

**R309. Environmental Quality, Drinking Water.**

**R309-405. Compliance and Enforcement: Administrative Penalty.**

**~~R309-405-1. Authority.~~**

~~Utah Code Annotated, Sections 19-4-104 and 19-4-109~~

**~~R309-405-2. Purpose, Scope, and Applicability.~~**

~~(1) This rule sets the criteria and procedures the Director will use in assessing penalties to public drinking water systems for violation of its rules.~~

~~(2) This guidance and ensuing criteria is intended to be flexible and liberally construed to achieve a fair, just, and equitable result with the intent of returning a public water system to compliance.~~

~~(3) This rule is applicable to all public drinking water systems.~~

**~~R309-405-3. Limits on Authority and Liability.~~**

~~Nothing in this rule should be construed to limit the Director's ability to take enforcement actions under Utah Code Annotated, Section 19-4-109.~~

**~~R309-405-4. Assessment of a Penalty and Calculation of Settlement Amounts.~~**

~~(1) Where the Director determines that a penalty may be appropriate, the Director shall propose a penalty amount by sending a notice of agency action to the public water system. The notice of agency action shall provide that the public water system may submit comments and/or information on the proposed penalty to the Director within 30 days. The criteria the Director will use in establishing a proposed penalty amount shall be as follows:~~

~~(a) Major Violations: \$600 to \$1000 per day for each day of violation. This category includes violations with high potential for impact on drinking water users, major deviations from the requirements of the rules or Safe Drinking Water Act, intentional fraud, falsification of data, violations which result in a public water system being considered by the Environmental Protection Agency to be: "Significant Non-Compliers" (SNC), or violations that may have a substantial adverse effect on the regulatory program. Specific violations that are subject to a major violation category can include the following:~~

~~(i) Violations subject to \$1000 per day penalty:~~

~~(A) Any violation defined by R309-220-5 which would trigger a Tier 1 public notification.~~

~~(B) Not having any elements of a source protection plan as required in R309-600 for ground water sources and R309-605 for surface water sources.~~

~~(C) Failure to respond to an Administrative Order issued by~~

the Director.

~~— (D) Introduction by the water system of a source water that has not been evaluated and approved for use as a public drinking water source under R309-515.~~

~~— (E) Construction or use of an interconnection to another public water system which has not been reviewed and approved in accordance with R309-550-9.~~

~~— (F) Having over 20 IPS points (Improvement Priority System points based on R309-400, the Water System Rating Criteria) specifically for operating pressures below that required by R309-105-9.~~

~~— (G) Having 50 IPS points specifically for an inadequate well seal as required in R309-515.~~

~~— (H) Having over 50 IPS points (not including the deficiencies in (F) and (G) above) specifically assessed in the physical facility section of an IPS report.~~

~~— (I) Use of a surface water source without proper filtration treatment in accordance with R309-525 or 530.~~

~~— (J) Exceeding the rated water treatment plant capacity as determined by review under R309-525 or 530.~~

~~— (K) Insufficient disinfection contact time as evaluated under R309-215-7.~~

~~— (ii) Violations subject to \$800 per day penalty:~~

~~— (A) Not having any of the required components of a cross connection control program in place as required by R309-105-12.~~

~~— (B) Any violation of the turbidity requirements outlined in R309-215-9(4)(b)(iii-iv) for individual filter turbidities using consecutive readings taken 15 minutes apart.~~

~~— (b) Moderate Violations: \$400 to \$600 per day for each day of violation. This category includes violations with a moderate potential for impact on drinking water users, moderate deviations from the requirements of the rules or Safe Drinking Water Act with some requirements implemented as intended, or violations that may have a significant notable adverse effect on the regulatory program. Specific violations that are subject to a moderate violation category can include the following:~~

~~— (i) Violations subject to \$600 penalty:~~

~~— (A) Any violation defined by R309-220-6 which would trigger a Tier 2 public notification.~~

~~— (B) Having a disapproved status on a source protection plan (R309-600 and 605) for a period longer than 90 days.~~

~~— (C) Installation or use of disinfection equipment that has not been evaluated and approved for use under R309-520.~~

