

**ADMINISTRATIVE PENALTY DISCUSSION PURSUANT TO THE NOV ISSUED FOR, TUHAYE 16  
OFFSITE SEWER, SETTLEMENT AGREEMENT DOCKET NO. I11-05**

Infractions of the Utah Water Quality Act are penalized up to \$10,000/day/violation for civil penalties (\$25,000/day/violation for criminal) according to guidelines established in the penalty policy (*Utah Administrative Code R317-1-9*).

The principles that apply in the penalty policy are:

- 1) Penalties should be based on the nature and extent of the violation
- 2) Penalties should at a minimum, recover the economic benefit of noncompliance;
- 3) Penalties should be large enough to deter noncompliance;
- 4) Penalties should be consistent in an effort to provide fair and equitable treatment of the regulated community.

To determine a civil penalty the State will consider:

- 1). the magnitude of the violations;
- 2) the degree of actual environmental harm or the potential for such harm created by the violations;
- 3) response and/or investigative costs incurred by the State or others;
- 4) any economic advantage the violator may have gained through noncompliance;
- 5) recidivism of the violator
- 6) good faith efforts of the violator
- 7) ability of the violator to pay;
- 8) the possible deterrent effect of a penalty to prevent future violations.

In the case of negotiated adjustments to penalties, arguments must be based on the considerations above.

Civil penalties for settlement purposes should be calculated based on the following formula:

**CIVIL PENALTY = PENALTY + ADJUSTMENTS - ECONOMIC AND LEGAL CONSIDERATIONS**

Penalties are grouped in four main categories:

- A. \$7,000 to \$10,000 per day. Violations with high impact on public health and the environment.
- B. \$2,000 to \$7,000 per day. Major violations of the Utah Water Quality Act, associated regulations, permits or orders.
- C. \$500 to \$2,000 per day. Significant violations of the Utah Water Quality Act, associated regulations, permits or orders.
- D. Up to \$500 per day. Minor violations of the Utah Water Quality Act, regulations, permits or orders.

Penalties are established within the penalty ranges shown above, based on the following criteria:

- History of compliance or non-compliance,
- Degree of willfulness or negligence, and
- Good faith efforts to comply.

Adjustments to the civil penalty include:

- The economic benefit gained as a result of non-compliance,
- Investigative costs incurred by the State and/or other governmental level,
- Documented monetary costs associated with environmental damage.

PENALTY - The penalty for FACILITY has been calculated as follows:

**Gravity Component:**

The gravity component of the penalty is based on violations found at the site. There was no permit issued for the project site. The violations at the site were from not having a permit, not having a storm water pollution prevention plan (SWPPP), and having no storm water control measures.

**VIOLATION 1: NO COVERAGE UNDER A UPDES STORM WATER PERMIT.**

The DWQ inspection of the site occurred on March 23, 2011. At that time construction activity stopped on the site until the Permit was procured and the SWPPP was in hand. The permit for the site was obtained on March 28, 2011. JSI was given notice by Talisker to start work on March 11, 2011. JSI moved onto the project March 14, 2011 and March 15<sup>th</sup>, they did not begin work. JSI started the project by attempting to clear the project area of snow. This occurred on March 16 & 17, 2011. Their initial clearing was on covered (asphalted area), they began to do clearing on the project area (causing a disturbance) on March 21, 2011. Work stopped on March 22 due to intense snowing again. Snow clearing commenced again March 23, 2011 when they stopped because of the DWQ inspection and the problems associated with it. The total number of days out of proper permit compliance is 8 days (March 21 when disturbance started to March 28 when they had a permit and a SWPPP. This is a category D violation.

**VIOLATION 2: NO SWPPP HAD BEEN DEVELOPED FOR THE SITE.**

There was no SWPPP that had been developed at the site. The period of non-compliance with a SWPPP is the same 8 days as violation #1. This is a category D violation.

