

**ADMINISTRATIVE PENALTY DISCUSSION PURSUANT TO THE NOV ISSUED FOR
SW ENERGY, SETTLEMENT AGREEMENT DOCKET No. I14-08**

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*).

SW Energy Statutory Maximum of \$10,000/violation/day for 21 days for 4 violation(s) = \$840,000

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; and
- 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; and
- 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 SW Energy has been calculated as follows:

Gravity Component:

The gravity component of the penalty is based on the following citations:

1. It is unlawful for any person to discharge a pollutant into waters of the state, unless the discharge is authorized by permit. Utah Code Ann. § 19-5-107(1)(a). Waters of the State means “all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state.” Utah Code Ann. § 19-5-102(23)(a). See also an identical definition at Utah Admin. Code § R317-1-1.31.
2. It is unlawful for any person to make any discharge not authorized under an existing valid discharge permit. Utah Code Ann. § 19-5-107(3)(a).
3. Utah Admin. Code § R317-2-7.1 prohibits any person from discharging, or placing any wastes or other substances, in a manner that may interfere with water’s designated uses, or to cause any of the applicable standards to be violated.
4. Utah Admin. Code § R317-2-7.2 prohibits any person from discharging, or placing any wastes or other substances, in a such a way as will be or may become offensive such as unnatural deposits, floating debris, oil, scum or other nuisances such as color, odor or taste.
5. UAC R317-2-13. Classification of Waters of the State – Classifies the Green River as 1C, 2A, 3B, and 4.
6. UAC R317-2-14. Numeric Criteria – Lists numeric criteria for Waters of the State.

VIOLATIONS:

For the purpose of calculating a penalty for this Settlement Agreement the four violations will each address specific parts of this illicit discharge event. Violations 1 and 2 will be assessed together as 1 violation for the first 2 days of the initial discharge on May 21, & 22, 2014. Violation 3 will address the 1 day of storm event related discharge on May 25, 2015. Violation 4 will address the days of dry wash contamination cleanup on May 23, & 24, 2014 and from May 26, to June 11, 2015.

VIOLATION 1, It is unlawful for any person to discharge a pollutant into waters of the state, unless the discharge is authorized by permit. Utah Code Ann. § 19-5-107(1)(a).

VIOLATION 2, It is unlawful for any person to make any discharge not authorized under an existing valid discharge permit. Utah Code Ann. § 19-5-107(3)(a).

On May 21, 2014, at mid-morning, a pumper discovered liquid shooting out of a well head operated by SW Energy. The incident resulted in the release of a production water and oil mixture. The mixture discharged to the surrounding land and into a dry wash tributary of the Green River at approximately 3,800 gallons per hour. No permit was in place for this discharge. At 5:50 pm on the 21st, the discharge had been reported to the National Response Center (Seq No 1083514) and Department of Environmental Quality (DEQ) (Incident Report No. 11822). The cause of the discharge was a broken valve in the well head. On May 22, 2014 at 1:20 pm the discharge was stopped by killing the well.

R317-2-13.b. classifies the Green River and tributaries as 1C, 2A, 3B, and 4. These classes are defined in R317-2-6 as:

Class 1C -- Protected for domestic purposes with prior treatment by treatment processes as required by the Utah Division of Drinking Water

Class 2A -- Protected for frequent primary contact recreation where there is a high likelihood of ingestion of water or a high degree of bodily contact with the water. Examples include, but are not limited to, swimming, rafting, kayaking, diving, and water skiing.

Class 3B -- Protected for warm water species of game fish and other warm water aquatic life, including the necessary aquatic organisms in their food chain.

Class 4 -- Protected for agricultural uses including irrigation of crops and stock watering.

The lack of a discharge permit is a violation of Utah Code Ann. § 19-5-107(1)(a) and Utah Code Ann. § 19-5-107(3)(a). Since in this case, Utah Code Ann. § 19-5-107(1)(a) and § 19-5-107(3)(a) are similar in nature they will be assessed as one violation for the penalty calculation.

