



BOARD OF WATER AND SOIL RESOURCES

Administrative Penalty Order Plan – Wetland Conservation Act

Adopted by the BWSR Board on May 28, 2008

OVERVIEW.

Introduction.

Laws of Minnesota 2007, Chapter 57, Section 103 authorize the Board of Water and Soil Resources (BWSR) to issue administrative penalty orders (APO) for violations of chapters 103B, 103C, 103D, 103E, 103F, and 103G. This plan has been developed by BWSR to provide the policy and process in the use of APO's, and will be effective following Board approval.

What is an Administrative Penalty Order?

Minnesota State Statute authorizes the Board to issue administrative penalty orders requiring violations be corrected and allows for the assessment of a monetary penalty. The APO identifies the violation, requires they be corrected, and imposes a penalty that may or may not be forgiven depending on the seriousness or repetitiveness of the violation. The maximum penalty is \$10,000 per violation. Willfulness, gravity, history, number of violations, economic benefit and other factors identified in the APO may be considered in determining the amount of the penalty.

For repeat violations, in addition to the above factors, the following must be considered: similarity to previous violations; time elapsed; the number of previous violations; and the response of the landowner or responsible party to the most recent prior violation. The APO must include a statement of fact supporting the claim that violations have occurred, a reference to the law or rule that has been violated, the amount of the penalty and the factors on which it was based, and a statement of the landowner or responsible party's right to review the APO. Statute also provides an appeal process.

Specific Application of Administrative Penalty Order Authority.

Initial priority for APO implementation will be for the Wetland Conservation Act (WCA), Minnesota Rules Chapter 8420. Following this limited use of APO, the Board will evaluate applying this enforcement authority to noncompliance of one or more of the remaining statutory provisions under this grant of authority.

Purpose of Administrative Penalty Orders.

The primary purpose in the application of APO authority will be to ensure regulatory compliance. This purpose will be accomplished through an emphasis on penalties that will be forgiven pending a finding of compliance by BWSR, the WCA local government, and/or law enforcement officer.

BWSR Administrative Penalty Order Plan
May 28, 2008

Another purpose of the Board's application of this authority is to be supportive of the implementation efforts of WCA LGU's and law enforcement authorities. This purpose will be achieved through the primary use of information developed by these entities in evaluating whether or not to issue an APO.

Procedural Safeguards.

Similar to other decision-making processes of the WCA, the APO process employed by the Board includes procedural safeguards. An individual subject to an APO issued under the Board's authority may request a hearing before an administrative law judge. The report issued by the administrative law judge will be reviewed by the Board's Dispute Resolution Committee (DRC). As a final step, the DRC recommendation must be considered by the full Board. This process will ensure due process and avoid litigation.

Coordination with Other Enforcement Authority.

BWSR's use of APO authority will be built upon and coordinated with the existing enforcement mechanisms and processes employed by law enforcement officers. The APO process may be started when a restoration or replacement order has not been complied with. In these circumstances, the Board's APO authority may be used as an alternative to criminal or civil prosecution. However, the Board's APO authority may be used in conjunction with prosecution for repeated or serious violations.

Role of Local Governments

WCA is administered by local units of government. According to Minnesota Rule Chapter 8420, these are counties, cities, townships, watershed districts, and soil and water conservation districts. Local governments currently have specific responsibilities under existing enforcement mechanisms. This plan will have BWSR using APO authority after an existing cease and desist order and/or restoration or replacement order has not been complied with. This plan envisions local governments providing information that has been generated through these existing mechanisms. Also, LGU's will be consulted and kept informed throughout the process, and will be involved in monitoring compliance.

Forgivable vs. Non-forgivable Administrative Penalty Orders.

An APO may include a monetary penalty that is either forgivable or non-forgivable in whole or in part. As stated above, the primary purpose of an APO is to achieve compliance. With this in mind, and as required by statute, the Executive Director will forgive a penalty if the violation is corrected within a specified period of time. However, for a repeated or serious violation, the penalty will not be forgiven, even if it is corrected within the specified period of time.

ADMINISTRATIVE PENALTY ORDER PROCESS.

(A). Identification of non-compliance.

An APO may be considered when BWSR staff are informed of non-compliance with a restoration or replacement order by a WCA LGU, soil and water conservation district and/or a law enforcement officer. The regional senior wetland specialist will be the first point of contact for all potential APO's.

(B). Review/Evaluate Evidence and Enforcement Options.

The regional wetland specialist or board conservationist will consult with the enforcement authority and make an initial recommendation on whether to consider pursuing an APO to the regional senior wetland specialist. If the regional wetland specialist or board conservationist and enforcement authority recommend an APO, they will forward all relevant information and records to the senior wetland specialist.

As discussed below, the preference for achieving compliance is for the county attorney to criminally prosecute. However, where the circumstances of the violation indicate that prosecution may not be the most effective route to achieve compliance, an APO may be pursued instead of prosecution.

The information that should be part of the APO record may include an LGU decision, a cease and desist order, the restoration or replacement order, and any other information that the LGU and law enforcement officer have that may be useful in deciding whether to pursue an APO. After collecting this information, the regional senior wetland specialist will consult with the Regional Supervisor and WCA Coordinator regarding the noncompliance case. The WCA Coordinator will, in turn, consult with the Attorney General's Office.

In addition, consultation with the enforcement authority is essential to ensure that the appropriate method is selected to achieve the goal of compliance. By the time a landowner or responsible party has not complied with a restoration or replacement order, their option to apply to the WCA LGU for after the fact approval no longer exists, and the only option is rectification of the impact. The options, in order of preference, are:

- (1) the county attorney criminally prosecute;
- (2) BWSR issue an APO; or
- (3) agency initiated civil suit to compel compliance with the cease and desist order or restoration or replacement order.

Options (1) and (2) may be combined when the violation is serious or the landowner or responsible party is a repeat violator.

The final recommendation to pursue an APO will be made by the WCA Coordinator in consultation with the regional supervisor, senior wetland specialist where the APO originated, and Attorney General staff. The WCA Coordinator will become the lead staff for all APO's and

BWSR Administrative Penalty Order Plan
May 28, 2008

will maintain communication of the status of APO's with the Land and Water Section Manager, regional supervisor, and regional wetland specialist.

After review of the enforcement options is complete, and after review by the Executive Director, the following three options will be considered:

1. Based on the evidence do not continue with the APO process;
2. Continue with the APO process by issuing a non-compliance notification as provided for in (B) below; or
3. Continue with the APO process, by directly issuing the APO as provided for in (D), without first issuing a non-compliance notification.

The county attorney will be consulted on potential application of an APO on a case-by-case basis. The decision to consult with the county attorney will be based on the facts of the situation and to ensure that the appropriate enforcement mechanism is selected to address the violation.

(C). Non-Compliance Notification.