~~— (D) Having measured turbidity spikes of greater than 0.5 or 1.0 NTU in two consecutive fifteen minute readings as defined in R309-215-9(4)(b)(i) or (ii) respectively.~~

~~— (E) Insufficient source capacity, storage capacity, or~~

~~delivery capacity as established by review of the system design under R309 500 through 550.~~

~~(F) Not complying with plan approval requirements as set forth in R309-500. The term infrastructure can include the disinfection process, surface water treatment process, and physical facilities such as water treatment plants, storage reservoirs, sources and distribution piping.~~

~~(c) Minor Violations: Up to \$400 per day for each day of violation. This category includes violations with a minor potential for impact on drinking water users, slight deviations from the rules or Act with most of the requirements implemented, or violations that may have a minor adverse effect on the regulatory program. Specific violations that are subject to a minor violation category can include the following:~~

~~(i) Violations subject to \$400 per day penalty:~~

~~(A) Any violation defined by R309-220-7 which would trigger a Tier 3 public notification or a violation of the monitoring requirements of R309-515-4(5), except for turbidity monitoring for surface water treatment facilities and violations termed as minor monitoring as outlined in R309-400-3 (minor bacteriological routine monitoring violation, minor bacteriological repeat monitoring violation and minor chemical monitoring violation).~~

~~(B) Failure to upgrade a Preliminary Evaluation Report for a source protection plan as required in R309-600 and 605.~~

~~(C) Failure to update a source protection plan as required in R309-600 and 605.~~

~~(D) Construction or use of a storage reservoir that has not been evaluated for use under R309-545.~~

~~(ii) Violations subject to \$200 per day penalty:~~

~~(A) Lacking individual components of a cross connection control program as required by R309-105-12.~~

~~(B) Not having a certified operator on staff as required in R309-300-5(10) after 1 year or 4 operator certification exam cycles.~~

~~(C) Any minor monitoring violation as defined by R309-400-3 (minor bacteriological routine monitoring violation, minor bacteriological repeat monitoring violation and minor chemical monitoring violation).~~

~~(D) Any violation of the turbidity requirements outlined in R309-215-9(4)(b)(i-ii) for individual filter turbidities using consecutive readings taken 15 minutes apart.~~

~~(2) The Director will assess the penalty, if any, after reviewing information submitted by the public water system. The public water system may appeal the assessment of the penalty as provided in R305-7-302.~~

**~~R309-405-5. Factors for Seeking or Negotiating Amount of~~**

### **Penalties.**

~~— The Director, in assessing the penalty, may take into account the following factors:~~

~~— (1) Economic benefit. The costs a person or organization may save by delaying or avoiding compliance with applicable laws or rules.~~

~~— (2) Gravity of the violation. This component of the calculation shall be based on:~~

~~— (a) The extent of deviation from the rules;~~

~~— (b) The potential for harm to drinking water users, regardless of the extent of harm that actually occurred;~~

~~— (c) The degree of cooperation or noncooperation and good faith efforts to comply. Good faith takes into account the openness in dealing with the violations, promptness in correction of problems, and the degree of cooperation with the State;~~

~~— (d) History of compliance or noncompliance. The penalty amount may be adjusted upward in consideration of previous violations and the degree of recidivism. Likewise, the penalty amount may be adjusted downward when it is shown that the violator has a good compliance record; and,~~

~~— (e) Degree of willfulness or negligence. Factors to be considered include how much control the violator had over the violation and the foreseeability of the events constituting the violation, whether the violator made or could have made reasonable efforts to prevent the violation, whether the violator knew, or should have known, of the legal requirements which were violated, and degree of recalcitrance.~~

~~— (3) The number of days of non compliance~~

~~— (4) Public sensitivity. The actual impact of the violation(s) that occurred.~~

~~— (5) Response and investigation costs incurred by the State and others.~~

~~— (6) The possible deterrent effect of a penalty to prevent future violations.~~

### **R309-405-6. Satisfaction of Penalty Under Stipulated Penalty Agreement.**

~~— The Director may accept the following methods of payment or satisfaction of a penalty to promote compliance and to achieve the purposes set forth in Utah Code Annotated Section 19-4-109:~~

