



# **DNREC**

## **Compliance & Enforcement Response Guide**

**September 19, 2002**

## **AN INTRODUCTION TO THE DNREC COMPLIANCE AND ENFORCEMENT RESPONSE GUIDE**

The Compliance and Enforcement Response Guide (CERG) consists of a set of guiding principles, policies and procedures, all of which collectively establish a framework for DNREC to use in exercising its enforcement authority and discretion in determining appropriate enforcement responses. Portions of the CERG are newly developed guidance and policies, and other portions have been implemented for some time.

The CERG is intended to enhance the fairness, consistency, predictability, deterrence value and efficiency of the DNREC enforcement process. The principles and policies contained in the CERG are intended to guide DNREC managers and staff in:

- 1) Designing appropriate case-specific enforcement strategies; and
- 2) Developing comprehensive compliance assurance strategies.

In addition, the CERG is intended to further the overall mission of DNREC by advancing the goals and objectives identified in the Department's Strategic Plan. Finally, the CERG is intended to help DNREC managers and staff use sound professional judgment. The CERG also serves to inform the regulated community, elected officials and the general public about the manner in which the Department conducts its compliance and enforcement activities. The CERG is not intended to be a substitute for the use of sound professional judgment.

### **A. RELATIONSHIP TO OTHER DEPARTMENT GUIDANCE AND POLICY**

The CERG is effective on September 19, 2002, and supersedes the 1987 Secretary's Enforcement Policy For the Division Of Air and Waste Management and the Division Of Water Resources. To the extent that components of the CERG are not inconsistent, all components should be read in conjunction with one another, and, collectively, define the DNREC enforcement program.

The CERG applies to all enforcement actions taken under the authority of the Delaware environmental statutes (as listed in the Scope) and regulations administered by DNREC, and all Federal environmental statutes and regulations delegated to Delaware and administered by DNREC, except where a case is subject to a program statute or regulation that requires a result at variance with the CERG, in which case that statute or regulation shall govern. In addition, should procedures in this Guide appear to conflict with other Department procedures or with state or federal statutes and regulations, the Secretary must be notified immediately for resolution before any action is taken.

This document also applies to all enforcement cases pending as of the effective date of this Guide in which DNREC has not reached agreement in principle with the regulated entity on the specific terms of a resolution. The CERG also applies to all enforcement cases commenced after the effective date of this policy.

There may be exceptional cases not adequately addressed by the CERG. In those cases a decision to act at variance with the CERG should be discussed in advance, and must be approved by the Secretary. The CERG is a working document that will be reviewed and updated periodically to reflect statutory, regulatory, and/or policy changes.

## **B. LEGAL EFFECT**

The guidance, policies and procedures set forth in the CERG do not constitute final agency action, do not carry the force of law, and are intended solely as guidance for DNREC employees in the exercise of enforcement authority. If a conflict were to arise between this Guide and Delaware's statutes and regulations, the statute or regulation would control. The CERG is not to be relied upon to create rights, duties, obligations, or defenses, implied or otherwise, enforceable at law or in equity, by any person in litigation with DNREC. This guidance is not intended to, nor does it, constitute "regulations" as that term is used in the Delaware Code. DNREC reserves the right to act at variance with this guidance, and to change the guidance and procedures at any time without public notice, whenever necessary to carry out the intent of the statutes and regulations.

In general, 29 Del. C. Chapter 100, the Freedom of Information Act ("FOIA") and the Department's FOIA regulation will govern the release of disclosures made pursuant to any provisions and policies within the CERG.