If option 2 outlined in (B) is selected, the landowner or responsible party may receive a letter that includes the following:

- (1) the history and facts regarding the violation;
- (2) BWSR's authority to issue an APO;
- (3) a statement that failure to comply with the restoration or replacement order may result in an APO.

The letter will include a request for a response in writing from the landowner or responsible party within ten working days from the day the letter is sent. An effective response will provide for compliance within 31 days of the receipt of the letter or that appropriate steps have been taken to comply with the restoration or replacement order and correct the violation. An effective response will not result in an APO. No response in writing, or failure to complete the compliance by the specified date will result in issuing an APO. The technical evaluation panel will be responsible, via monitoring and inspections, to determine if compliance has been achieved.

(D). Administrative Penalty Order.

A landowner or responsible party who fails to comply with a restoration or replacement order may be issued an APO. An APO may be issued after or in the absence of a non-compliance notification. The APO will be issued by the Executive Director and must contain the following:

- a concise statement of the facts alleged to constitute a violation;
- a reference to the statute, rule, ordinance, variance, order, or term or condition of a permit that has been violated;
- specify that compliance with WCA requirements is required in addition to any penalty that may be imposed;

BWSR Administrative Penalty Order Plan
May 28, 2008

- 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 landowner or responsible party's right to request an expedited administrative hearing to review the order.

(E). Amount of Penalty-Initial Violations.

The Executive Director may issue an APO assessing a penalty of up to \$10,000 for all violations identified during an inspection or compliance review. The amount of the penalty will be determined by the WCA coordinator in consultation with the regional senior wetland specialist, and regional supervisor and may be based on the following factors:

- the willfulness of the violation;
- the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- the history of past violations;
- the number of violations;
- the economic benefits gained by the landowner or responsible party by allowing or committing the violations; and
- other factors as justice may require, if the additional factors are specifically identified in the APO.

In addition to the above factors, the following additional factors may be considered when the penalty amount is determined:

- the efforts of the landowner or responsible party to comply with the restoration or replacement order;
- the size of the impact;
- the function of the wetland prior to the impact; and
- the ability to restore the site of the violation to its pre-impact condition.

(F). Amount of Penalty-Repeat Violations.

For violations after an initial violation, in determining the amount of the penalty, the factors identified for an initial violation must be considered, as well as the following:

- similarity of the most recent previous violation and the violation to be penalized;
- time elapsed since the last violation;
- number of previous violations; and
- response of the landowner or responsible party to the most recent previous violation identified.

(G). Forgivable Penalties.

Except for repeated or serious violations, the penalty assessed must be forgiven if:

BWSR Administrative Penalty Order Plan

May 28, 2008

- the landowner or responsible party demonstrates, in writing, before the 31st day after receiving the APO, that the violation has been corrected; or
- before the 31st day after receiving the APO, the landowner or responsible party has developed a corrective plan acceptable to the Executive Director, and has accomplished the restoration by the date designated in the approved plan.

Compliance Determination.

The Executive Director will determine whether the violation has been corrected and notify the landowner or responsible party of this determination. The technical evaluation panel will advise the Executive Director in making this determination. The penalty will be forgiven in accordance with the following requirements:

- within 31 days the landowner or responsible party provide information demonstrating that the violation has been corrected or that appropriate steps have been taken to comply with the restoration or replacement order and correct the violation. A corrective plan will only be acceptable if the Executive Director determines that the violation cannot be corrected within 30 days. A corrective plan must be in writing, in a form acceptable to the Executive Director, and developed in consultation with the LGU and enforcement authority.
- the Executive Director will review and evaluate all information obtained by BWSR staff, local governments including the technical evaluation panel, and law enforcement officials in evaluating whether a restoration or replacement order has been complied with and a violation corrected.
- the Executive Director will mail notice of the determination of compliance within 15 days of the receipt of the information that documents compliance.
- the corrective plan will not be approved unless the landowner or responsible party acknowledges that forgiveness of the penalty is contingent on a timely completion of the corrective action contained in the plan. The penalty will not be forgiven if the corrective action plan is not completed within the specified time period.

Failure to Comply.

Unless the landowner or responsible party requests an expedited administrative hearing or district court hearing, as provided for under Minn. Stat. 116.072, subd. 6, the forgivable penalty is due and payable on the 31st day after the landowner or responsible party received the APO if:

- the landowner or responsible party fails to provide information demonstrating that the violation has been corrected; or
- the landowner or responsible party has not taken appropriate steps toward correcting the violation.

If the landowner or responsible party has submitted information that the Executive Director determines is not sufficient to show that the violation has been corrected or that appropriate steps have been taken toward correcting the violation, the forgivable penalty is due on the 20th day after the landowner or responsible party receives this determination, unless the landowner or responsible party has requested an expedited administrative hearing or district court hearing.

BWSR Administrative Penalty Order Plan
May 28, 2008

Interest.

Interest, at the rate established by the State court administrator pursuant to Minn. Stat. 549.09, begins to accrue on forgivable penalties on the 31st day after the landowner or responsible party received the APO. However, interest will be abated if the Executive Director cannot determine compliance within ten working days after the expiration of the 31st day period.

(H). Non-forgivable Penalties.

The Executive Director may assess a non-forgivable penalty for repeated or serious violations. This penalty will not be forgiven even if the violation is corrected. Under, Minn. Stat. 116.072, subd. 5, a non-forgivable APO is due 31 days after the landowner or responsible party receives the APO, unless an expedited administrative hearing or district court hearing is requested as provided under Minn. Stat. 116.072, subd. 6

Because of the seriousness and finality of a non-forgivable APO, the Executive Director will provide notice of the violation and an opportunity for response by the landowner or responsible party before issuing a non-forgivable APO. The Executive Director will send a letter to the landowner or responsible party requesting, within 10 days, any information that may have a bearing on the Executive Director's determination. In addition, BWSR staff may contact the landowner or responsible party to explain the violation and ask about factual issues. In all cases, the Executive Director will consider the response of the landowner or responsible party before issuing a non-forgivable APO.

Serious Violations.

Serious violations include conduct showing a disregard of requirements or standards of the WCA, or present an actual or potential danger to public health or safety. Within this scope of serious violations, BWSR will develop a list of program specific examples that will be attached to this plan as future guidance.

Repeat Violations.

For a violation to be considered repeat, a violation must be of a similar type as the prior violation, although the facts need not be identical. A repeat violation may be based on a variety of prior enforcement actions. The Executive Director may determine that a violation is a repeat violation if a similar violation occurs after any of the following actions:

- a permit has been issued, whether all conditions have been complied with or not;
- failure to comply with a restoration or replacement order, agreement, or other corrective plan of action;
- a forgivable APO where a correction was made;
- a forgivable APO where a correction was not made and a penalty was assessed;
- a non-forgivable APO; or
- any other violation for which notice has been given to the landowner or responsible party for a violation of the WCA.