~~— (1) Payment of the penalty may be extended based on a person or organization's inability to pay. This shall be distinguished from an unwillingness to pay. In cases of financial hardship, the Director may accept payment of the penalty under an installment plan or delayed payment schedule with interest.~~

~~— (2) In circumstances where there is a demonstrated financial hardship, the Director may allow a portion of the penalty to be~~

~~deferred and eventually waived if no further violations are committed within a period designated by the Director.~~

~~(3) In some cases, the Director may allow the violator to satisfy the penalty by completing a Supplemental Environmental Project (SEP) approved by the Director. The following criteria shall be used in determining the eligibility of such projects:~~

~~(a) The project must be in addition to all regulatory compliance obligations;~~

~~(b) The project must relate to some or all of the issues of the violation;~~

~~(c) The project must primarily benefit the drinking water users;~~

~~(d) The project must be defined, measurable and have a beginning and ending date;~~

~~(e) The project must be agreed to in writing between the public water system and the Director;~~

~~(f) The project must not generate the public perception favoring violations of the laws and rules.~~

#### **~~R309-405-7. Penalty Policy for Civil Proceedings.~~**

~~Pursuant to Utah Code Annotated Section 19-4-109(2)(b), any person who willfully violates any rule or order made or issued pursuant to the Utah Safe Drinking Water Act, Utah Code Annotated Section 19-4-101 et seq, is subject to a civil penalty of not more than \$5000 per day for each day of violation. The Director shall apply the provisions of R309-405-4, 5, and 6 in pursuing or resolving willful violations except that the penalty range per day for each day of violation for major violations shall be \$3000 to \$5000, for moderate violations shall be \$2000 to \$3000, and for minor violations shall be up to \$2000.~~

#### **R309-405-1. Purpose, Scope, and Applicability.**

(1) The Division's enforcement program protects public health by ensuring compliance with the Safe Drinking Water Act, rules promulgated by the Board, and valid administrative orders issued by the Director.

(2) Rule R309-405 sets the procedures, criteria, and factors that apply to the assessment and settlement of formal administrative penalties against public drinking water system suppliers for violation of the Safe Drinking Water Act, Sections 19-4-101 et seq., rules promulgated by the Board, or orders issued by the Director under the Safe Drinking Water Act.

(3) Rule R309-405 applies to all public drinking water systems and suppliers under the Safe Drinking Water Act.

#### **R309-405-2. Authority.**

Sections 19-4-104, 19-4-105, 19-4-106(4), and 19-4-109.

### **R309-405-3. Definitions.**

The following additional definitions apply to Rule R309-405:

(1) "Administrative order" means any form of order issued by the Director under the Safe Drinking Water Act that requires the supplier to take an action or refrain from taking an action. Administrative orders include any order variations, including Compliance Agreement/Enforcement Order, Stipulated Consent Order, Initial New System Order, and any form of unilateral order.

(2) "Administrative penalties" are monetary sanctions imposed by the Director pursuant to Section 19-1-109 arising from violations of the Safe Drinking Water Act, rules promulgated by the Board, or lawful orders issued by the Director.

(3) "Formal enforcement" is an action initiated by the Director that is intended to result in an enforceable order or final violation finding under either administrative or civil (judicial) procedures.

(4) A "notice of agency action" is a notice issued by the Director under Section 19-4-109(4) and the Utah Administrative Procedures Act that initiates any type of formal enforcement action that involves the assessment of administrative penalties. A notice of agency action may include a notice of violation or an administrative order in any combination where a penalty is being sought in connection with the formal enforcement matter.

(5) A "notice of violation" is a written notice signed by the Director under Section 19-4-107 stating the nature of the violation of one or more legally-binding requirements. A notice of violation may include an administrative order to correct the violation or seek a variance by a specific date. A notice of violation may be the only formal enforcement action taken or it may be used as a basis for other enforcement actions.

(6) "Respondent" is the public water system supplier or other person who is the subject of the notice of violation, administrative order, or other form of formal enforcement under this rule.