**VIOLATION 3: ADEQUATE AND APPROPRIATE STORM WATER CONTROLS WERE ABSENT**

“There were no BMP’s onsite with regards to the work being done on Mr. Cummings property (see inspection report).” There was significant potential for sediments to be discharged into the stream at the time of inspection.

The period of non-compliance with appropriate storm water controls is the same 8 days as violation #1. This is a category D violation.

**VIOLATION 4: DISCHARGE OF POLLUTANTS UNLAWFUL**

During the assessment of the violation there was concern about a steep bank on one side of the creek that follows close to the edge of the creek. During a meeting on July 12, 2011, the violator disclosed that this bank was placed next to the creek during excavation activity performed a year or more before the date of the DWQ inspection, by the complainant when the complainant was on better terms with the violator. This bank was not disturbed in the 2 weeks prior to the DWQ inspection on March 23, 2011 when the violator was causing disturbances leading to the current action. The disturbance cause by the violator was initiated when the violator started scraping snow from

the surface so that they could commence a sewer connection project (on March 21, 2011). With an excavator the violator reached toward the edge of creek on the low slope side, and dragging the bucket back, scraped the snow from the surface, disturbing the surface as the bucket dragged over the earth. It is possible during the work of scraping the snow back from the edge of the creek that the permittee spilled fill into the creek but, more than likely soil flowed into the creek from melting snow over disturbed soil within inches from the creek. The Utah water quality act states (Utah Code Annotated, 19-5-107), it is unlawful for any person to discharge a pollutant into waters of the state... or to place or cause to be placed any wastes in a location where there is probable cause to believe it will cause pollution. This is a class C violation. It will be applied for 5 days. The days are calculated adding March 21, and March 23 to 28. March 22 was a cold day with a severe storm event. That time period had a series of storm events, which is why the project was delayed. The days numbered are at 6 but there is time where the temperature and the weather would not have been conducive for melting snow. The 5 days is a best estimate.

### **CRITERIA ADJUSTMENTS TO THE PENALTY**

The violator has no history of non-compliance and has tried to be contentious about storm water concerns in the Tuhaye development up to now. The violator was distracted by boundary dispute threats from a neighbor and a possible legal confrontation associated with that which prompted quick action for this project. Also, the violator was confused about if the project should have been permitted or not. It is under an acre but it is associated with the Tuhaye development, therefore it is a part of a common plan of development or sale and it should have been permitted. Therefore the violator will receive 95% credit for history of compliance.

The violator stopped construction immediately with the DWQ inspection and did not commence work until a permit and SWPPP were in hand. The violator will be given 95% credit for good faith efforts to comply.

Recalling the discussion above about the knowledge and judgment the violator used, the violator will receive 20% credit for the degree of willfulness or negligence.

### **Economic Benefit Justification:**

Economic benefit received by the VIOLATOR was calculated based on; 1. capital investment delayed; 2. delayed expenditures, and; 3. expenses not incurred. Avoided and delayed expenses are based on a survey of current construction, engineering and product costs. The field entries for the Environmental Protection Agency BEN model have been used in previous storm water calculations.

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| Capital Investment: | This part of the calculation includes pollution items that were not bought to avoid the discharge such as silt fencing, gravel socks, etc. |
| Expenditures:       | This part of the calculation includes costs of items such as inspections, monitoring, and record keeping set up that were delayed.         |
| O & M Costs:        | Avoided operation and maintenance costs were used in the economic benefit calculation.   |

The economic benefit calculation was done with the current BEN programs provided by the Environmental Protection Agency. A copy of the BEN calculations is attached to the calculations portion of the document. The

calculation was based on the delayed costs for developing the SWPPP (the SWPPP having a capital cost of \$1,000), of BMP materials that were not purchased and implemented on time, (estimated at \$500), and on missed operation and maintenance costs for BMPs and the SWPPP for 15 days. Annual operation and maintenance costs (maintaining the BMPs and the SWPPP) are estimated at \$1,200 a year or \$100 a month. The time the permittee gained an advantage from delaying is from March 14, 2011 to March 28, 2011.

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