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## ACRONYMS

ARP	Accidental Release Prevention
AST	Aboveground Storage Tank
CAAA	Federal Clean Air Act Amendments of 1990
CERG	Compliance and Enforcement Response Guide
CFR	Code of Federal Regulations
DAS	Development Advisory Service
DAWM	Division of Air and Waste Management
DNREC	Delaware Department of Natural Resources and Environmental Control
DOJ	Delaware Department of Justice
DRGHW	Delaware Regulations Governing Hazardous Waste
DRGSW	Delaware Regulations Governing Solid Waste
DSWC	Division of Soil and Water Conservation
EHS	Extremely Hazardous Substance(s)
EHSRMA	Delaware's Extremely Hazardous Substances Risk Management Act
EPA	United States Environmental Protection Agency
ERP	EPAs Hazardous Waste Civil Enforcement Response Policy
LUST	Leaking Underground Storage Tank
OSHA	Department of Labor, Occupational Safety and Health Agency
PLUS	Program Loans for Underground Storage Tanks Systems
RCPP	1990 RCRA Civil Penalty Policy
RCRA	Resource Conservation and Recovery Act
SHWMB	Solid and Hazardous Waste Management Branch of the Delaware Department of Natural Resources and Environmental Control, Division of Air and Waste Management
SNC	Significant Non-Compliers
SNN	Not a Significant Non-Complier
SV	Secondary Violator
UST	Underground Storage Tank
7 <u>Del. C.</u> Chapter 40	Sediment and Stormwater Law
7 <u>Del. C.</u> , Chapter 60	Delaware Code Annotated, Title 7, Conservation, Part VII – Natural Resources, Chapter 60 Environmental Control
7 <u>Del. C.</u> , Chapter 63	Delaware Code Annotated, Title 7, Conservation, Part VII – Natural Resources, Chapter 63 – Hazardous Waste Management
7 <u>Del. C.</u> Chapter 66	Wetlands
7 <u>Del. C.</u> Chapter 72	Subaqueous Lands
7 <u>Del. C.</u> Chapter 74	Delaware Underground Storage Tank Act
7 <u>Del. C.</u> Chapter 74A	The Jeffrey Davis Aboveground Storage Tank Act

**SCOPE:** The CERG applies to actions taken pursuant to 7 Del Code:

**Chapter 40** – *Sediment and Stormwater,*

**Chapter 60** – *Environmental Control,*

**Chapter 62** – *Oil Pollution Liability,*

**Chapter 63** – *Hazardous Waste Management,*

**Chapter 66** – *Wetlands,*

**Chapter 68** – *Beach Preservation,*

**Chapter 70** – *Coastal Zone Act,*

**Chapter 71** – *Noise Control and Abatement,*

**Chapter 72** – *Subaqueous Lands,*

**Chapter 74** – *Delaware Underground Storage Tank Act,*

**Chapter 74A** – *The Jeffrey Davis Aboveground Storage Tank Act,*

**Chapter 77** – *Extremely Hazardous Substances Risk Management Act,*

**Chapter 78** – *Pollution Prevention Act,*

**Chapter 79** – *Environmental Permit Application Background Statement*

**Chapter 91** – *Delaware Hazardous Substance Cleanup Act.*

## CHAPTER ONE: POLICY CONSIDERATIONS

### SECTION I. MISSION AND GOALS

#### **OUR VISION:**

The Department envisions a Delaware that offers a healthy environment where people embrace a commitment to the protection, enhancement and enjoyment of the environment in their daily lives; where Delawareans' stewardship of natural resources ensures the sustainability of these resources for the appreciation and enjoyment of future generations; and where people recognize that a healthy environment and a strong economy support one another.

#### **OUR MISSION:**

The mission of the Department of Natural Resources and Environmental Control is to ensure the wise management, conservation, and enhancement of the state's natural resources, protect public health and the environment, provide quality outdoor recreation, improve the quality of life, and educate the public on historic, cultural, and natural resource use, requirements, and issues.

#### **GOAL: PROMOTE HEALTH AND SAFETY**

The health of people, wildlife, and plants are affected by air quality (ozone and particulates can damage even healthy lungs); water quality (bacteria can make swimmers sick, lack of dissolved oxygen can kill fish); accidents and spills involving petroleum and hazardous substances; mosquitoes and other pests (mosquitoes transmit encephalitis, ticks transmit Lyme disease); open burning (burning of trash and leaves emits cancer causing chemicals); contaminated soils (can result in contamination of drinking water supplies and adjacent surface water bodies) and contaminated fish and shellfish. The Department promotes public safety and helps to ensure a healthy environment for all Delawareans through education, outreach, planning, and regulatory programs.

#### **GOAL: Conserve Plant and Animal Resources**

This goal is to conserve and enhance plant and animal communities, through protection and management of species populations and their habitats. This effort involves maintenance of biodiversity, harvest allocation of species populations, protection of ecological functions and processes, and performance of educational outreach. Achieving this goal requires good quality air, water and soils. Sustaining this goal requires coordination of Department activities.