### **R309-405-4. Formal Enforcement Introduction; No Limits on Authority and Remedies.**

Section R309-405-4 addresses administrative procedures as they apply to formal enforcement actions.

(1) Formal enforcement actions are initiated by the Director through the issuance of a notice of violation or any form of administrative order, notice of agency action, or any combination of a notice of violation, administrative order, or

notice of agency action.

(2) The Director may initiate and pursue formal enforcement through administrative procedures or through judicial procedures. In lieu of initiating formal enforcement through administrative procedures, the Director may initiate formal enforcement proceedings through judicial procedures in state court under Subsection 19-4-109(8). Final administrative orders may also be enforced in state court through judicial procedures.

(3) Administrative penalties are intended to emphasize the need for timely, meaningful, and lasting corrective actions and to deter future violations.

(4) Nothing in Rule R309-405 should be construed to limit the Director's enforcement discretion or right to pursue any administrative or judicial enforcement actions under the Safe Drinking Water Act.

#### **R309-405-5. Formal Administrative Enforcement Actions and Assessment of Administrative Penalties.**

Section R309-405-5 addresses formal enforcement actions and monetary penalties available to the Director through administrative procedures.

(1) Formal Administrative Enforcement Actions Seeking No Penalties.

(a) Whenever the Director issues, under the Safe Drinking Water Act, a notice of violation or administrative order, or a combined notice of violation and administrative order, that does not seek the imposition of administrative penalties, the procedures set forth in Section 19-1-301 and Rule R305-7 shall apply to the issuance and service of the notice of violation or administrative order, or combined notice of violation and order, and any adjudication arising from the issuance and service of the notice of violation or administrative order, or combined notice of violation and administrative order.

(2) Formal Administrative Enforcement Actions Seeking Penalties.

(a) Whenever the Director issues, under the Safe Drinking Water Act, a notice of violation or administrative order, or a combined notice of violation and administrative order, that seeks the imposition of administrative penalties, the notice of agency action procedures set forth in Section 19-4-109 and Subsection R309-405-5(5) shall apply to the issuance and service of the notice of violation or administrative order, or combined notice of violation and administrative order, and any adjudication arising from the issuance and service of the notice of violation or administrative order, or combined notice of violation and administrative order.

(3) Violations of Administrative Orders.

(a) If the Director seeks the imposition of administrative penalties arising from the violation of an administrative order, the notice of agency action procedures set forth in Section 19-4-109 and Subsection R309-405-5(5) shall apply to the issuance and service of the notice of agency action and any adjudication arising from the issuance and service of the notice of agency action.

(b) The Director may seek judicial enforcement or the imposition of administrative penalties arising from the violation of an administrative order issued under the Safe Drinking Water Act without first issuing a notice of violation.

(4) Administrative Penalty Range.

(a) Any violation by a public water system serving a population of more than 10,000 individuals shall be subject to a penalty of exactly \$1,000 on a per day, per violation basis.

(b) Any violation by a public water system serving a population of less than 10,000 individuals shall be subject to a penalty not to exceed \$1,000 on a per day, per violation basis, based on the criteria described in Section R309-405-6.

(5) Administrative Penalty Assessment, Payment, and Collection Procedures; Adjudications and Appeals.

(a) Prior to assessing administrative penalties under the Safe Drinking Water Act and Rule R309-405, the Director shall provide the respondent with a written Notice of Proposed Assessment of Administrative Penalties, in accordance with Section R305-7-402, and provide the respondent with the opportunity of no less than 30 calendar days to submit comments to the Director relating to the proposed penalties. The comments may include evidence of mitigating circumstances the respondent desires the Director to consider prior to assessing penalties.

(b) After considering any timely comments or evidence submitted by the respondent, the Director may decline to assess administrative penalties by providing notice to the respondent. If, after considering timely comments and evidence submitted by the respondent, the Director makes the decision to pursue the assessment of penalties, the Director shall proceed as follows:

(i) The Director shall issue a Notice of Agency Action and Demand for Payment in accordance with Section 19-4-109 and Title 63G, Chapter 4, Administrative Procedures Act, providing a detailed statement of basis for the assessed penalty, including the Director's evaluation of any comments or evidence submitted by the respondent during the comment period.