The potential to impact Class 1C water qualifies this as a major violation and warrants assessment at Penalty Category A or B. Due to the companies prompt response and cleanup efforts which minimized impact to environment and potential impact to public health **these days of these violations will be assessed at Category B.**

Mitigation considerations are subdivided into three equal categories (1/3 each for Degree of Negligence, History of Compliance, and Degree of Good Faith Effort).

-Credit for degree of negligence.

SW Energy will be given 50% credit for degree of negligence in the penalty calculation. This credit is given because the Division of Water Quality (DWQ) does not see evidence that SW Energy knowingly did not perform maintenance of broken valve causing the discharge. A greater percentage is not granted because the event was likely easily preventable by valve replacement.

-Credit for history of compliance.

SW Energy will be given 100% credit for history of compliance in the penalty calculation. This was the first incident involving SW Energy recorded in the DEQ Environmental Incident Database.

-Credit for good faith efforts to comply.

SW Energy will be given 75% credit for good faith efforts in the penalty calculation. SW Energy showed good faith with the initial reporting of the event and the response to kill the well and stop the discharge.

\$3,250/day/violation x 1 violation x 2 days = \$6,500 Category B Penalty

VIOLATION 3, UAC R317-2-7.1 for discharging substances that may interfere with water's designated uses, or to cause any of the applicable standards to be violated.

On May 25, 2015, a large storm event occurred at the discharge site, in the dry wash, and the Green River. This storm event further mobilized the uncontained product which included the potential to impact the Green River and tributary's designated uses.

As previously discussed the Green River and tributaries are Class 1C water. The impact to the dry wash is a violation of *UAC R317-2-7.1*. The potential to impact Class 1C water qualifies this as a major violation and warrants assessment at penalty Category A or B. Due to the companies prompt response and cleanup efforts which minimized impact to environment and potential public health impacts **the day of this violation will be assessed at Category B.**

Mitigation considerations are subdivided into three equal categories (1/3 each for Degree of Negligence, History of Compliance, and Degree of Good Faith Effort).

-Credit for degree of negligence.

SW Energy will be given 90% credit for degree of negligence in the penalty calculation. This is given because SW Energy was undertaking a significant effort to remove the product from the dry wash at the time of the storm event.

-Credit for history of compliance.

SW Energy will be given 100% credit for history of compliance in the penalty calculation. This was the first incident involving SW Energy recorded in the DEQ Environmental Incidents Database LHD.

-Credit for good faith efforts to comply.

SW Energy will be given 100% credit for good faith efforts in the penalty calculation. SW Energy showed good faith with the response to the event and cleanup effort undertaken.

\$2,167/day/violation x 1 violation x 1 day = \$2,167 Category B Penalty

VIOLATION 4, UAC R317-2-7.2 for discharging substances that may become offensive such as oil and may cause undesirable aquatic life effects and undesirable human health effects.

On May 23, & 24, 2015, SW Energy was engaged in a cleanup effort of product in the dry wash tributary to the Green River. This product had the potential to be offensive and if mobilized would cause undesirable aquatic life and human health effects. The potential to impact Class 1C water qualifies this as a significant to major violation and warrants assessment at penalty Category B or C. Due to SW Energy's cleanup efforts undertaken to minimized potential impacts to the environment and potential public health impacts, **these days of this violation will be assessed at Category C.**

Mitigation considerations are subdivided into three equal categories (1/3 each for Degree of Negligence, History of Compliance, and Degree of Good Faith Effort).

-Credit for degree of negligence.

SW Energy will be given 90% credit for degree of negligence in the penalty calculation. This is given because SW Energy was undertaking a significant effort to remove the product from the dry wash tributary prior to the storm event.

-Credit for history of compliance.