#### **GOAL: Broaden the Commitment to Environmental Protection and Resource Conservation**

Economic, environmental, and social problems cannot be addressed in isolation. The Department works in partnership with others to develop strategies that integrate economic development, environmental quality, and social policy making with broad public involvement. Integration means the coordination and/or unification of Department programs and authorities for the purpose of more effectively and efficiently preventing or

reducing damage to the environment. This involves a systematic approach that reflects shared goals and takes into account the linkages of the environment, both internally (cross media) and externally with society. “Internal integration” refers to environmental policy actions taken across media to prevent release of pollutants and control residues. “External integration” refers to incorporating environmental policy into other types of policy ranging from agriculture, transportation, and energy to trade and economic development. The quality of the environment in the next century will largely be determined by the degree to which external integration succeeds. The Department strives to create a widely held ethic of stewardship that strongly encourages individuals, institutions, and corporations to take full responsibility for the economic, environmental, and social consequences of their actions.

#### **GOAL: Promote and Provide Recreational Opportunities**

Recreational opportunities that allow Delawareans to enjoy natural resources and open spaces, contribute to and enhance our quality of life. The Department strives to provide recreational opportunities while balancing resource protection with resource use management. A diverse system of state parks and wildlife areas that protects natural resources and provides recreational and environmental educational opportunities is crucial. Achieving this goal requires good quality air, water and soils, plus healthy living resources. Sustaining this goal requires coordination of Department activities. This effort involves provision of public access and other recreational facilities, balancing multiple uses, and performing educational outreach.

## **SECTION II. PRINCIPLES FOR COMPLIANCE AND ENFORCEMENT**

In an ideal world, regulation is replaced by stewardship; an inherent respect for the environment. In this concept of stewardship, everyone takes responsibility for their actions and the use of resources for the benefit of the community. In the real world, stewardship is sometimes compromised by conflicting priorities, values, capabilities and perspectives. This creates the need for regulation and enforcement.

The challenge for regulators is to balance the use of compliance tools with the recognition of stewardship efforts. Regulated entities must be made aware of the conditions for compliance, made to feel the consequences of non-compliance, and provided an opportunity to demonstrate behavior beyond compliance. When enforcement is necessary, it should be fair, focused, visible, and timely.

The following principles are embraced to meet this challenge:

1. Compliance is the first step toward the ultimate goal of stewardship.
2. Enforcement will be balanced with education, technical assistance, and incentives to achieve compliance and encourage stewardship.
3. Enforcement will be an effective deterrent against future violations.
4. Enforcement actions will increase in severity for regulated entities with poor compliance histories.

5. The cost of non-compliance should be greater than the cost of compliance.
6. Resources utilized by DNREC to assure compliance will be used proportional to the potential impact on human health and the environment and in keeping with statutory responsibilities.
7. DNREC will support the development and use of alternative tools to traditional enforcement that achieve compliance and encourage going beyond compliance.
8. DNREC will trust, empower, and support its employees to make enforcement decisions and use discretion where appropriate.
9. DNREC will ensure that its employees are well trained and informed to make enforcement decisions that are fair, appropriate and substantively consistent across program areas.
10. Enforcement policies, procedures, pertinent data, and other critical information will be accessible to any interested party.
11. Enforcement decisions will be defensible, documented, and proportional to the degree of potential harm.
12. DNREC will foster partnerships internally and externally to realize shared responsibilities in environmental stewardship.
13. Equity must result from the treatment of people of all races, income, and cultures with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

### **SECTION III. CLASSIFYING NONCOMPLIANCE**

All statutory and regulatory violations are subject to enforcement. This principle applies to all facilities (major or minor, permitted or unpermitted) and to all violations of the environmental statutes and regulations administered by the Department. Violations are classified based upon the seriousness of the alleged violations (*i.e.*, duration, gravity, magnitude, willfulness) and their impact or threat of impact on human health and the environment. This classification is also used to prioritize enforcement actions. Because many of its programs are based on federal requirements, the Department has adopted EPA's terminology for classifying noncompliance, which varies depending on the media involved. The media-specific descriptions of these classifications are found in Chapter 6. This classification and prioritization system does not imply that lower priority violations will not be subject to enforcement. It merely indicates that the level of attention given to enforcement matters is based upon their environmental and programmatic significance.

