

Administrative Penalty Order (APO) Plan for Enforcement of Excessive Soil Loss Requirements

DRAFT March 29, 2018

This document was developed by the Board of Water and Soil Resources (BWSR) pursuant to Minn. Statutes §103B.101, subd. 12(a) and (b) and Minn. Statutes §103F.401 through 103F.455, to provide procedures for the issuance of APOs by local governments and BWSR. It is a guide, not a rule. It is not a statement of general applicability and future effect. It is not designed to amend statute or rules. Statutes are subject to change and if the language of this Plan differs from statute, the statute controls. In addition, users of this document are encouraged to obtain legal advice of an attorney regarding their specific application of Minn. Stat. §103F.401 through §103F.455.

This document is organized as follows:

- A. Part A contains guidance for counties that elect to use Administrative Penalty Orders to enforce the excessive soil loss prohibitions of Minn. Stat. §103F.415; and
- B. Part B shall be used when BWSR is the enforcement authority for the excessive soil loss prohibitions of Minn. Stat. §103F.415.

Background

Minnesota's soil erosion law is found in Minn. Statutes §103F.401 through 103F.455. The law, which dates back to 1984, sets forth a strong public policy stating that a person may not cause excessive soil loss. However, the law was entirely permissive in that it only encouraged local governments to adopt soil erosion ordinances and could not be implemented without a local government ordinance. The soil erosion law was changed in 2015 when a number of revisions were made by the Legislature and approved by the Governor to broaden its applicability.

Minnesota Laws 2015, regular and 1st special sessions changed the law by: 1) repealing Minn. Statutes §103F.451 "Applicability", which eliminates the requirement that the law is only applicable with a local government ordinance; 2) creating specific Administrative Penalty Order (APO) authority in Minn. Statutes §103B.101, subd. 12a, for BWSR and counties to enforce the law; and 3) amending Minn. Statutes §103F.421 "Enforcement" to remove local enforcement only through civil penalty and to revise requirements for state cost-share of conservation practices required to correct excessive soil loss.

Excessive soil loss is defined as "soil loss that is greater than established soil loss limits. Excessive soil loss may be evidenced by sedimentation on adjoining land or in a body of water." (Minn. Statutes §103F.401, subd. 6.)

The result of the combined changes now sets forth statewide regulation of excessive soil loss regardless of whether or not a local government has a soil loss ordinance¹.

Statute also directs BWSR to "adopt a plan containing procedures for the issuance of administrative penalty orders by local governments and the board" (Minn. Statutes §103B, subd. 12a (b)). The APO Plan for Buffer Law Implementation was adopted by the Board on June 28, 2017 and published in the State Register on July 31, 2017, becoming effective 30 days after publication. This APO Plan for the Enforcement of Excessive Soil Loss

¹ Counties with an existing soil loss ordinance are Fillmore, Goodhue, Mower, Olmsted and Winona

Requirements is a companion document based on the same statutory authority, but pertaining to excessive soil loss rather than riparian protection. Unlike riparian protection, Minnesota's soil erosion law does not include watershed districts as a local government, as such this APO authority is restricted to counties and BWSR.

This BWSR APO Plan, and any subsequent amendments, becomes effective 30 days after publication in the State Register. The procedures that BWSR will use when it is the enforcement authority are contained in Part B of this Plan.

This Plan provides guidance for counties and BWSR to use APO authority to ensure that complaints regarding excessive soil loss are investigated and documented, financial and technical assistance are offered, and an equitable settlement is arrived at. The primary goal is to prevent excessive soil loss through compliance rather than to exact penalties. Thus, the responsible party or parties will have the opportunity to come into compliance before any penalties are assessed.

Enforcement responsibilities of Counties and BWSR

Counties and BWSR are authorized under Minn. Stat. §103B.101, subdivision 12a, to require that violations of the excessive soil loss requirements in §103F.421 be corrected and to assess administrative penalties for noncompliance.

Counties choosing to enforce the excessive soil loss requirements of Minn. Stat. §103F.421 may elect to enforce by adopting a local APO plan. Guidance for county APO plans is provided in part A. In areas where the county has not elected to enforce, BWSR is authorized under §103B.101, subd. 12a, to carry out enforcement responsibilities.

Minn. Stat. §103F.48, subdivision 9, establishes an appeals process that land occupiers can use to appeal APOs issued by counties or BWSR.