SW Energy will be given 100% credit for history of compliance in the penalty calculation. This was the first incident involving SW Energy recorded in the DEQ Environmental Incidents Database LHD.

-Credit for good faith efforts to comply.

SW Energy will be given 100% credit for good faith efforts in the penalty calculation. SW Energy showed good faith with the response to the event and cleanup effort undertaken.

\$550/day/violation x 1 violation x 2 days = \$1,100 Category C Penalty

Between May 26, & June 11, 2015, SW Energy was engaged in a cleanup effort of any impacted areas in the dry wash tributary to the Green River. This residual product had minimal potential to be offensive or cause undesirable aquatic life effects and human effects. This minimal potential qualifies this as a minor to significant violation and warrants assessment at penalty Category C or D. Due to SW Energy's cleanup efforts undertaken on these days to minimize potential impacts to the environment and public health, **these days of this violation will be assessed at Category D.**

Mitigation considerations are subdivided into three equal categories (1/3 each for Degree of Negligence, History of Compliance, and Degree of Good Faith Effort).

-Credit for degree of negligence.

SW Energy will be given 90% credit for degree of negligence in the penalty calculation. This is given because SW Energy was undertaking a significant effort to remove the product from the dry wash at the time of the storm event.

-Credit for history of compliance.

SW Energy will be given 100% credit for history of compliance in the penalty calculation. This was the first incident involving SW Energy recorded in the DEQ Environmental Incidents Database LHD.

-Credit for good faith efforts to comply.

SW Energy will be given 100% credit for good faith efforts in the penalty calculation. SW Energy showed good faith with the response to the event and cleanup effort undertaken.

\$17/day/violation x 1 violation x 17 days = \$283 Category D Penalty

Total Gravity Penalty

$$\underline{\$6,500 + \$2,167 + \$1,100 + \$283 = \$10,050 \text{ for all Violations}}$$

Economic Benefit Justification:

Economic benefit associated with SW ENERGY 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 recent construction, engineering and/or product costs as appropriate. The field entries for the Environmental Protection Agency (EPA) economic benefit model (BEN) were provided by SW ENERGY for the following categories, as appropriate:

- Capital Investment: This part of the calculation includes pollution items that were not bought to avoid the discharge such as treatment systems, silt fencing, gravel socks, etc. It was not found that SW Energy deliberately avoided any capital investments.
- Expenditures: This part of the calculation includes costs of items such as inspections, monitoring, and record keeping set up that were delayed. It has not been found that SW Energy was insufficiently inspecting, monitoring, or keeping records for the facility.
- O & M Costs: Avoided operation and maintenance costs were used in the economic benefit calculation. It has not been found that SW Energy knowingly avoided replacing the valve which broken. Further, it was not found that valve replacement was recommended by any of the regulatory community.

BEN is a program developed by EPA to determine the economic benefit a violator has gained by not complying with regulations. The economic benefit calculation was done with the current BEN program provided by the EPA. It was not found that SW ENERGY had any economic benefit for noncompliance. Therefore, the penalty for the economic benefit portion of non-compliance is \$0 as calculated.

TOTAL PENALTY AMOUNT: \$10,050 + \$0 = \$10,050

MITIGATION PROJECTS (SUPPLEMENTAL ENVIRONMENTAL PROJECTS)

Mitigation projects must fully adhere to *UAC R317-1-8.4*. SW Energy agrees not to attempt to gain or generate any positive publicity, and further agrees not to deduct or otherwise attempt to obtain a tax benefit from the foregoing funding of the mitigation project(s). Approved mitigation projects shall only be applied to the gravity component of the total penalty amount (\$10,050).

- (1) Mitigation Project(s) – To be determined by SW Energy. These projects must be approved by the Director and at least partially involve an area of water pollution control.
- (3) Anonymous Donation(s) – Donations can be submitted to a nonprofit organization to be used for environmental education, improving the environment or other environmental purposes. The donation must be approved by the DWQ Director.