### **SECTION IV. ENFORCEMENT PHILOSOPHY**

Appropriate enforcement action means that the mechanism used by DNREC to achieve compliance is proportional to the alleged violation, reflective of the facility's compliance history, and protective of human health and the environment. In addition, an appropriate

enforcement action, which may include a civil penalty and recovery of economic benefit, sends a message of deterrence to the regulated community.

In order for the enforcement program to maintain credibility with the regulated community and the public in general, DNREC must take consistent and fair enforcement actions. This means that the regulated community should expect a similar response to a comparable violation - given its impact on human health and the environment - regardless of where it occurs. While it is important to recognize that each case is fact-specific and must be managed accordingly, consistency should always be a factor in determining the enforcement action. Consistency does not mean, however, blind adherence to past decisions that may no longer be appropriate. DNREC believes fairness will result when enforcement is pursued consistently within the bounds of the law and applicable regulations. Also to ensure fairness, DNREC remains receptive to good-faith arguments - based on fact, state or federal law, or policy - that a given situation is different and should be treated differently, that a facility is in fact in compliance, or that a heavy penalty is not warranted given the specific circumstances of the infraction.

DNREC's fundamental principle in choosing a course of action is to use the least adversarial method appropriate to the situation that will achieve DNREC's goals of compliance, correction, and deterrence. It is DNREC's intent, however, to use the full range of enforcement tools available to it as necessary to achieve its goals in a timely manner.

## **SECTION V. OVERVIEW OF ENFORCEMENT ACTIONS**

There are a variety of enforcement tools available to DNREC staff to bring sources and facilities into compliance. The least adversarial method is some form of informal enforcement that notifies a facility of alleged noncompliance and encourages self-correction without further Department action. Examples of informal enforcement include Letters of Warning and Letters of Deficiency.

More formal enforcement methods involve an administrative, civil, or criminal process that generally result in an enforceable instrument such as an Administrative Order or judicial decree. Examples of the more formal enforcement methods include, but are not limited to, Notices of Violation, Administrative Orders, Consent Orders, Formal Hearings, Settlement Agreements, Cease and Desist Order proceedings, and civil and criminal suits.

Much of what the Department does to bring facilities into compliance is of a non-adversarial nature and is geared toward the use of consensual means. These actions include Letters of Agreement, informal meetings, and Conciliation Orders. When non-adversarial means fail or would be inappropriate, adversarial enforcement actions should be pursued. These actions include Cease and Desist Orders, Formal Hearings, and litigation.

Chapter 4 sets forth the general practices and presumptions to be used by DNREC staff in determining an appropriate response to violations. The different enforcement actions available to the enforcement staff are set forth in Chapter 5 in an ascending, progressive order. Questions regarding the appropriateness and applicability of any of the enforcement methods are to be directed to the appropriate Division Director.

## **SECTION VI. CHRONIC VIOLATOR PROVISIONS**

In June 2001, the Delaware General Assembly passed legislation that, among other things, created a provision to address chronic violators of the state's environmental laws and regulations. Senate Substitute for Senate Bill 33 amended 7 Del. C. Chapter 79 and directed DNREC to adopt regulations to include the definition of a chronic violator, the process for determining when a facility or regulated party shall be declared a chronic violator and the terms and conditions under which the designation of a chronic violator should be lifted. The legislation also directed DNREC to establish a committee of industry and conservation organizations to assist the agency in developing the regulations. The legislation directed DNREC to consider a number of factors in determining whether a person or facility has engaged in a pattern of willful neglect or disregard to the permits laws or regulations of the Department. These factors include the nature and extent of the harm caused or threatened, the impact on the integrity of the regulatory program, duration of non-compliance, number of violations of a similar nature, the total number of violations of all types, the economic benefit attributable to violations and whether any or all of the violations were willful or grossly negligent.

After nearly a year of deliberation, the committee voted in June 2002 to endorse a regulatory framework that includes a process for determining and lifting chronic violator status and affords the Department discretion in addressing potential chronic violators. The regulation allows the Secretary to initiate a review of any regulated party at any time and also requires the Secretary to conduct a review if one of the following conditions apply in a timeframe not to exceed five years.