Enforcement authorities of local governments other than counties

Local governments, as defined in Minn. Stat. §103F.401, include the elected governing bodies of counties, home rule charter or statutory city, or town, or their designated agents, which include SWCDs, watershed districts, water management organizations, and other resource management entities. However, authority to issue administrative penalty orders for violation of soil loss requirements is restricted to counties and to BWSR. Other local governments are authorized to pursue enforcement under the provisions of §103F.421, subd. 4. and 103F.425, as well as Rules part 8400.4040 – 8400.40.

Investigation of reported excessive soil loss associated with agricultural activities

Soil and Water Conservation Districts (SWCDs) are required under Minn. Stat. §103F.421, subdivision 2, to investigate an excessive soil loss complaint when requested by the local government, to determine whether soil loss from the tract of land in question is excessive, and to report the results to the local government.

Part A. County Administrative Penalty Order Plan Guidance

1. Enforcement Procedures

A county that elects to enforce the requirements of Minn. Stat. 103B.101, subd. 12a and §103F.415-455 must adopt an official control to provide procedures for the issuance of administrative penalty orders, enforcement and appeals. BWSR has the authority to adopt orders under Minn. Stat. §103B.101 and county enforcement authority is pursuant to Minn. Stat. Chapter 394, which is in addition to any other official control or authority available to BWSR and counties.

2. Administrative Penalty Order (APO) Provisions

A county that chooses to use the APO authority granted in Minn. Stat. §103B.101, subd. 12a must adopt an ordinance or other official control that includes provisions for the use of APOs to enforce the excessive soil loss prohibition of statute and rule. This part provides guidance and recommended procedures to a county that elects to use APOs to enforce the soil erosion requirements of Minn. Statutes §103F.401-455.

A. Investigation of Complaints Associated with Agricultural Activities

The following procedural steps are guided by Minn. Stat. §103F.401 – 103F.455, together with the companion Minnesota Rules 8400.4000 through 8400.4080 (Excessive Soil Loss Control).

Step 1 - County or its designated agent² receives a written complaint which complies with part 8400.4040, subpart 1. Complaints are confidential data and are not public information.

Step 2 - County forwards the complaint to the SWCD to initiate an investigation and develop a report (Rules 8400.4040, subparts 2. & 3.)

- a. The SWCD notifies the land occupier of the complaint and provides an opportunity for the land occupier to be at a site visit (Rules 8400.4040, subpart 2.). Note the Data Practices Act requirements regarding confidential data, referenced below under Section E.
- b. The SWCD makes a site visit to investigate any evidence of excessive erosion and/or sedimentation, in accordance with Minn. Stat. §103F.421, subd. 2. (Permitted soil loss and sedimentation limits are defined in Rules 8400.4025, subparts 1 and 2.) Based on the investigation, the SWCD prepares a written report that includes:
 - i. Evidence of rill and/or gully erosion;
 - ii. Extent of adverse impacts on adjoining land or a waterbody from sedimentation;
 - iii. Average rate of soil loss from water or wind erosion in tons per acre per year;
 - iv. If excessive soil loss is determined, a conservation plan with practicable soil conservation practices to prevent excessive soil loss or reduce the soil loss to the most practicable extent; and
 - v. A summary of the findings, and a conservation plan with one or more options, as applicable.

Step 3 - The SWCD submits the report to the county and BWSR. If the report documents that excessive soil loss is not occurring, the county, or its designated agent, must dismiss the complaint.

Step 4 - If the report documents excessive soil loss, written notice, by the county, must be given to the land occupier, in accordance with Rules 8400.4040, subpart 4.

² “Agents [of a local government] may include soil and water conservation districts, water management organizations, joint powers boards, watershed districts, and other governmental entities responsible for resource management within the local government’s jurisdiction.” Minn. Stat. §103F.401, subd. 8.

B. Offer of Technical and Financial Assistance, **Mediation**

1. If the SWCD's investigation documents excessive soil loss, the SWCD must offer technical assistance to the land occupier and make state cost share funds available to implement permanent conservation practices (Minnesota Statutes §103F.445).
2. The land occupier has 90 days after a complaint is substantiated to apply for State Cost-Share program assistance or the cost-share is reduced to 50 percent, unless the SWCD or the board approves an extension. An extension must be granted if funds are not available (Minn. Stat. §103F.421, sub. 4).
3. If the land occupier does not agree with the findings of excessive soil loss and an associated conservation plan, the county must request the land occupier to participate in a mediation process (Minn. Stat. 103F.421, subd. 3).
4. When State Cost-Share program funds are available and the land occupier does not comply with the mediated agreement or conservation plan and recommended practicable soil conservation practices, the land occupier may be subject to an APO and penalty as detailed in the Sections C and D below.
5. If the land occupier refuses to participate in mediation or the land occupier and the county do not agree to a mediated settlement, the local government may forward the complaint to the county attorney. The county attorney may dismiss the complaint or petition for a district court hearing under Minn. Stat. 103F.425.