A repeat violation may be based on the same conduct that led to the initial violation. For example, if a landowner or responsible party who received a forgivable APO fails to correct a

BWSR Administrative Penalty Order Plan
May 28, 2008

violation after an initial restoration or replacement order and the site is subsequently inspected and the violation is identified, this would be considered a repeat violation and may be subject to a non-forgivable APO. The fact that a landowner or responsible party appeals a prior penalty amount will not prejudice the determination of a current penalty amount.

Compliance with Restoration Order.

The APO assessing a non-forgivable penalty may also include the requirement that the violation cited in the APO be corrected within 30 days. A landowner or responsible party who receives such an APO must correct the violation within 30 days, unless the Executive Director issues a written extension. The landowner or responsible party must promptly provide evidence to the Executive Director that the violation has been corrected, including any evidence that is reasonably requested by the Executive Director. Compliance with the cease and desist order or restoration or replacement order does not relieve the landowner or responsible party of the duty to pay the non-forgivable penalty. Failure to correct violations may be grounds for an additional APO or other enforcement action.

Penalty due.

Unless the landowner or responsible party requests an expedited administrative hearing or district court hearing, the non-forgivable penalty is due and payable on the 31st day after the APO was received regardless of whether the landowner or responsible party has corrected the violation as required by the APO.

Interest.

Interest, at the rate established by the State court administrator pursuant to Minn. Stat. 549.09, begins to accrue on non-forgivable penalties on the 31st day after the landowner or responsible party receives the APO. However, interest will be abated if the Executive Director cannot determine compliance within ten working days after the expiration of the 31st day period.

(I). Combination Violations.

A combination APO may be issued when the case includes both forgivable and non-forgivable violations. In determining which violations are forgivable and which are non-forgivable, and in determining the penalty amounts, the factors included in sections E, F, G, and H will be considered.

As in the case of a non-forgivable APO, the Executive Director will send the landowner or responsible party a letter requesting a response within ten days before issuing a combination APO and request any information relating to the violation unless a meeting or other communication has occurred relating to the violation.

The forgivable penalty portion of the combination APO is due and interest owed as provided for in G. The non-forgivable penalty portion of the combination APO is due and interest owed as provided for in H.

(J). Referral for Collection of Penalty.

All penalties, interest, costs, attorney fees and litigation expenses collected under an APO or the enforcement of an APO must be paid by the landowner or responsible party within a specified time by certified or cashiers check made payable to the Minnesota Board of Water and Soil Resources. Any penalties, interest, costs, attorney fees and litigation expenses not timely remitted may be collected using lawful means as determined to be efficient and cost effective,

including the Minnesota Revenue Recapture Act, Minn. Stat. 270A.01 to 270A.12. In addition, or alternatively, the matter may be referred for collection to the Attorney General's Office.

(K). Compliance Verification and Documentation.

BWSR staff, WCA LGU staff, soil and water conservation districts, DNR conservation officers, and local law enforcement will monitor and document the compliance status of violations subject to an APO. This monitoring and documentation will be similar to that carried out for WCA decisions, cease and desist orders and restoration or replacement orders issued by law enforcement officers.

BWSR will coordinate compliance verification and communicate compliance status to the landowner or responsible party.

(L). Hearing Requests.

A landowner or responsible party that has received an APO has the right to challenge the APO by requesting an expedited administrative hearing or district court hearing. The deadline for requesting a expedited administrative hearing varies depending on whether the APO is forgivable, non-forgivable, or a combination of both.

Forgivable APO's.

A landowner or responsible party of a forgivable APO may request a hearing as follows:

- the landowner or responsible party who received a forgivable APO and fails to provide information showing the violation has been corrected or fails to submit a corrective plan, has 30 days from receipt of the APO; or
- if a landowner or responsible party who received a forgivable APO provides information showing the violation has been corrected or submits a corrective plan, and if the landowner or responsible party receives notice that the violation has not been corrected or an appropriate plan has not been approved, then the landowner or responsible party has 20 days after receiving this notice to request a hearing on the determination of the inadequacy of the corrective plan.

BWSR Administrative Penalty Order Plan
May 28, 2008

Non-forgivable APO's.

The landowner or responsible party may request a hearing on the penalty provided for in a nonforgivable APO within 30 days from receipt of the APO. A hearing on the adequacy of the corrective plan required in the nonforgivable APO may be requested as follows:

- the landowner or responsible party of a non-forgivable APO who fails to provide information showing the violation has been corrected or fails to submit a corrective plan has 30 days from receipt of the APO; or
- if a landowner or responsible party of a non-forgivable APO provides information showing the violation has been corrected or submits a corrective plan, and if the landowner or responsible party receives notice that the violation has not been corrected or an appropriate plan has not been approved, then the landowner or responsible party has 20 days after receiving notice to request a hearing on the determination of the inadequacy of the corrective plan.

Combination APO's.

The landowner or responsible party may request a hearing on the non-forgivable portion of the combination APO within 30 days from receipt of the combination APO. The landowner or responsible party of a combination APO may (1) request a hearing on the forgivable portion of the APO, or (2) on the corrective action required in the APO, or both, then the landowner or responsible party has the following options:

- the landowner or responsible party who received a forgivable APO and fails to provide information showing the violation has been corrected or fails to submit a corrective plan, has 30 days from receipt of the APO; or
- if a landowner or responsible party who received a forgivable APO provides information showing the violation has been corrected or submits a corrective plan, and if the landowner or responsible party receives notice that the violation has not been corrected or an appropriate plan has not been approved, then the landowner or responsible party has 20 days after receiving notice to request a hearing on the determination of the inadequacy of the corrective plan.

Hearing Requirements and Process.

All hearing requests must specifically state the reasons for seeking review of the APO. The landowner or responsible party must be notified of the time and place of the hearing at least 20 days before the hearing. The hearing must be held within 30 days after a request for hearing has been filed with BWSR, unless the parties to the hearing agree to a later date. An administrative law judge (ALJ) from the Office of Administrative Hearings will conduct the hearing. The procedures for the hearing are provided for in Minnesota Rules, parts 1400.8510 to 1400.8612.

At the hearing, both the landowner or responsible party and the Executive Director will have an opportunity to present evidence. Any individual wishing to submit written arguments to the ALJ must do so within ten days of the hearing. The ALJ must issue a report making recommendations within 30 days after the close of the hearing record. After the ALJ's report is received, the landowner or responsible party has five days in which to submit comments to be considered by the Dispute Resolution Committee (DRC) before a final APO is issued. If the ALJ makes a

BWSR Administrative Penalty Order Plan
May 28, 2008

finding that the hearing request was frivolous, the DRC may add to the amount of the penalty the costs charged to BWSR by the Office of Administrative Hearings.

After receipt of the ALJ's report, the DRC will review the report and make a recommendation to the Board if the APO should be issued in its original form, in a revised form, or not at all. The Board will consider the recommendation of the DRC at its first meeting following the DRC meeting.