1. Three or more of any combination of administrative orders, civil judicial actions, court orders, negotiated settlements and criminal convictions or;
2. Three or more of any combination of administrative orders, civil judicial actions, court orders, negotiated settlements and criminal convictions under the same Department regulator program against the same person at different locations.

The regulation also includes a public notification process when a review is initiated and completed and when a party is delisted as a chronic violator.

As of September 17, 2002, the regulation has not yet been promulgated. This guide will be updated upon promulgation of the regulation. (Appendix I - 2 has been Reserved for the Chronic Violator Regulation).

## **SECTION VII. ACCESS TO DEPARTMENT RECORDS**

Most documents contained in Department files are considered to be public records and are subject to inspection by members of the public. Procedures relating to the inspection and copying of public records retained by the Department of Natural Resources and Environmental Control ("the Department") pursuant to 29 Del. C. Chapter 100, the Freedom of Information Act ("FOIA") have been prescribed by regulation. It is the Department's goal in establishing this regulation to maximize the amount of information available to the public, establish a reasonable fee structure for copying public records, and to streamline procedures used to disseminate this information. This regulation applies to the Department in dealing with requests from the public for information as set

forth in the Freedom of Information Act. This regulation does not apply to the Department in its normal course of business with Federal, State, or local agencies, nor to private parties (corporate or individual) with whom the Department is conducting business (permit, contractual agreement, licenses, etc.), provided the public records are germane to the business being conducted.

The Department is undertaking an effort to make more of its public records available electronically, either through dedicated computer terminals or via the Internet. It is important to note, though, that FOIA does not require an agency to create documents or reports that do not otherwise exist in response to a request, and that the statute does not require an agency to copy any records at its own expense in response to a request.

Some materials in Department files are not considered to be public documents, and so will not be made available to the public. Non-public materials can include information submitted by an outside party under a claim of confidentiality (e.g., confidential business information or a proposed settlement in a pending enforcement action) as well as documents generated by the Department itself (e.g., internal personnel materials, deliberative process material, or certain enforcement-related documents such as attorney-client communications or material which would reveal law enforcement investigative techniques or disclose a confidential informant).

An integral part of the FOIA regulation is a procedure outlined to address the confidential treatment of information submitted to the Department. It is important to understand that this confidentiality procedure is a necessary part of the FOIA regulation in that any information submitted to the Department is subject to public review unless deemed to be confidential by the Secretary. Appendix I – 1 provides a list of statutory provisions concerning confidential information that the Department may receive.

## **CHAPTER TWO: DNREC APPROACH TO COMPLIANCE ASSURANCE**

### **SECTION I. EDUCATION AND OUTREACH**

#### **A. INTRODUCTION**

DNREC believes that a multi-faceted approach is the best way to encourage and maintain compliance with environmental laws and regulations and to stimulate a sense of responsibility and stewardship that goes well beyond compliance. This chapter presents an overview of DNREC's various education and outreach activities, with reference as applicable to the interaction between the approach and specific compliance assurance activities or objectives.

At times, education and outreach activities overlap with technical assistance activities. For example, a seminar might cover a topic in such a way that an attendee can learn how to implement improvements at his or her work facility based on the presentation, even though the primary focus of the seminar was more general education and outreach.

For purposes of this section education and outreach activities are deemed to be those whose primary audience is the public at large, including a very broad group of regulated entities such as industrial complexes, small businesses, government facilities, nonprofits, homeowners, etc. This section is not intended to describe those activities that focus on specific facilities needing compliance-related advice.

Throughout each year, DNREC staff frequently undertakes education and outreach activities. The majority of such activities are directed to the public at large as well as to a broad range of people more directly affected by environmental laws, such as municipal officials, industrial hazardous waste managers, pollution control facility operators, and individual property owners. The activities are designed to elevate awareness and instill a sense of personal and corporate responsibility for compliance and, ultimately, to foster environmental stewardship. Routine inspections permit application processing, and other DNREC endeavors also typically incorporate education and outreach. Thus, these activities also are a key component of DNREC's compliance assurance goal.