C. APO Issuance and Penalties

The county may issue an APO as provided for in Minn. Stat. §103B.101, subdivision 12a against a land occupier who does not comply with a mediation agreement or a conservation plan.

1. Initial Violation. The penalty range for a land occupier on the same **tract** that has not previously been the subject of an APO issued by the county may be based on the following schedule, which is consistent with BWSR's schedule:
 - a. \$0 for 11 months after issuance of the APO;
 - b. \$100 per month for six (6) months (180 days) following the time period in a; and
 - c. \$500 per month after six (6) months (180 days) following the time period in b.

Counties may modify the timeline for compliance for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

2. Repeat violation. The penalty range for a land occupier on the same **tract** that has previously been the subject of an APO issued by the county may be based on the following schedule, which is consistent with BWSR's schedule:
 - a. \$100 per day for 180 days after issuance of the APO; and
 - b. \$500 per day for after 180 days following the time period in a.

Counties may modify the timeline for compliance for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

3. Order. The APO should include:
 - a. The facts constituting a violation of the excessive soil loss prohibition;
 - b. The statute, rule, and/or official control that has been violated;
 - c. Prior efforts to work with the land occupier to resolve the violation;
 - d. Actions identified in a mediated agreement or conservation plan that would correct the violation;

- e. Documentation that cost-share program funds are available to assist the land occupier;
- f. The amount of the penalty to be imposed;
- g. The date the penalty will begin to be assessed;
- h. The date that payment of the penalty is due;
- i. The date by which all or part of the penalty may be forgiven if the land occupier complies with the mediated agreement/conservation plan; and
- j. The land occupier's right to appeal the APO.

All or part of the penalty must be forgiven if it is determined that the violation has been corrected by the land occupier by the date specified in the APO. If part or all of the penalty is forgiven, the county is encouraged to document the reasons and the amount of the penalty that has been forgiven.

A copy of the issued APO must be sent to the SWCD and BWSR.

According to Minn. Stat. §103F.48, subd. 9, an APO that is not appealed to the executive director of BWSR within 30 days of receipt by the land occupier is final.

D. Administrative Penalty Order Procedures

1. Statute of limitations. According to Minn. Stat. §541.07, subd. 2 (2), the county 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 for 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 land occupier involved.
2. Compliance verification. Once a land occupier has submitted written evidence of correction of the violation, compliance must be verified. The county should:
 - a. Review and evaluate all information related to the APO to determine if the violation has been corrected;
 - b. Verify compliance by a site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
 - c. Document compliance verification.

The county may consult with the SWCD when conducting a compliance verification. Permanent conservation practices must be recorded with the county recorder on the tracts where they occur if the cost-sharing funds are issued to the landowner.

3. Right to appeal. Minn. Stat. §103F.48, subdivision 9, establishes the rights and procedures for a land occupier to appeal an APO issued for a violation of the excessive soil loss prohibition. A land occupier may appeal, in writing, the terms and conditions of an APO issued by a county within 30 days of receipt of the APO. The appealing party must provide a copy of the APO that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted personally, by U.S. mail, or electronically, to the executive director of BWSR. 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 within 60 days of receipt of the appeal. The executive director's decision is appealable to the Minnesota Court of Appeals pursuant to Minn. Stat. §14.63 to 14.69.
4. Penalty due, interest assessed. Unless the land occupier appeals the APO within 30 days of receipt of the APO, the penalty is due and payable to the county as specified in the APO. If the land occupier submits written evidence within 30 days of the date specified in the APO, which may include a validation of

compliance issued by the SWCD, that the violation was corrected, but the county determines it was not fully corrected, the violator has 20 days to pay the penalty after receipt of a letter of determination from the county that the violation has not been fully corrected, or the time period specified in the APO as issued, whichever is later.

Interest will accrue at the rate established pursuant to Minn. Stat §549.09 beginning on the 1st day of the 12th month after the issuance of the corrective action notice consistent with Minn. Stat. §103B.101, subd. 12a.