The landowner or responsible party who received the final APO may appeal it to the Minnesota Court of Appeals. If the landowner or responsible party does not appeal the final APO, or the APO is reviewed and upheld by the Minnesota Court of Appeals, then the landowner or responsible party must pay the amount of the penalty plus interest accruing from 31 days after the landowner or responsible party received the original APO.

(M). Role of the Dispute Resolution Committee.

To provide for the issuance of an unbiased final APO, BWSR has a procedure for separating persons involved in the issuance of the APO from persons involved in consideration of an appeal through the expedited administrative hearing process.

The regional supervisor and senior wetland specialist where the APO originated, the WCA Coordinator and Attorney General staff involved in the issuance of the APO will defend the Executive Director if there are any requests for an expedited administrative review. In addition, these individuals will conduct any meetings with the landowner or responsible party.

The Assistant Director for Policy and Programs, an attorney from the Attorney General's Office, the appeals coordinator, and a senior wetland specialist from a different region from where the APO originated will advise the Dispute Resolution Committee (DRC).

The only contact the individuals involved in issuing the APO will have with the DRC regarding the merits of the case, until the DRC's decision is issued and the appeal process has concluded or the time for appeal has expired, will be through the adversarial process in conjunction with the contested case proceedings with contemporaneous notice to the landowner or responsible party who received the APO.

To preserve its independence, the individuals who advise the DRC must have no ex parte discussions with the individuals involved in issuing the APO, other program staff, or attorney's representing individuals involved in issuing the APO (discussions without the landowner or responsible party or representatives of the landowner or responsible party present) of the case until the appeal process has expired.

(N). Mediation.

All contested cases will be conducted and decided according to the Administrative Procedures Act (Minn. Stat. Chapter 14). As an alternative to initiating or continuing with a contested case

BWSR Administrative Penalty Order Plan

May 28, 2008

hearing, the parties, subsequent to BWSR approval, may enter into a written agreement to submit the issues raised to arbitration by an ALJ.

(O). Collection; District Court Petition.

BWSR may request the Attorney General to enforce 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, injunctive or other appropriate relief including attorney's fees, costs and interest. The Attorney General may petition the district court to file the APO as an order of the court. At any court hearing the only issues a landowner or responsible party may contest are procedural and notice issues. Once entered, the APO may be enforced in the same manner as a final judgment in district court. In any judicial action brought by the Attorney General, if the State finally prevails and if the proven violation was willful, the State may be allowed an amount determined by the court to be reasonable value of all or part of the litigation expenses incurred by the State. In determining the amount, the court will give consideration, in addition to other penalties, to the economic circumstances of the defendant.

Appendix 1: Anticipated APO Use and Projected Costs

A. Anticipated Use.

This plan proposes to consider use of an APO to seek compliance for a WCA violation, only after existing enforcement mechanisms have been employed. According to discussions with Department of Natural Resources Enforcement Division staff, fewer than 1% of all wetland impacts where a cease and desist order has been issued result in the county attorney considering or seeking prosecution.

According to data provided by DNR-Division of Enforcement, the following number of WCA related cease and desist order and restoration or replacement orders were issued:

	2005	2006	Totals
Cease and Desist Orders	309	567	876
Restoration Orders	139	231	370
Totals	448	798	1246

This data indicates, that if BWSR had APO authority in 2005 and 2006, this enforcement process would have been considered for use in approximately 3 and 6 enforcement cases respectively. Specific circumstances on the ground may increase or decrease this estimation, but for planning purposes, BWSR will anticipate use of this APO authority up to 10 times annually. However, if the current use of prosecution changes, these estimates of possible APO use may be increased.

B. Cost.

The process for developing and carrying forward an APO is extensive, and will involve a number of BWSR staff. The costs associated with an APO may include those incurred by the following:

- LGU
- DNR-Enforcement
- Attorney General
- BWSR Staff
- BWSR Board
- BWSR Dispute Resolution Committee
- Administrative Law Judge

Additional costs for LGUs and DNR should be minimal, however, BWSR's additional costs in staff time, board expenses, and administrative law judge time could be considerable. Total BWSR staff time is estimated to range from 40 hours for violations resolved with the notification letter, to over 200 hours for APOs that go to a hearing before an administrative law judge. In addition, BWSR will be required to pay for the administrative law judge. The Pollution Control Agency currently pays approximately \$5,000 per appeal for administrative law judge services. BWSR will closely track time required to fulfill the procedural requirements of the APO process.

Appendix 2: Administrative Penalty Order (APO) Penalty Calculation Guidance

A. Introduction.

This guidance is to be used when calculating the amount of a penalty for inclusion in an APO issued under Minn. Stat. 103B.101, subd. 12 and 116.072. The calculation of a penalty is a discretionary act based on an evaluation of the facts of each case under the criteria for penalty assessment listed in Minn. Stat. 116.072. When the circumstances are appropriate, staff may deviate from these guidelines in whole or in part when recommending a penalty amount to the Executive Director.

Outline of Penalty Calculation Process

Step 1: Determine the past and present violations.

Step 2: Determine whether the violation(s) is(are) serious

Step 3: Determine whether the violation(s) is(are) repeated.

Step 4: Calculate the base penalty.

Step 5: Consider the following adjustments for each violation(s):

- (a) the willfulness/culpability of the violations(s).
- (b) history of past violation(s), including:
 - (i) similarity to previous violation(s).
 - (ii) time elapsed since last violation(s)
 - (iii) number of previous violation(s).
 - (iv) response to most recent violation(s)
- (c) other factors justice may require.
- (d) economic benefit.

Step 6: Determine whether the penalty is forgivable or nonforgivable.

Step 7: Reduce the penalty, if necessary to \$10,000.

Explanations for specific adjustments and determinations used in individual adjustments will be included in the penalty calculation worksheet.

Step 1: Determine the past and present violations.

The past and present violations should be listed and described. Include the citation number and a short description of the WCA rule provision that applied to the case.

Step 2: Determine whether the violation(s) is(are) serious.

Serious violations include conduct showing a disregard of requirements or standards of the WCA, or present an actual or potential danger to public health or safety. Within this scope of serious violations, BWSR will develop a list of program specific examples that will be attached to this plan as future guidance.

Step 3: Determine whether the violation(s) is(are) repeated.

The violation may be repeated if the landowner or responsible party has previously violated one or more statutes or rules. For a violation to be considered repeat, a violation must be of a similar type as the prior violation, or be based on the same conduct that led to the prior violation, although the facts need not be identical. The enforcement document or basis for any previous violations should also be listed.

A violation should generally be considered “similar” if the BWSR’s or another regulatory agency’s previous enforcement response would have alerted the individual of a similar compliance problem. A repeat violation may be based on a variety of prior enforcement actions. A violation is a may be a “similar violation” when:

1. The same or similar requirement, permit, statute or rule was violated.
2. The same process requirements were the source of related violations.
3. A similar act or omission was the basis of the violation.