In addition to providing more general information to a larger audience, many education and outreach activities play a more direct role in promoting compliance with environmental laws and in addressing violations that have occurred. DNREC inspectors frequently carry fact sheets on topics that are anticipated to be of concern or benefit to property owners and facility managers. DNREC settlements of administrative enforcement actions sometimes include as a condition of settlement that the alleged violator:

- attend or sponsor a continuing education seminar covering the area from which the underlying violation arose;
- periodically provide the community with environmental performance reports; or

- implement an Environmental Management System (EMS) developed in accordance with the process set forth in ISO 14000.

If DNREC notices a pattern of non-compliance throughout a regulated sector, a seminar specific to that topic can be prepared and presented.

## **B. PROVIDING ESSENTIAL INFORMATION**

### **1. Business and Permitting Services**

The Office of Business and Permitting Services, within the Office of the Secretary, houses the Pollution Prevention Program, Clean Air Act Small Business Assistance Program, community involvement and general permitting assistance programs. This office is responsible for preparing, coordinating, and disseminating informational material to the regulated community and the general public, for coordinating the Development Advisory Service, and for providing direct technical assistance to facilities.

The Development Advisory Service (DAS) is a forum for developers, landowners, businesses and others seeking information concerning environmental permitting requirements. DAS is unique to Delaware and has existed within DNREC for over 20 years. Individuals who have site plans or conceptual designs for commercial establishments, subdivisions, major manufacturing facilities, utility operations and the like may attend one of DAS's monthly meetings. There, in one room, developers can meet regulators from all divisions in DNREC and receive advice and/or regulatory requirements likely to impact their project. Other staff from the State Fire Marshall's Office, the Public Service Commission, the Department of Agriculture and the State Department of Transportation also regularly attend meetings, providing a one-stop shop of information for those seeking to develop a parcel of land.

In the Office of Business and Permitting Services, there are two Ombudsman positions dedicated to assisting small businesses with environmental requirements and advocating for communities affected by environmental issues.

### **2. DNREC Ombudsmen**

The Ombudsmen within DNREC help to fulfill the Department's commitment toward developing and maintaining positive relationships with the community it serves. Historically, the first public sector Ombudsmen originated in Sweden in 1809 and were appointed by the Parliament to investigate reported complaints, report findings, and helped to achieve equitable settlements. The Ombudsman concept spread through Europe and eventually to the United States in the 1960's. There are three Ombudsman positions within DNREC to assist the public:

#### **a. Small Business Ombudsman**

DNREC's Small Business Ombudsman ("SBO") position was created by the Clean Air Act Amendments of 1990 which required each state to implement a Small Business Assistance Program and employ an Ombudsman to administer the program. The SBO assists small businesses in understanding and complying with the requirements set forth by the Clean Air Act, as well as other environmental rules and regulations. This position

ensures that the special needs of small businesses are not overlooked when new regulations are developed by the agency. DNREC's SBO is a member of the Delaware Small Business Resource Partnership, which is a consortium of State and Non-profit agencies that serve small businesses in Delaware. The SBO works with small businesses by answering questions on the phone, through e-mails, and in person, as well as through training workshops and seminars.

**b. Community Ombudsman**

DNREC's Community Ombudsman ("CO") position was created as a result of Senate Bill 33 which was passed in 2001 to help DNREC serve the public and community groups more efficiently. The mission of the CO is to conduct community outreach, serve as an advocate for community environmental issues, and facilitate dialogue among stakeholders. This position helps to promote an understanding of community concerns relating to public health and the environment. The CO acts as a voice to under-served communities and ensures that community concerns play a role in the Department's decision-making process.

**c. Water Resources Ombudsman**

DNREC's Division of Water Resources ("DWR") Ombudsman position was established in 1994 to provide improved communications with the general public and overall responsiveness of Division staff. The DWR Ombudsman works to foster effective and open communications between the public and the Division, and to ensure that services provided to the public are user-friendly.

**3. Printed Outreach and Education Materials**

**a. Fact Sheets, Reports, Guidance Documents, Directories**

DNREC has developed an extensive array of environmental fact sheets, on topics ranging from summaries of DNREC's air quality, water quality, and waste management rules, to procedures for remediating contaminated sites, to tips on how citizens, municipalities, and businesses can help protect the environment.. Existing fact sheets are revised and new fact sheets are created as necessary to provide accurate, up-to-date information.