5. Referral for collection of penalty. All penalties and interest assessed under an APO must be paid by the land occupier within the specified time and made payable to the county. Any penalty or interest not received in the specified time may be collected by any lawful means by the county.
6. 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 investigation by the SWCD identifies excessive soil loss, staff should follow record keeping procedures to assess and document the following to the extent known or available:
 - a. Cause of the violation;
 - b. Magnitude and duration of the violation;
 - c. Whether the violation presents an actual or imminent risk to public health and safety, or to the environment or the natural resources of the state;
 - d. Past violations;
 - e. Efforts by the SWCD, county, watershed district or BWSR to assist the land occupier to become compliant, including written and oral communications with the land occupier and results of mediation, where applicable; and
 - f. Past and present corrective action efforts by the land occupier.

E. Confidential Data

Under Minn. Stat. §13.44, subd. 1 of the Minnesota Government Data Practices Act, “The identities of individuals who register complaints with government entities concerning violations of state laws or local ordinances concerning the use of real property are classified as confidential data.” Confidential data are not public, and are accessible only to BWSR, county, SWCD, or other government personnel whose work assignments reasonably require access, and to those authorized by state or federal law. They are not accessible to the subject of the data (i.e. the person whom the complaint is alleged against). Thus, neither the data subject, nor the public at large, can know the identity of the complainant. (The identity of the person whom the complaint is alleged against is not classified.)

Part B: BWSR Administrative Penalty Order Plan

1. Administrative Penalty Order Authority

BWSR's authority to enforce the excessive soil loss prohibition of Minn. Stat. §103F.415 by APO is pursuant to Minn. Stat. §103B.101, subdivision 12(a) and (b). If the county has not adopted an APO plan, BWSR will pursue enforcement through an APO process following the investigation of complaints and offer of technical and financial assistance listed under Part A, County APO Plan Guidance.

2. Administrative Penalty Order Provisions

A. Investigation of Complaints; Enforcement Team

The procedural steps for investigation of complaints associated with agricultural activities listed in Part A, Section 2.A and ~~2.B~~, must precede any issuance of an APO by BWSR.

Prior to issuance of an APO, BWSR staff may establish an enforcement team to review the specific facts and develop an APO.

B. Offer of Technical and Financial Assistance, Mediation

1. If the SWCD's investigation documents excessive soil loss, the SWCD must offer technical assistance to the land occupier and make state cost share funds available to implement permanent conservation practices (Minnesota Statutes §103F.445).
2. The land occupier has 90 days after a complaint is substantiated to apply for State Cost-Share program assistance or the cost-share is reduced to 50 percent, unless the SWCD or the board approves an extension. An extension must be granted if funds are not available (Minn. Stat. §103F.421, sub. 4).
3. If the land occupier does not agree with the findings of excessive soil loss and an associated conservation plan, the SWCD requests the land occupier to participate in a mediation process (Minn. Stat. 103F.421, subd. 3).
4. When State Cost-Share program funds are available and the land occupier does not comply with the mediated agreement or conservation plan and recommended practicable soil conservation practices, the land occupier may be subject to an APO and penalty as detailed in the Sections C and D below.

BC. APO Issuance and Penalties

1. Initial Violation. The penalty for a land occupier on the same **tract** that has not previously been the subject of an APO issued by BWSR shall be based on the following schedule:
 - a. \$0 for 11 months after issuance of the corrective action notice;
 - b. \$100 per month for six (6) months (180 days) following the time period in a; and
 - c. \$500 per month after six (6) months (180 days) following the time period in b.

BWSR may modify the timeline for compliance for a modification that imposes a substantial new action or significantly accelerates the completion date for an action.

2. Repeat violation. The penalty for a land occupier on the same **tract** that has previously been the subject of an APO issued by BWSR shall be based on the following schedule:
 - a. \$100 per day for 180 days after issuance of the APO; and
 - b. \$500 per day after 180 days following the time period in a.

BWSR may modify the corrective actions and timeline for compliance for a modification that imposes a

substantial new action or significantly accelerates the completion date for an action.

3. Order. The APO should include:

- a. The facts constituting a violation of the excessive soil loss prohibition;
- b. The statute and/or rule that has been violated;
- c. Prior efforts to work with the land occupier to resolve the violation;
- d. The amount of the penalty to be imposed;
- e. The date the penalty will begin to be assessed;
- f. The date that payment will be due;
- g. The date by which all or part of the penalty may be forgiven if the land occupier has complied with the corrective action notice; and
- h. The land occupier's right to appeal the order.

Pursuant to §103F.48, subd. 7(d) all or part of the penalty may be forgiven based on the correction of the noncompliance by the date specified in the APO by the land occupier. If part or all of the penalty is forgiven, the reasons and the amount of the penalty that has been forgiven will be documented in the enforcement file.