(ii) The Notice of Agency Action and Demand for Payment shall include notice of the right to a formal adjudicative proceeding in accordance with Subsection 63G-4-201(2)(a)(vi) by filing a written response within 30 days of the mailing date of the Notice of Agency Action and Demand for Payment. The



adjudication of administrative penalties shall be conducted as a formal adjudication.

(iii) If the respondent does not request an adjudicative proceeding, payment of administrative penalties shall be due within 30 days of the date of issuance of the Notice of Agency Action and Demand for Payment.

(iv) If the respondent files a timely written response to the Notice of Agency Action and Demand for Payment pursuant to Section 63G-4-204, the following procedures shall apply:

(A) The Director, serving as the presiding officer, shall conduct a formal adjudication pursuant to Title 63G, Chapter 4, Administrative Procedures Act.

(B) At the conclusion of the formal adjudicative proceeding, the Director shall issue a final order of the adjudicative proceeding, pursuant to Section 63G-4-208, as the final agency action regarding the assessment of administrative penalties.

(C) The final order of the adjudicative proceeding shall be subject to judicial review pursuant to Section 63G-4-403.

(6) Settlement.

(a) At any time during a notice of violation, administrative order, or penalty assessment or adjudication process, the Director may compromise or settle administrative penalties in accordance with Subsection 19-4-109(3), except that settlements that require the payment of penalties in excess of \$25,000 require Board approval under Subsection 19-4-104(1)(c)(vii).

(b) The Director's authority to compromise or settle administrative penalties includes providing payment terms and extensions of time, at the discretion of the Director.

#### **R309-405-6. Factors for Determining Amount of Penalties.**

The Director, in assessing or setting any administrative penalty, or in settling any claim for civil penalty, and the Board, in reviewing an administrative penalty settlement under Subsection 19-4-104(1)(c)(vii), may evaluate the following factors in determining the appropriate amount of the penalty:

(1) Economic benefit. The costs a person or organization may save by delaying or avoiding compliance with applicable laws or rules.

(2) Gravity of the violation. This component of the calculation shall be based on:

(a) the extent of deviation from the Utah Safe Drinking Water Act or rules;

(b) the potential for harm to drinking water users, regardless of the extent of harm that in fact occurred; and

(c) the degree of willfulness, recklessness, or negligence

including how much control the respondent had over the violation and the reasonable foreseeability of the events constituting the violation; whether the respondent made or could have made reasonable efforts to prevent the violation; whether the respondent knew, or should have known, of the legal requirements which were violated; any facts suggesting that the violation was intentional; and the degree of the respondent's recalcitrance.

(3) The duration of non-compliance.

(4) Self-disclosure of non-compliance by the water supplier.

(5) The degree of cooperation and good faith efforts to comply. Good faith takes into account the openness in dealing with the violations and promptness in providing notice, correcting violations, and avoiding potential public harm.

(6) By contrast with Subsection R309-405-6(5), the degree of recalcitrance, non-cooperation, or delay associated with providing notice and appropriate responses to the violations.

(7) History of compliance or non-compliance. The penalty amount may be adjusted upward in consideration of previous violations and the degree of recidivism. Likewise, the penalty amount may be adjusted downward when it is shown that the respondent has a good compliance record.

(8) Response and investigation costs incurred by the state and others.

(9) The possible deterrent effect of a penalty to prevent future violations by the respondent or other suppliers.

(10) The respondent's financial structure, revenue sources to pay penalties, financial capabilities, and ability to pay or demonstrated inability to pay.

(11) Any other aggravating or mitigating circumstances that are relevant to the matter.

### **R309-405-7. Financial Hardship; Penalty Adjustments.**

Based on demonstrated financial hardship not previously considered under Section R309-405-6, the Director may:

(1) reduce or extend payment of an administrative penalty under the Safe Drinking Water Act and this rule; or

(2) approve a payment installment plan or allow a portion of the penalty to be deferred and eventually waived if no further violations are committed within a period designated by the Director.

**KEY: drinking water, environmental protection, penalties**

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