**b. Reports, Guidance Documents, Directories**

In addition to fact sheets, more comprehensive reports and guidance documents facilitate DNREC's education and outreach efforts. As with fact sheets, these documents fulfill a role both in preventing violations and in remediating them. A number of "best management practices" provide guidance for complying with requirements and going beyond compliance using pollution prevention. Examples of documents produced for compliance purposes include:

- Delaware Erosion and Sediment Control Standards and Specifications
- UST Branch Technical Guidance Manual
- Delaware Risk Based Corrective Action Program Guide
- Vapor Recovery and You Manual
- Manual Tank Gauging and Inventory Controls Manual
- Toxics Release Inventory
- Annual Air Quality Report

- Pollution Reduction Management Practices and Regulatory Guidance for Vehicle and Other Salvage Facilities
- Hazardous Waste and You
- Managing Automotive and Repair Waste
- Solvents – Regulations and Reduction
- Simply Septics – A Guide for Delaware Homeowners

### **c. Newsletters**

DNREC publishes several newsletters. *DNREC News*, is a regularly published, general purpose newsletter designed to reach a broad audience that includes individuals, community groups, environmental consultants, legislators, government agency officials, industry officials, and anyone else who wishes to be placed on DNREC's mailing list. Each issue of *DNREC News* contains a calendar of events, an update of regulatory actions and news releases that were recently issued to the press.

Outdoor Delaware Magazine is published quarterly and covers conservation and environmental issues of interest to school students and to the general public. The magazine is available to all paid subscribers. Further, the distribution to certain school programs is supported with State of Delaware general funds through an appropriation.

Other specialty newsletters are targeted to specific audiences. "Think Tank", for example, created by DNREC's Underground Storage Tank Branch, is distributed to tank owners/ operators statewide, providing them with the latest state and federal regulatory requirements as well as technical updates. The Fish and Wildlife Division publishes a semi-annual newsletter directed to hunters and anglers. Examples of related specialty newsletters published by others include:

- NEIWPC LUSTline
- ASTSWMO MTBE Newsletter
- Fish and Wildlife 's Observer

In addition to preparing DNREC publications, DNREC staff frequently contributes to outside publications such as newsletters published by industry or business associations.

## **4. Education and Outreach through the News Media**

DNREC reaches out to its stakeholders, the regulated community, and the general public through newspapers, magazines, television, and radio.

### **a. Press Releases**

DNREC frequently reaches out to the regulated community and the general public by issuing press releases. Over 370 press releases are issued each year. As a general information and education tool, press releases are a vehicle for informing the public about releases of pollutants into the environment. It is also a means of announcing new programs, regulations, events, publications, and to provide information on upcoming hearings and

conferences, program milestones, training opportunities and other subjects designed to keep the regulated community and the public informed of DNREC's environmental protection and natural resource management activities.

As a compliance-related tool, press releases are also used to announce the initiation and/or resolution of significant enforcement actions, and so play an important deterrent role in DNREC's compliance assurance efforts. See section on public information policy regarding enforcement actions.

#### **b. Interviews**

DNREC conveys environmental protection messages, including regulatory requirements, through interviews with reporters from the various print and audio-visual media. Hundreds of interviews are given each year, providing the public with DNREC's perspectives on issues and events and information on DNREC regulatory and educational programs.

DNREC's outreach and responsiveness to the media are particularly valuable practices in assisting the agency in conveying regulatory compliance information. Media interviews often focus on specific DNREC enforcement actions, providing a forum for educating both the public and the regulated community on environmental requirements and DNREC enforcement activities. Some of these media inquiries are precipitated by agency-issued press releases.

#### **c. Public Service Announcements, Training Videos**

DNREC also periodically creates Public Service Announcements (PSAs) that are aired on television and/or on radio. Recent examples include:

- Open Burning Video
- Automobile gas tank filling procedures
- Recycling PSAs in conjunction with the Environmental Defense Fund
- Clean air series on transportation issues and impacts

Non-PSA videos have been developed that have also proven successful. For example:

- Poultry carcass composting
- Storm water best management practices
- Sludge

#### **d. Education and Outreach through DNREC Web Site**

DNREC reaches out to its stakeholders, the regulated community, and the general public through the Internet. DNREC's Web site continues to emerge as a powerful outreach tool. By accessing [www.dnrec.state.de.us](http://www.dnrec.state.de.us), Delaware's regulated community along with all citizens can tap into a wealth of information critical to compliance assurance. From regulations and rules to fact sheets, event calendars to press releases, program descriptions to Q & A sections, DNREC's web site has become an invaluable tool for meeting a variety of educational needs. It is increasingly referred to by DNREC

inspectors, permit engineers, and others to carry out their duties. Ease of access to useful information is critical to compliance assurance operations, and the information available through this web site now encompasses virtually every DNREC program. The site's logical format coupled with key links within and without, facilitates and expands its user friendliness.