For the purpose of “repeat” or “history of” violations, the prior violation may include an act or omission for which a formal or informal enforcement response occurred. The “repeat” or “history of” violations include acts or omissions where the violator has been given written, or in limited instances, verbal notification that the MPCA has found that a violation exists. Written notification is helpful, but not always necessary.

In the case of large corporations with many divisions or wholly owned subsidiaries, it is sometimes difficult to determine whether a previous instance of non-compliance should trigger a consideration of “repeat” or “history of” violations. Changed business ownership often raises similar problems. In making this determination, the lead staff person should ascertain who in the organization had control or oversight responsibility for violating conduct. In those cases, the violation should be considered part of the compliance history of the landowner or responsible party. It is important to note, however, that the repeat/history determination will be more difficult in these cases because responsibility can appear to be diluted when it involves more than one individual. As always, BWSR considers the totality of the circumstances, case by case.

Step 4: Calculate the base penalty.

The following matrix should be used to determine the base penalty. The gravity of the violation(s) is used to determine the base penalty. Gravity is determined by the potential for harm (the vertical axis of the matrix) and the deviation from compliance (the horizontal axis) of the matrix). The violation’s potential for harm is determined first, then its deviation from

BWSR Administrative Penalty Order Plan
May 28, 2008

compliance. Each violation is rated on each axis as either major, moderate or minor (i.e., major is highest level of gravity, then moderate, and then minor). Violations can then be identified by their location on the matrix (i.e., a moderate, major violation would mean that the potential for harm is moderate and the deviation from compliance is major).

Note that since each case is determined on its own unique circumstances, in some cases the same types of violations may not result in identical gravity determinations.

When more than one violation has been found, a separate penalty may be calculated for each violation, and those penalties are added together for the total base penalty. If the cited violations are similar, or each individual violation stems from similar causes, for purposes of determining the Base Penalty the violations may be considered together. In this case, the penalty will take into consideration the number and severity of violations being grouped together.

		Deviation from Compliance	
		Moderate	Major
Potential For Harm	Major	\$8,000 to \$3,500	\$10,000 to \$5,000
	Moderate	\$3,500 to \$1,000	\$5,000 to \$2,000
		{ Base Penalty Range }	

When calculating the *potential for harm* to humans, animals, and natural resources, consideration should be given to the risk of actual harm caused by the violation(s). Further, when actual harm from a violation is observed, the potential for harm has been realized and the rating may reflect this fact.

When calculating the *deviation from compliance*, consideration should be given to the quantity or extent of the violation (i.e. how much, how far) or the extent to which the landowner or responsible party attempted to prevent the violation. When the position of the violation in the matrix is established, then determine the base penalty from within the applicable range. The amount chosen is discretionary because the matrix is intended to be only a guide.

The number of violations is given consideration by individual application of the violations to the matrix or if grouping similar violations be considering the number or violations in the group and making an appropriate adjustment to the deviation from compliance and potential for harm axes.

Step 5: Consider the following adjustments for each violation(s):

Adjustments to the base penalty may be calculated using a percentage of the base penalty in increments of 5% ranging from 0-100%. Most enforcement cases should not result in any adjustment over 50%, but an unlimited percentage range allows for case-by-case flexibility and options for dealing with egregious violations or situations.

BWSR Administrative Penalty Order Plan
May 28, 2008

(a) The willfulness/culpability of the violation(s).

If the violation seems willful/culpable, an upward adjustment may be warranted. A violation is willful/culpable if:

- the conduct was apparently performed with knowledge that it was illegal;
- the landowner or responsible party should have reasonably known that the conduct was illegal; or
- the landowner or responsible party apparently proceeded with indifference or recklessness as to whether the conduct was illegal.

In addition, to consideration of behavior when committing the violation, consideration should also be given to the landowner or responsible party's response to BWSR after BWSR begins to seek compliance.

(b) History of past violation(s) (including).

The following adjustments are for any documented violations or previously communicated instances of noncompliance, whether or not the previous violations resulted in an enforcement action.

(i) Similarity to previous violation(s).

Determine the extent to which the current violation to be penalized is similar to the previous violation. An appropriate upward adjustment should correspond to the degree of similarity between the current violation and previous violation(s).

(ii) Time elapsed since last violation(s).

An increase in the penalty may be appropriate based on the time elapsed since the most recent previous violation. The more recent the last violation, the greater the penalty increase may be. Note: The statute of limitations does not limit consideration of older enforcement history, rather, less weight should be given to older violations.

(iii) Number of previous violation(s).

An increase in the penalty may be appropriate based on whether there are previous violations. The more previous violations, the greater the penalty increase may be.

(iv) Response to most recent violation(s)

Under this section, the penalty may be increase or reduced based on the response of the landowner or responsible party to the most recent violation.

Therefore, factors that should be considered in applying a particular percentage are the following:

1. How similar is the current violation to the most previous violation?
2. How recent was any previous violation?
3. How many previous violations are there?
4. How has the individual responded to the most recent previous violation?

BWSR Administrative Penalty Order Plan
May 28, 2008

One or more of the above factors may have a cumulative affect upon the enhancement if warranted by the violation.

The range of percentages of the history is 0% to 100% depending upon the circumstance. The continuum applies because BWSR has the discretion to decide which factors are appropriate and when one or more factors should be considered together.

(c) Other factors justice may require.

Individual cases raise unique facts and issues. Under this section, as adjustment to the base penalty may be made based on this unique facts and issues. Under this section the penalty may be enhanced or mitigated based on the applicable “other factors”. If the adjustment of the base penalty is based in whole or in part on “other factors as justice may require” then the factors must be specifically identified in the APO. If the landowner or responsible party refuses to respond to BWSR notices or calls or refuses to take any corrective action, such behavior may warrant an increased penalty. However, prompt response to violations is expected and therefore does not warrant a decrease in penalty.

(d) Economic benefit.

In order for a penalty to be an effective deterrent and in order to ensure that a landowner or responsible party does not benefit from violating the WCA, the penalty amount must address the economic benefit the violator realized from the noncompliance. Economic benefit typically results from delayed costs, avoided costs and/or competitive advantage of noncompliance.

Every reasonable effort should be made to calculate and recover the economic benefits of noncompliance in an enforcement action that includes a civil penalty. If possible, the economic benefit should be calculated from the start of noncompliance up to the point when the facility was or will be in compliance.

Step 6: Determine whether the penalty is forgivable or nonforgivable.

