



Policy 9: Buffer Enforcement Procedures and Administrative Penalty Order Plan

Buffer Law Implementation

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I. Background

The 2015 Legislature passed legislation establishing a requirement for the establishment, maintenance and enforcement of buffers and/or alternative practices on land adjacent to public waters and public drainage ditches. This legislation authorizes counties, watershed districts or the Board of Water and Soil Resources (Board) to require violations of the water resources riparian protection requirements of Minn. Stat. §103F.48 to be corrected and assess administrative penalties. The administrative penalty order (APO) authority is an enforcement tool to gain compliance with the riparian resource protection requirements to achieve the purposes of this law, which are:

- 1) protect state water resources from erosion and runoff pollution;
- 2) stabilize soils, shores, and banks; and
- 3) protect or provide riparian corridors.

This law directs the Board to “adopt a plan containing procedures for the issuance of administrative penalty orders by local governments and the Board” which must be published in the State Register no later than July 1, 2017. The plan, and any subsequent amendments, become effective 30 days after it is published.

This plan provides the procedures for counties, watershed districts or the Board to effectively use the administrative penalty order authority to ensure the water resources riparian protection requirements of Minn. Stat. §103F.48 are complied with by landowners. The primary goal is to protect water quality through compliance with the water resources riparian protection requirements rather than to exact penalties. Thus as described in this plan, all landowners will have the opportunity to come into compliance before penalties are assessed.

1. Enforcement responsibilities of soil and water conservation districts, counties, watershed districts and the Board

A. *Soil and water conservation districts (SWCD)* are required under Minn. Stat. §103F.48, subdivision 6 to track landowner progress toward compliance and under subdivision 7 must notify the county or watershed district with jurisdiction and the Board if it determines a landowner is not in compliance with the water resources riparian protection requirements.

B. *Counties and watershed districts* are not required to enforce the water resources riparian protection requirements of Minn. Stat. §103F.48, but may elect jurisdiction by notifying the Board by March 31, 2017 and identifying the ordinance, rule, or other official control they intend to use to carry out this compliance and enforcement authority, which may include APOs. In areas where the county or watershed district have not elected to have jurisdiction, the Board is required to carry out enforcement responsibilities.

C. *Counties and watershed districts with jurisdiction or the Board* are authorized under Minn. Stat. §103B.101, subdivision 12a, to require violations of the water resources riparian protection requirements to be corrected and assess administrative penalties. In addition, Minn. Stat. §103F.48, subdivision 7,

authorizes counties and watershed districts to enforce the water resources riparian protection requirements by ordinance, rule, or adopting an APO plan that is consistent with the plan adopted by the Board.

D. The Board is required under Minn. Stat. §103F.48, subdivision 1(j), to determine that the county or watershed district rule, ordinance or official control has adequate procedures for APO issuance, enforcement and appeals. In addition, the Board has responsibility to adopt an APO plan by July 1, 2017 and ensure that a county or watershed district APO plan is consistent with the Plan adopted by the Board under Minn. Stat. §103F.48, subdivision 7. Minn. Stat. Minn. Stat. §103F.48, subdivision 9, establishes an appeals process for APOs issued by counties, watershed districts or the Board to be appealed to the executive director of the Board.

II. Buffer Requirements

1. Buffer width

Except as provided under section II.5 a landowner must maintain a buffer area on a water shown on the buffer protection map as follows:

- A. For waters shown on the buffer protection map requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer as measured according to subsection 2, except as provided in subsection 5;
- B. For waters shown on the buffer protection map requiring a sixteen and a half (16.5) foot minimum width buffer as measured according to subsection 2 except as provided in subsection 5; and

2. Measurement

- A. The measurement of the required buffer on land adjacent to a water requiring a fifty (50) foot average width and a thirty (30) foot minimum width buffer must be from the top or crown of the bank. Where there is no defined bank, measurement must be from the edge of the normal water level in accordance with Board guidance.
- B. The measurement of the required buffer on land adjacent to a water requiring a sixteen and a half (16.5) foot minimum width buffer must be from the top or crown of bank in the same manner as for measuring the vegetated grass strip under Minn. Stat. §103E.021 in accordance with Board guidance.

3. Use of Buffer Area

A buffer may not be used for cultivation farming but may be grazed, mowed, hayed or otherwise harvested, provided permanent growth of perennial vegetation is maintained, except as provided in subsection 4.G and section 5 consistent with Board guidance.

