
MEMORANDUM

TO: Board of Directors, Castle Pines North Metro District

FROM: Seter, Vander Wall & Mielke, P.C.

DATE: April 17, 2024

RE: CDPHE Penalty & Settlement Offer

This memorandum discusses the District's settlement conference with representatives of CDPHE's Water Quality Control Division that occurred on March 25th.

Background

CDPHE has alleged seven (7) separate unauthorized discharge events by the District between October 23, 2020 and August 8, 2023 in violation of the Colorado Water Quality Control Act. It is our understanding that the District has never contested the validity of any of these alleged discharge violations. At the March 25th meeting, CDPHE presented the District with an offer to settle the alleged discharge violations. If the District does not accept the settlement offer, then CDPHE will assess a unilateral penalty order and the District will have the option to either pay the penalty, or file an appeal.

CDPHE Settlement Calculation Guidelines

Per C.R.S. 25-8-608 and 5 CCR 1002-101, a violation is punishable by a penalty of not more than \$64,326 per day for each violation that occurs. In determining a civil penalty, CDPHE may consider the following factors: (1) potential damage from the violation; (2) compliance history; (3) whether the violation was intentional, reckless, or negligent; (4) the impact upon or threat to public health or environment as a result of the violation; (5) duration of the violation; and (6) economic benefit realized by the violator as a result of the violation.

CDPHE enforces this penalty scheme using the following formula:

Civil penalty = (unauthorized discharge penalty + administrative violations penalty) +/- aggravating or mitigating factors + economic benefit.

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Unauthorized Discharge Penalty

The unauthorized discharge penalty of \$78,752 was calculated by using the formula (potential damage + fault + compliance history) x days of violation.

Potential damage is calculated by determining the potential impact the discharge had or may have on the receiving water. Typically, CDPHE determines the value of potential or actual harm by using a categorical table that assesses penalties based on the type of water that was discharged into (agricultural, recreation, water supply, aquatic life) with potential harm penalties ranging from \$0- \$20,000 and actual harm penalties \$5,000 - \$40,000+. In the case of unauthorized discharge leading to land application, there are no penalty tables and instead CDPHE looks at past violation precedents.

Six of the seven alleged District violations were assigned either low or mid-range dollar amounts, between \$5000 and \$7500 each, for potential damage, because the discharges were into waterways that were dry at the time. The alleged 2022 violation was assessed at \$16,250 because it hit state waters within the aquatic life warm water category, which carries the highest penalty (potential= \$12,501 – 20,000; actual= \$40,000+).

Degree of fault is calculated by considering: f the violator could control the events resulting in the violation;

- If the violator took reasonable precautions to prevent the events resulting in the violations; (\$1,000- 2000 per violation if could not reasonably foresee or control the circumstances, \$2,000- 3000 if should have been aware of circumstances, \$3,000- 4,0000 if aware of circumstances and failed to take necessary steps to prevent or abate it or had specific information documenting the violations and failing to stop it, \$4,000 -5000 where there is a bad faith effort to comply or unjustified delay in preventing or remediating the violation)
- If the violator delayed taking corrective actions;
- The size/complexity of the violator and/or parent entity, as well as the engineering, legal, and financial resources at their disposal;
- If the violator was negligent or recalcitrant; and
- Degree of culpability.

The District was assessed a category 2 fault, based on a history of self-reporting, maintaining a plan for infrastructure review and upgrades, and compliance with previous compliance advisory notices. It was advised that this is supposed to fall within category 3, but is being treated as category 2 for settlement purposes.

History is assessed by considering: how similar the previous violations were, how recent the previous violations were, the number of previous violations, and the violator's response to previous violations in correcting the problem. Category 1 (\$1,000 - \$2,500/ violation) - Relevant violation(s) at any other facility/projects under common ownership or control. Category 2 (\$2,500 - \$5,000/ violation) - Any previous formal enforcement action (ie. Notice of Violation (NOV), Cease and Desist Order (CDO), Clean up Order (CUO), Penalty Order (OCP), etc)

issued within five years prior to the date of issuance of the current enforcement action for violation(s) different from what is cited in the current enforcement action. Category 3 (\$5,000 - \$7,500/ violation) - Any previous formal enforcement action (ie. NOV, CDO, CUO, OCP, etc) issued within five years prior to the date of issuance of the current enforcement action for the same or similar violation(s) cited in the current enforcement action.

The District received all 0s for the history factor, because CDPHE brought all of the previous enforcement actions at once – if these had been issued separately, then there would have been a history multiplier.

Administrative penalties are not applicable in this case, because the alleged violation was an unauthorized discharge.

The District received 1 day multipliers for six of the seven alleged violations, except for the alleged 2022 violation.

In this case, the District’s unauthorized discharge penalty was calculated as follows:

Incident #	Potential Damage	Fault	History	Days of Violation	Unauthorized Discharge Penalty
2020-0481	\$6250	\$2500	0	1	\$8750
2021-0471	\$7500	\$2500	0	1	\$10000
2021-0069	\$6250	\$2500	0	1	\$8750
2021-0526	\$5001	\$2500	0	1	\$7501
2021-0578	\$5001	\$2500	0	1	\$7501
2022-0111	\$6250	\$2500	0	2	\$17500
2023-0455	\$16250	\$2500	0	1	\$18750
Total Unauthorized Discharge Penalty = \$78, 752					

Aggravating and Mitigating Circumstances

The unauthorized discharge penalty may be increased or decreased based on aggravating and/or mitigating circumstances. Mitigating circumstances may decrease a penalty by up to 25% for timely compliance, and an additional 25% for actions going above and beyond what is required, for a maximum 50% reduction. **The District received the maximum 50% penalty deduction for its timely compliance and engineering work, resulting in a 50% reduction of the initial penalty to \$39,376.**

Economic Benefit

Economic benefit is any savings or monetary gain realized by a violator as a result of delaying or avoiding pollution control expenditures during the period of noncompliance. The objective of the economic benefit calculation is to place violators in the same financial position they would have been in if they had achieved and maintained continuous regulatory compliance.

There are two types of costs that are considered when determining economic benefit; delayed costs and avoided costs. CDPHE uses the EPA's BEN model to calculate economic benefit. If adequate information is not available to run a BEN calculation, the penalty by default may be increased by 20%.

Lift Stations 2&5- As a settlement consideration these sites were combined into one economic benefit category. Noncompliance date range February 3rd 2021- March 20th 2022. Based on settlement considerations on compliance dates, the model showed a negative economic benefit. No economic benefit component was assigned.

Lift Station 3- Noncompliance date range November 11th 2018- June 23rd 2023. As a settlement consideration Division increased asset useful life from 15 years, to maximum of 25 years. Economic benefit of \$91,602.00.

Overall, the settlement offer was calculated at an amount of \$130,978.

Supplemental Environmental Project

In lieu of direct payment, District may identify and complete a supplemental beneficial project. Final penalty amount must be set prior to coordination with SEP coordinator. Cannot be already identified, budgeted, planned, or needed for compliance. Must be completed in Douglas County. Different projects carry different mitigation factors (amount spent needed to satisfy requirement based on potential benefit to District).

Nathan to give update on conversation with Jocelyn re program director issues and practical issues.