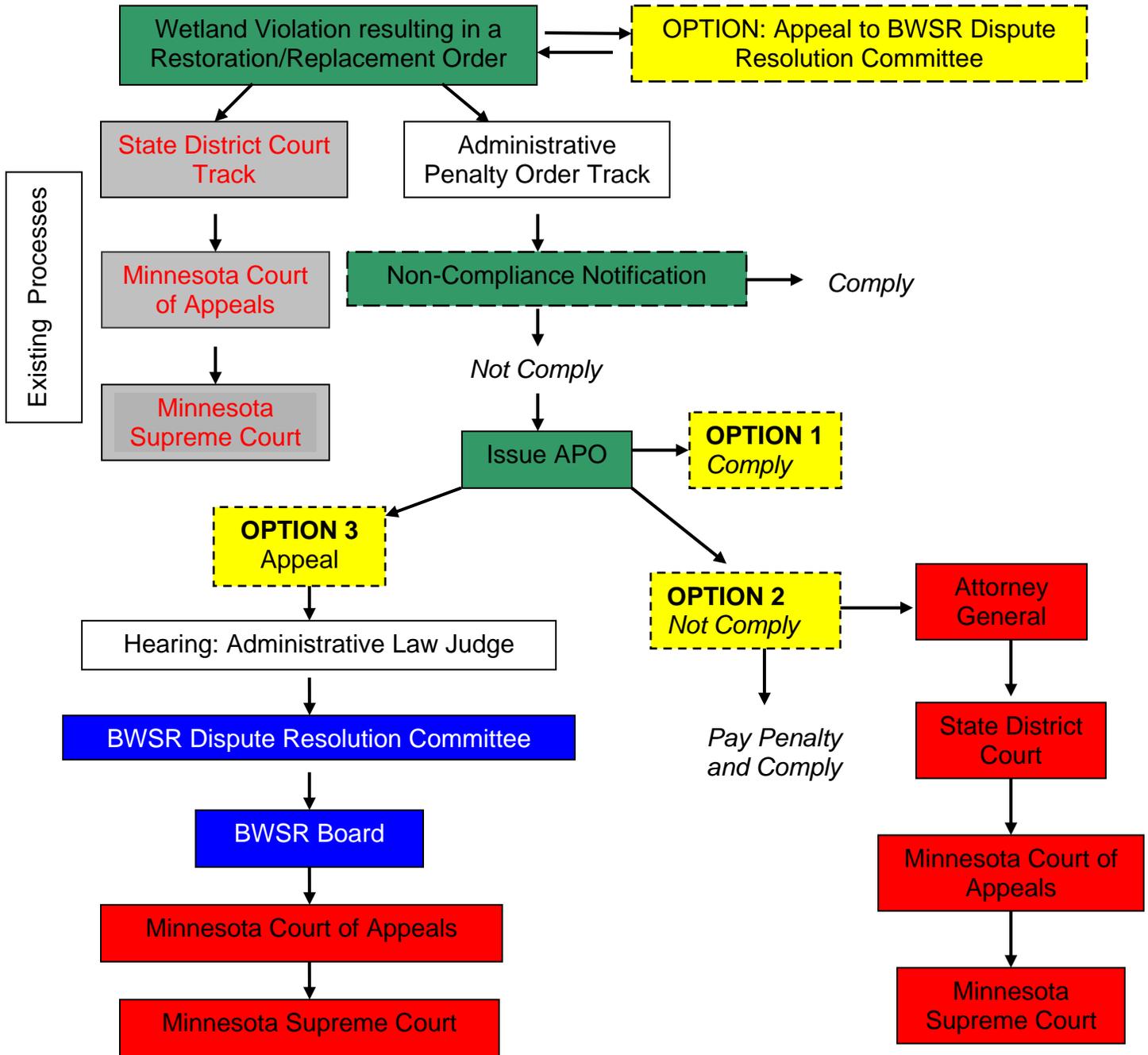
If a violation is neither repeated nor serious, then the penalty must be forgivable. If the violation is serious or repeated or both, then the penalty may be nonforgivable. In some instances, a forgivable penalty will give the landowner or responsible party adequate incentive to take corrective action. In other cases, a nonforgivable penalty may be necessary to deter the landowner or responsible party or others from such conduct.

Step 7: Reduce the penalty, if necessary to \$10,000.

Statute limits the penalty to a maximum of \$10,000, therefore the base penalty plus any adjustments cannot result in a penalty above this amount.

Appendix 3: WCA ADMINISTRATIVE PENALTY ORDER PROCESS

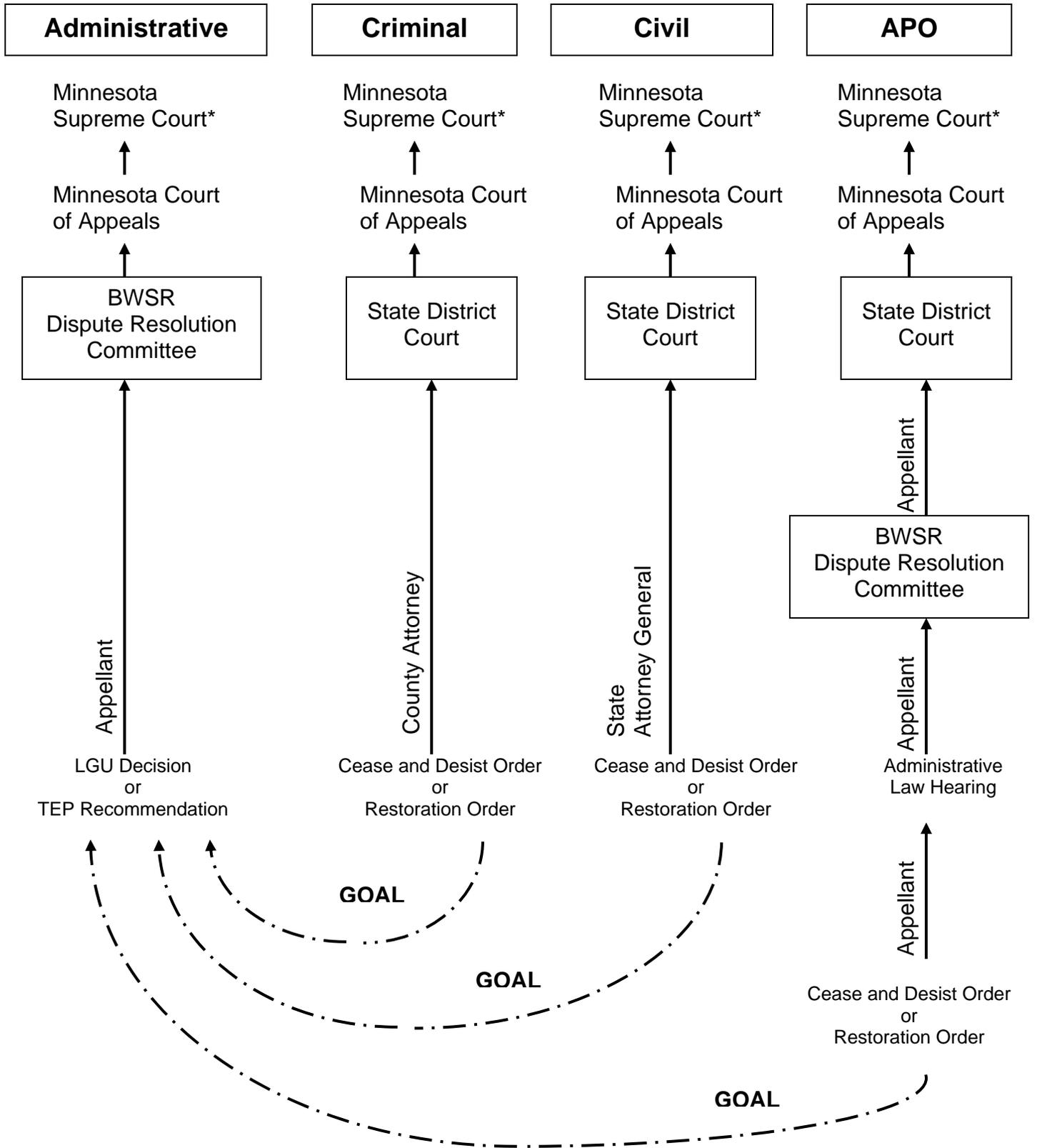
For enforcement of the Wetland Conservation Act, Mn Rule 8420,
 as provided under M.S. 116.072