4. Exemptions

The requirement of subsection 1 does not apply to land that is:

- A. Enrolled in the federal Conservation Reserve Program;
- B. Used as a public or private water access or recreational use area including stairways, landings, picnic areas, access paths, beach and watercraft access areas, provided the area in such use is limited to what is

permitted under shoreland standards or, if no specific standard is prescribed, what is reasonably necessary;

C. Covered by a water-oriented structure in conformance with shoreland standards or, if no specific standard is prescribed, what is reasonably necessary;

D. Covered by a road, trail, building or other structure;

E. Regulated by a national pollutant discharge elimination system/state disposal system (NPDES/SDS) municipal separate storm sewer system, construction or industrial permit under Minnesota Rules, chapter 7090, and the adjacent waterbody is provided riparian protection;

F. Part of a water-inundation cropping system; or

G. In a temporary nonvegetated condition due to drainage tile installation and maintenance, alfalfa or other perennial crop or plant seeding, or a construction or conservation project authorized by a federal, state or local government unit.

5. Alternative practices

An owner of land that is used for cultivation farming may demonstrate compliance with subsection 1 by establishing and maintaining an alternative riparian water quality practice(s), or combination of structural, vegetative, and management practice(s), based on the Natural Resources Conservation Service Field Office Technical Guide or other practices adopted by the Board which provide water quality protection comparable to the water quality protection provided by a required buffer as defined in subsections 1 to 3.

III. Compliance Determinations

Compliance on each parcel will be determined based on the establishment and maintenance of buffers and/or alternative practices.

Compliance status will be determined on a parcel basis as identified by a unique locally defined property identification number or description and the compliance status of each bank, or edge of a water body on an individual parcel will be determined independently.

1. Identification of Potential Noncompliance

The Board will initiate an action for noncompliance with section II when it:

- (a) receives a notice of landowner noncompliance from the SWCD under Minn. Stat. §103F.48, subdivision 7;
- (b) observes apparent noncompliance; or
- (c) receives a third-party complaint from a private individual or entity, or from another public agency.

Before the Board initiates a noncompliance action based on (b) or (c) it will refer the matter to the SWCD and allow the SWCD to verify the compliance status of the parcel as provided in this subsection.

When the Board has received a notification of potential noncompliance from the SWCD, the Board and SWCD will consult to determine the appropriate course of action to confirm compliance status. This may include communication with the landowner or operator, inspection or other appropriate steps. On the basis of this

coordination, the SWCD may issue a notification of noncompliance to the Board. If the SWCD does not issue such a notification, the Board will not pursue a compliance or enforcement action under Minnesota Statutes §103F.48 and subsection IV.2.

At any time during this process, the landowner may provide documentation of compliance to the SWCD. The SWCD will evaluate the documentation, or review the buffer and/or alternative practices to determine if the parcel is in compliance and issue its determination in writing to the landowner. The SWCD may issue a validation of compliance if applicable and requested by the landowner. The SWCD must send a copy of a noncompliance determination to the Board.

IV. Enforcement and Penalty Procedures

1. Notice of Noncompliance

On receipt of an SWCD notification of noncompliance, the Board will send the landowner of record a notice of noncompliance that will:

- (a) describe a list of options for compliance;
- (b) provide a practical timeline for implementing the compliance options; and
- (c) a statement that failure to respond to this notice will result in the assessment of financial penalties.

The Board in its judgment also may name as a responsible party a tenant or other person with control over that part of the property subject to section II.1. The Board may deliver or transmit the notice of noncompliance by any means reasonably determined to reach the responsible party or parties, and will document receipt. However, a failure to document receipt will not preclude the Board from demonstrating receipt or knowledge of the notice of noncompliance in an enforcement proceeding under section IV.2. The Board must send a copy of the notice to the SWCD.

At any time during this process, the landowner or responsible party or parties may provide documentation of compliance to the Board. In addition, the landowner or responsible party or parties may supply information in support of a request to modify a corrective action or the timeline for compliance. On the basis of any such submittal or at its own discretion, the Board in writing may modify the corrective action or timeline for compliance, and will deliver or transmit the modified action and timeline in accordance with this section. The Board should determine if the noncompliance has been fully corrected and issue its determination in writing to the landowner. The SWCD may issue a validation of compliance if requested by the landowner.

A notice of noncompliance is not considered a final decision subject to appeal.

2. Administrative Penalty Order.

A. Enforcement by the Board

The Board's authority to enforce the water resources riparian protection requirements of Minn. Stat. §103F.48 is by administrative penalty order authorized under Minn. Stat. §103B.101, subdivision 12a.

B. The Board's enforcement team

Prior to issuance of an APO, the Board will establish an enforcement team to review the case and develop an APO. The enforcement team exists to assure the consistent administration of APO authority.

The Board's enforcement team consists of:

- Buffer and Soil Loss Coordinator
- Regional Manager for the area where the violation originated; and
- The Board Conservationist for the area where the violation originated.

C. Amount of penalty

The Board may issue an administrative penalty order against a landowner as provided for in Minn. Stat. §103B.101, subdivision 12a that imposes a monetary penalty against a landowner that does not comply with the notice of noncompliance.

