess appropriate penalties, some violators simply choose to pay fines that are minimal compared to their financial gain from violating the law. Effective application of APO authority serves to clearly inform people of the requirements under Minnesota's water appropriation law and consequences of violations. This can be an incentive for a violator to come into compliance and thus helps provide equity among all water users.

The DNR will only use its APO authority with knowing violators who do not take steps to come into compliance in a timely manner once notified. When the DNR is made aware of a possible violation, the DNR will investigate. If that investigation indicates a likely violation, the DNR will communicate with the potential violator, explaining the permitting process and providing instructions on how to apply for a permit. If the person's water use is below the permitting

threshold, the DNR will keep a record of a signed statement from the person documenting that an appropriation permit is not necessary. If the water use is above the permitting threshold of 10,000 gallons per day or 1 million gallons per year, the DNR will instruct the person to cease pumping water and apply for a permit, if appropriate. An APO will not be issued if the person complies with the law within 30 days of being notified.

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

While the APO will be a valuable tool, its use is expected to be infrequent. As in the past, DNR's first and most desired option is to work with water appropriators and help them achieve compliance.

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 also 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 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 or actual damage from the violation and the deviation from compliance with the rule or statute violated by the person. To determine a penalty, the DNR will use the "Administrative Penalty Order Calculation Worksheet" included as Appendix B of this Plan.

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 as they relate to minor, moderate or severe potential for harm 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 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.

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.

Notice of violation

When DNR has identified that a violation is occurring, the violator will be notified that they must stop their illegal appropriation of water immediately; refusal to do so will start the APO process. If the person desires to appropriate water in the future, they must apply for and receive a permit from DNR.

Enforcement team

If the person does not comply when noticed, 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:

- Conservation Assistance and Regulation Section Manager of the Division of Ecological and Water Resources,
- Operations Manager of the Division of Enforcement,
- APO Coordinator, and
- Staff who were involved in conducting the review of the violation(s) and their supervisors.

APO and correction of violation

DNR will send an APO to the person violating the law. A person who receives an APO will have an opportunity to 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 must review the information and decide if the violation has been fully corrected. DNR will issue its determination to the landowner in writing. 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, the 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 administrative penalty order or other enforcement action.

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 by 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 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 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 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, 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 violator requests review of the APO in an expedited administrative hearing, the penalty is due and payable to the DNR by the 30th day after the order was received. If the 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

Multiple repeat offenses may be addressed through issuance of multiple administrative penalty orders if the corrective actions specified in the previous APO are not met and the person continues to violate water appropriation law. 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, or cease and desist orders for violation of water appropriation and use law after January 1, 2015. 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 calculation worksheet

The APO calculation worksheet, located in Appendix B, details the process the DNR will follow when calculating the amount of an APO issued under Minnesota Statutes, section 103G.299. The calculation of an APO is based on the criteria for penalty assessment described in law.

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. By itself, the current violation represents a minor deviation from compliance. Each past APO, citation or cease and desist order issued to this person for water appropriation violations after December 31, 2014 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 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. Where actual damage from a violation is observed, the potential for harm has been realized and the penalty assessment will reflect this fact.

The APO calculation worksheet, in Appendix B, details the environmental factors that, by themselves, represent either a minor, moderate, or severe potential for harm. The worksheet also identifies environmental factors associated with actual harm. Both actual and potential harm factors are considered in determining whether the overall potential for harm is minor, moderate, or severe. The presence of three or more environmental factors that individually represent minor harm, together constitute a moderate potential for harm due to their cumulative effects. The presence of three or more environmental factors that individually represent moderate harm, together constitute a severe potential for harm due to their cumulative effects.

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 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

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 further directs the Commissioner to provide a 30-day period for public comment on the Plan. 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 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

DNR provided 37 days for public comment, an increase over the required comment period. Copies of the procedures used to solicit comment, notices issued requesting comment, and public comments received on development and revision of the plan are available from the DNR.

The APO Plan is not a static document, but will be updated as appropriate. The DNR may make substantive revisions to 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. Minor changes that are for clarification purposes will not be published for comment.

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. These factors will not increase a penalty amount from a minor category to a moderate category, nor a moderate category to a severe category. Rather, this factor will only add to a penalty within the range of an existing category as defined by deviation from compliance and potential for harm.

"History of past violations" refers to only violations of DNR water appropriation permit requirements. Past violations are any committed by the person after December 31, 2014, 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. Two or three violations of the law, including the current violation, represent a moderate deviation from compliance. Four or more violations of the law, including the current violation, represent a severe deviation from compliance.

"Minor potential for harm" means past or current appropriation(s) or use(s) of waters of the state without the required appropriation permit(s) after December 31, 2014 with zero, one or two environmental factors present that indicate a minor potential for harm. Refer to the *APO Calculation Worksheet* for a list of environmental factors that indicate a minor potential for harm. Three or more environmental factors that individually represent minor harm, together constitute a moderate potential for harm due to their cumulative effects.

"Moderate potential for harm" means past or current appropriation(s) or use(s) of waters of the state without the required appropriation permit(s) after December 31, 2014 with:

- three or more environmental factors present that indicate a minor potential for harm with zero or one environmental factors present that indicate a moderate potential for harm; or

- one or two environmental factors present that indicate a moderate potential for harm.

Refer to the *APO Calculation Worksheet* for a list of environmental factors that indicate minor and moderate potential for harm.

“Number of violations” refers only to violations of the DNR’s water appropriation permit requirements occurring after December 31, 2014. 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, the Administrative Penalty Order plan required in Minnesota Statutes, section 103G.299, subdivision 12.

“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 as they relate to minor, moderate or severe potential for harm:

- 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.

“Severe potential for harm and 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 with:

- one or more environmental factors present that indicate a severe potential for harm; or
- three or more environmental factors present that indicate a moderate potential for harm; or
- three or more environmental factors present that indicate a minor potential for harm with two more factors present that indicate a moderate potential for harm.

Refer to the *APO Calculation Worksheet* for a list of environmental factors that indicate moderate and severe potential for harm.

“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.

Appendix B. Administrative Penalty Order Calculation Worksheet