Green = Staff Decisions
 Blue = Board Decisions
 Red = Court/Couty Attorney or Attorney General Decisions
 Yellow = Landowner Decisions

Comply/Not Comply refers to the enforcement order and/or the regulatory requirements of the WCA

Appendix 4: WETLAND CONSERVATION ACT
 Four Tracks for Dispute / Violation Resolution



* The MN Supreme Court is not obligated to hear a case appealed from a lower court.

Appendix 5: Administrative Penalty Order Statutes

LAWS OF MINNESOTA 2007, CHAPTER 57

Sec. 103. Minnesota Statutes 2006, section 103B.101, is amended by adding a subdivision to read:

Subd. 12. Authority to issue penalty orders. (a) The board may issue an order requiring violations to be corrected and administratively assessing monetary penalties of up to \$10,000 per violation for violations of this chapter and chapters 103C, 103D, 103E, 103F, and 103G, any rules adopted under those chapters, and any standards, limitations, or conditions established by the board.

(b) Administrative penalties issued under paragraph (a) may be appealed according to section 116.072, if the recipient of the penalty requests a hearing by notifying the commissioner in writing within 30 days after receipt of the order. For the purposes of this section, the terms "commissioner" and "agency" as used in section 116.072 mean the board. If a hearing is not requested within the 30-day period, the order becomes a final order not subject to further review.

(c) Administrative penalty orders issued under paragraph (a) may be enforced under section 116.072, subdivision 9. Penalty amounts must be remitted within 30 days of issuance of the order.

EFFECTIVE DATE. This section is effective the day following final enactment.

MINNESOTA STATUTES 116.072 ADMINISTRATIVE PENALTIES.

Subdivision 1. **Authority to issue penalty orders.** (a) The commissioner may issue an order requiring violations to be corrected and administratively assessing monetary penalties for violations of this chapter and chapters 114C, 115, 115A, 115D, and 115E, any rules adopted under those chapters, and any standards, limitations, or conditions established in an agency permit; and for failure to respond to a request for information under section [115B.17, subdivision 3](#). The order must be issued as provided in this section.

(b) A county board may adopt an ordinance containing procedures for the issuance of administrative penalty orders and may issue orders beginning August 1, 1996. Before adopting ordinances, counties shall work cooperatively with the agency to develop an implementation plan for the orders that substantially conforms to a model ordinance developed by the counties and the agency. After adopting the ordinance, the county board may issue orders requiring violations to be corrected and administratively assessing monetary penalties for violations of county ordinances adopted under section [400.16](#), [400.161](#), or [473.811](#) or chapter 115A that regulate solid and hazardous waste and any standards, limitations, or conditions established in a county license issued pursuant to these ordinances. For violations of ordinances relating to hazardous waste, a county's penalty authority is described in subdivisions 2 to 5. For violations of ordinances relating to solid waste, a county's penalty authority is described in subdivision 5a. Subdivisions 6 to 11 apply to violations of ordinances relating to both solid and hazardous waste.

(c) Monetary penalties collected by a county must be used to manage solid and hazardous waste. A county board's authority is limited to violations described in paragraph (b). Its authority to issue orders under this section expires August 1, 1999.

Subd. 2. **Amount of penalty; considerations.** (a) The commissioner or county board may issue an order assessing a penalty up to \$10,000 for all violations identified during an inspection or other compliance review.

BWSR Administrative Penalty Order Plan
May 28, 2008

(b) In determining the amount of a penalty the commissioner or county board may consider:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner or county board specifically identifies the additional factors in the commissioner's or county board's order.

(c) For a violation after an initial violation, the commissioner or county board shall, in determining the amount of a penalty, consider the factors in paragraph (b) and the:

- (1) similarity of the most recent previous violation and the violation to be penalized;
- (2) time elapsed since the last violation;
- (3) number of previous violations; and
- (4) response of the person to the most recent previous violation identified.

Subd. 3. Contents of order. An order assessing an administrative penalty under this section shall include:

- (1) a concise statement of the facts alleged to constitute a violation;
- (2) a reference to the section of the statute, rule, ordinance, variance, order, stipulation agreement, or term or condition of a permit or license that has been violated;
- (3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and
- (4) a statement of the person's right to review of the order.

Subd. 4. Corrective order. (a) The commissioner or county board may issue an order assessing a penalty and requiring the violations cited in the order to be corrected within 30 calendar days from the date the order is received.

(b) The person to whom the order was issued shall provide information to the commissioner or county board before the 31st day after the order was received demonstrating that the violation has been corrected or that appropriate steps toward correcting the violation have been taken. The commissioner or county board shall determine whether the violation has been corrected and notify the person subject to the order of the commissioner's or county board's determination.

Subd. 5. Penalty. (a) Except as provided in paragraph (b), if the commissioner or county board determines that the violation has been corrected or appropriate steps have been taken to correct the action, the penalty must be forgiven. Unless the person requests review of the order under subdivision 6 or 7 before the penalty is due, the penalty in the order is due and payable:

- (1) on the 31st day after the order was received, if the person subject to the order fails to provide information to the commissioner or county board showing that the violation has been corrected or that appropriate steps have been taken toward correcting the violation; or
- (2) on the 20th day after the person receives the commissioner's or county board's determination under subdivision 4, paragraph (b), if the person subject to the order has provided information to the commissioner or county board that the commissioner or county board determines is not sufficient to show the violation has been corrected or that appropriate steps have been taken toward correcting the violation.

(b) For a repeated or serious violation, the commissioner or county board may issue an order with a penalty that will not be forgiven after the corrective action is taken. The penalty is due by

BWSR Administrative Penalty Order Plan
May 28, 2008

31 days after the order was received unless review of the order under subdivision 6, 7, or 8 has been sought.

(c) Interest at the rate established in section [549.09](#) begins to accrue on penalties under this subdivision on the 31st day after the order with the penalty was received.