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

According to Minn. Stat. §103F.48, subd. 9, an APO that is not appealed to the executive director of BWSR within 30 days of receipt by the land occupier is final.

CD. Administrative Penalty Order Procedures

1. Statute of limitations. According to Minn. Stat. §541.07, subd. (2), BWSR has two years in which to commence an APO action after the violation is discovered. The goal is to complete the action as soon as reasonably practical, recognizing that situations for 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.
2. Compliance verification. Once a land occupier has submitted written evidence of correction of the violation, compliance must be verified. BWSR should:
 - a. Review and evaluate all information related to the APO to determine if the violation has been corrected;
 - b. Verify compliance by site visit, re-inspection, examination of documentation, or other means as may be reasonable under the facts of the case; and
 - c. Document compliance verification.

BWSR may consult with the SWCD when conducting a compliance verification.

3. Right to appeal. Minn. Stat. §103F.48, subdivision 9, establishes the rights and procedures for appeal of an APO issued for a violation of the excessive soil loss requirements. A land occupier may appeal, in writing, the terms and conditions of an APO issued by a county or BWSR within 30 days of receipt of the APO. The appealing party must provide a copy of the APO that is being appealed, the basis for the appeal and any supporting evidence. The appeal may be submitted personally by U.S. mail, or electronically, to the executive director of BWSR. 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 within 60 days of receipt of the appeal. The executive director's decision is appealable to the Minnesota Court of Appeals pursuant to Minn. Stat. §14.63 to 14.69.

4. Penalty due, interest assessed. Unless the land occupier appeals the APO within 30 days of receipt of the APO, the penalty is due and payable to BWSR as specified in the APO. If the land occupier 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 BWSR determines it was not, the land occupier has 20 days to pay the penalty after receipt of the letter from BWSR that the violation has not been fully corrected, or the time period specified in the APO as issued, whichever is later.

Interest will accrue at the rate established pursuant to Minn. Stat §549.09 beginning on the 1st of the 12th month after issuance of the corrective action notice consistent with Minn. Stat. §103B.101, subd. 12a.

5. Referral for collection of penalty. All penalties and interest assessed under an APO must be paid by the land occupier within the specified time and made payable to BWSR. Penalties and interest that have not been paid by the land occupier within 12 months of the date specified in the APO will be referred to the Minnesota Department of Revenue for collection. Any penalty or interest not received in the specified time may be collected by any lawful means.
6. Reporting and documentation. Effective compliance reporting and documentation is strongly recommended to ensure that proper enforcement action is taken, and that a record is maintained of these actions in the appropriate enforcement file. When BWSR identifies a violation of the excessive soil loss prohibition, BWSR staff should follow record keeping procedures to assess and document the following to the extent known or available:
 - a. Cause of the violation;
 - b. Magnitude and duration of the violation;
 - c. Whether the violation presents an actual or imminent risk to public health and safety, or the natural resources of the state;
 - d. Past violations;
 - e. Efforts by the SWCD, county, watershed district or BWSR to assist the land occupier to become compliant, including written and oral communications with the land occupier and results of mediation, where applicable; and
 - f. Past and present corrective action efforts by the land occupier.

DE. Confidential Data

Under Minn. Stat. §13.44, subd. 1 of the Minnesota Government Data Practices Act, "The identities of individuals who register complaints with government entities concerning violations of state laws or local ordinances concerning the use of real property are classified as confidential data." Confidential data are not public, and are accessible only to BWSR, county, SWCD, or other government personnel whose work assignments reasonably require access, and to those authorized by state or federal law. They are not accessible to the subject of the data (i.e. the person whom the complaint is alleged against). Thus, neither the data subject, nor the public at large, can know the identity of the complainant. (The identity of the person whom the complaint is alleged against is not classified.)

Even though individuals cannot access confidential data about themselves, they have a right to know whether confidential data is maintained by BWSR or a local government. If an individual asks whether he or she is the

subject of a property complaint, that inquiry should be confirmed, and they should be advised that the data is classified as confidential.

Definitions

1. "BWSR" means the Board of Water and Soil Resources.
2. "Conservation practices" is as defined in Minn. Stat. §103F.401, subd. 3.
3. "Excessive soil loss" is as defined in Minn. Stat. §103F.401, subd. 6.
4. "Land occupier" is as defined in Minn. Stat. §103F.401, subd. 7.
5. "Local government" is as defined in Minn. Stat. §103F.401, subd. 8.

DRAFT