(a) Initial Violation. The penalty for a landowner that has not previously been the recipient of an administrative penalty order will be assessed on the following schedule:

- (a) \$100 per parcel per month for six (6) months (180 days) following the correction period; and
- (b) \$500 per parcel per month for after six (6) months (181 days) following the correction period.

The correction period ends eleven months after the notice of noncompliance was issued. A modification of the corrective actions and timeline for compliance will extend the correction period only as to a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

(b) Repeat violation. The penalty for a landowner that has previously been the recipient of an administrative penalty order will be assessed on the following schedule:

- (a) \$100 per parcel per day for 180 days following the correction period; and
- (b) \$500 per parcel per day for after 181 days following the correction period.

The correction period ends eleven months after the notice of noncompliance was issued. A modification of the corrective actions and timeline for compliance will extend the correction period only as to a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

D. Order. The Administrative Penalty Order (APO) will state:

- i. The facts constituting a violation of the water resources riparian protection requirements;
- ii. The statute and/or Board policy that has been violated;
- iii. Prior efforts to work with the landowner to resolve the violation;
- iv. The amount of the penalty to be imposed, the date the penalty will begin to be assessed, and the date that payment will be due; and
- v. The responsible party(ies) right to appeal the order.

All or part of the penalty may be forgiven on the basis of diligent correction of noncompliance following issuance of the APO by the landowner or responsible party(ies).

A copy of the APO must be sent to the SWCD.

An APO that is not submitted for appeal to the executive director of the Board within 30 days of receipt by the landowner is final.

3. Administrative Penalty Order Procedures

A. Statute of limitations. According to Minn. Stat. §541.07, clause (2), the Board has two years in which to commence an administrative penalty order action after the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations on 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.

B. Compliance verification. Once a landowner has submitted written evidence of correction of the violation, compliance must be verified. The Board, in coordination with the SWCD will:

- Review and evaluate all information related to the APO to determine if the violation 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.

C. Right to appeal. Minn. Stat. §103F.48, subdivision 9, establishes the authorities and procedures for appeal of an administrative penalty order issued for a violation of the water resources riparian protection requirements. A landowner or agent or operator may appeal, in writing, the terms and conditions of an administrative penalty order issued by a county, watershed districts or the Board within 30 days of receipt of the order. The appealing party must provide a copy of the order that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted by U.S. mail or electronically to the executive director of the Board. At the discretion of the executive director, APOs for the same or similar violations on a parcel may be combined and addressed as a single appeal. The executive director will review the appeal and supporting evidence and issue a decision with 60 days of receipt of the appeal. The executive director's decision is appealable to the Court of Appeals pursuant to Minn. Stat. §14.63 to 14.69.

D. Penalty due, interest assessed. Unless the violator requests an appeal of the APO within 30 days of receipt of the APO, the penalty is due and payable to the Board as specified in the APO. If the violator submits written evidence, which may include a validation of compliance issued by the SWCD, within 30 days of the date specified in the APO that the violation was corrected, but the Board determines it was not, the violator has 20 days to pay the penalty after receipt of the letter that the violation has not been fully corrected from the Board.

Interest will accrue at the rate established pursuant to Minn. Stat 549.09 beginning on the 31st day after issuance of the order, or the 21st day after the landowner receives the letter of determination that the violation has not been fully corrected.

E. 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 Board. Penalties and interest that have not been paid by the landowner or other responsible party within 12 months of the date specified in the APO will be referred to the Minnesota Attorney General's Office for collection. Any penalty or interest not received in the specified time may be collected by lawful means.

F. Reporting and documentation. Effective compliance reporting and documentation will ensure that proper enforcement action is taken, and that a record is maintained of these actions. When the Board identifies a violation of the water resources riparian protection requirements, staff will follow record keeping procedures to assess and note the following to the extent known or available:

- Cause 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;
- Efforts by the SWCD, county, watershed district or THE BOARD to assist the landowner to become compliant, including written and oral communications with the landowner; and
- Past and present corrective action efforts by the landowner.

Definitions

1. "**Board**" means the Board of Water and Soil Resources.
2. "**Buffer**" means an area consisting of perennial vegetation, excluding invasive plants and noxious weeds.
3. "**Buffer protection map**" means the buffer map established and maintained by the commissioner of natural resources published in 2017, and as subsequently amended, that is available on the department of natural resources website.
4. "**Commissioner**" means the commissioner of natural resources.
5. "**Cultivation farming**" mean practices that disturb root or soil structure or that impair the viability of perennial vegetation due to cutting or harvesting near the soil surface.
8. "**Normal water level**" means the level evidenced by the long-term presence of surface water as indicated directly by hydrophytic plants or hydric soils or indirectly determined via hydrological models or analysis.
9. "**Public waters**" has the meaning given in Minn. Stat. §103G.005, subdivision 15. The term public waters as used in this ordinance applies to waters that are on the public waters inventory as provided in Minn. Stat. §103G.201.