Subd. 5a. County penalty authority for solid waste violations. (a) A county board's authority to issue a corrective order and assess a penalty for all violations relating to solid waste that are identified during an inspection or other compliance review is as described in this subdivision. The model ordinance described in subdivision 1, paragraph (b), must include provisions for letters or warnings that may be issued following the inspection and before proceeding under paragraph (b).

(b) For all violations described in paragraph (a), a county attorney or county department with responsibility for environmental enforcement may first issue a notice of violation that complies with the requirements of subdivision 4, except that no penalty may be assessed unless, in the opinion of the county board, the gravity of the violation and its potential for damage to, or actual damage to, public health or the environment is such that a penalty under paragraph (c) or (d) is warranted. In that case the county attorney or department may proceed directly to paragraph (c) or (d).

(c) If the violations are not corrected, if appropriate steps have not been taken to correct them, or if the county board has determined that the gravity of the violations are such that action under this paragraph is warranted, a county board may issue a corrective order as described in subdivision 4, except that the penalty may not exceed \$2,000.

(d) If the violations are still not corrected, if appropriate steps have not been taken to correct them, or if the county board has determined that the gravity of the violations are such that action under this paragraph is warranted, a county board may issue a corrective order as described in subdivision 4, except that the penalty may not exceed \$5,000.

(e) In determining the amount of the penalty in paragraph (c) or (d), the county board shall be governed by subdivision 2, paragraphs (b) and (c). The penalty assessed under paragraph (c) or (d) shall be due and payable, forgiven, or assessed without forgiveness as described in subdivision 5.

Subd. 6. Expedited administrative hearing. (a) Within 30 days after receiving an order or within 20 days after receiving notice that the commissioner or county board has determined that a violation has not been corrected or appropriate steps have not been taken, the person subject to an order under this section may request an expedited hearing, utilizing the procedures of Minnesota Rules, parts 1400.8510 to 1400.8612, to review the commissioner's or county board's action. The hearing request must specifically state the reasons for seeking review of the order. The person to whom the order is directed and the commissioner or county board are the parties to the expedited hearing. The commissioner or county board must notify the person to whom the order is directed of 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 or county board unless the parties agree to a later date.

(b) All written arguments must be submitted within ten days following the close of the hearing. The hearing shall be conducted under Minnesota Rules, parts 1400.8510 to 1400.8612, as modified by this subdivision. The Office of Administrative Hearings may, in consultation with the agency, adopt rules specifically applicable to cases under this section.

(c) The administrative law judge shall issue a report making recommendations about the commissioner's or county board's action to the commissioner or county board within 30 days

BWSR Administrative Penalty Order Plan
May 28, 2008

following the close of the record. The administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines that, based on the factors in subdivision 2, the amount of the penalty is unreasonable.

(d) 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 commissioner or county board may add to the amount of the penalty the costs charged to the agency by the Office of Administrative Hearings for the hearing.

(e) If a hearing has been held, the commissioner or county board may not issue a final order until at least five days after receipt of the report of the administrative law judge. The person to whom an order is issued may, within those five days, comment to the commissioner or county board on the recommendations and the commissioner or county board will consider the comments. The final order may be appealed in the manner provided in sections [14.63](#) to [14.69](#).

(f) If a hearing has been held and a final order issued by the commissioner or county board, the penalty shall be paid by 30 days after the date the final order is received unless review of the final order is requested under sections [14.63](#) to [14.69](#). If review is not requested or the order is reviewed and upheld, the amount due is the penalty, together with interest accruing from 31 days after the original order was received at the rate established in section [549.09](#).

Subd. 7. District court hearing. (a) Within 30 days after the receipt of an order from the commissioner or a county board or within 20 days of receipt of notice that the commissioner or a county board has determined that a violation has not been corrected or appropriate steps have not been taken, the person subject to an order under this section may file a petition in district court for review of the order in lieu of requesting an administrative hearing under subdivision 6. The petition shall be filed with the court administrator with proof of service on the commissioner or county board. The petition shall be captioned in the name of the person making the petition as petitioner and the commissioner or county board as respondent. The petition shall state with specificity the grounds upon which the petitioner seeks rescission of the order, including the facts upon which each claim is based.

(b) At trial, the commissioner or county board must establish by a preponderance of the evidence that a violation subject to this section occurred, the petitioner is responsible for the violation, a penalty immediately assessed as provided for under subdivision 5, paragraph (b) or (c), is justified by the violation, and the factors listed in subdivision 2 were considered when the penalty amount was determined and the penalty amount is justified by those factors.

Subd. 8. Mediation. In addition to review under subdivision 6 or 7, the commissioner or county board is authorized to enter into mediation concerning an order issued under this section if the commissioner or county board and the person to whom the order is issued both agree to mediation.

Subd. 9. Enforcement. (a) The attorney general on behalf of the state, or the county attorney on behalf of the county, may proceed to enforce penalties that are due and payable under this section in any manner provided by law for the collection of debts.

(b) The attorney general or county attorney may petition the district court to file the administrative order as an order of the court. At any court hearing, the only issues parties may contest are procedural and notice issues. Once entered, the administrative order may be enforced in the same manner as a final judgment of the district court.

(c) If a person fails to pay the penalty, the attorney general or county attorney may bring a civil action in district court seeking payment of the penalties, injunctive, or other appropriate relief including monetary damages, attorney fees, costs, and interest.

BWSR Administrative Penalty Order Plan
May 28, 2008

Subd. 10. **Revocation and suspension of permit.** If a person fails to pay a penalty owed under this section, the agency or county board has grounds to revoke or refuse to reissue or renew a permit or license issued by the agency or county board.

Subd. 11. **Cumulative remedy.** The authority of the agency or county board to issue a corrective order assessing penalties is in addition to other remedies available under statutory or common law, except that the state or county board may not seek civil penalties under any other provision of law for the violations covered by the administrative penalty order. The payment of a penalty does not preclude the use of other enforcement provisions, under which penalties are not assessed, in connection with the violation for which the penalty was assessed.

Subd. 12. [Repealed, 1999 c 99 s 24]

Subd. 13. **Feedlot administrative penalty orders.** (a) Prior to the commissioner proposing an administrative penalty order to a feedlot operator for a violation of feedlot laws or rules, the agency staff who will determine if a penalty is appropriate and who will determine the size of the penalty shall offer to meet with the feedlot operator to discuss the violation, and to allow the feedlot operator to present any information that may affect any agency decisions on the administrative penalty order.

(b) Notwithstanding subdivision 5, for feedlot law or rule violations for which an administrative penalty order is issued under this section, not less than 75 percent of the penalty must be forgiven if:

- (1) the abated penalty is used for approved measures to mitigate the violation for which the administrative penalty order was issued or for environmental improvements to the farm; and
- (2) the commissioner determines that the violation has been corrected or that appropriate steps are being taken to correct the action.