To increase the utility of the Web site in an enforcement context, in 2000 DNREC began posting each formal administrative enforcement action, criminal enforcement action, and Notice of Violation that is issued along with a listing of all environmental releases reported to the agency. Posting this information is seen as a timely way to better inform the regulated community and the general public about actions DNREC is taking. See section on Public Information policy regarding enforcement actions.

DNREC has also initiated development of an Environmental Information System that will be accessed through the Department's web site. When fully operational, the system will provide compliance, enforcement and permitting information on regulated facilities and sites. The system will be a useful tool for agency staff in coordinating multi-media regulatory efforts and for the public and regulated community for tracking facility performance.

All press releases, public notices and issues of DNREC News, complete with calendar and regulatory updates, are also published on the web. Information on participatory and volunteer events is listed—oftentimes with online registration forms. Increasingly education materials for teachers are being put online as well as education material for the general public (e.g. biodiversity reports) and links to sites like Project Wild.

## **5. Speaking Engagements, Workshops, Training Courses, Conferences, Trade Fair Displays**

Providing information can be facilitated through meeting with people in a group setting, and DNREC is extremely active in this arena. Topics covered in these presentations include air pollution, beach preservation, lakes, pollution prevention, riparian corridor protection, shoreline protection, waste management, wastewater treatment, water supply, and wetlands. This type of communication serves DNREC's compliance outreach objectives well.

## **C. PROMOTING AN ETHIC OF ENVIRONMENTAL STEWARDSHIP**

Several outreach activities are designed to foster an ethic of environmental stewardship, especially among the younger generation. DNREC believes that promoting a sense of personal responsibility for environmental stewardship will result in increased compliance with environmental law.

### **1. Environmental Education in Schools**

Environmental education in the schools helps DNREC target impressionable youngsters, who often carry messages learned home to parents and other relatives. DNREC staff frequently "guest lecture" for classes at all education levels, and have provided technical assistance with special projects such as

composting. DNREC, in conjunction with the Department of Education, other agencies and not-for-profit organizations, has developed curriculum and educational supplements for teachers and students on such topics as watershed management, pollution prevention and recycling, air quality, wetlands and aquatic resources.

## **2. Volunteer Programs**

Outreach and education can take many forms. Successful DNREC-sponsored programs involving the training of volunteers have reaped benefits, both scientific and goodwill, for DNREC programs and volunteers alike. Most importantly, Delaware's environment has benefited.

## **D. REGULATORY DEVELOPMENT PROCESS**

It is the policy of the Department of Natural Resources and Environmental Control to follow the process outlined below when developing, amending, repealing, or adopting any regulation as defined in 29 Del. C. §10102, except emergency regulations where such are allowable by law. The steps in this process are detailed in Appendix II – 1.

## **SECTION II. TECHNICAL AND FINANCIAL ASSISTANCE**

DNREC has long recognized that regulatory compliance is best attained and sustained using a combination of approaches, including outreach/education and technical and financial assistance. Frequently, outreach/education activities and technical assistance activities overlap. For example, fact sheets on very specific topics, such as shoreline stabilization educate as well as provide specific guidance. Also, seminars on program-specific requirements and guidance documents often are targeted at a particular regulated sector for purposes of increasing awareness and compliance. For purposes of this discussion, technical assistance is deemed to focus on providing site-, activity-, or facility-specific compliance-related guidance.

Because DNREC believes that compliance is part of the ultimate goal to ensure protection of public health and the environment, DNREC places a high priority on providing technical assistance to regulated entities. Some programs are specifically designed to provide technical assistance to regulated entities (and so do not have any direct regulatory responsibilities); these include the Pollution Prevention Program and Small Business Technical Assistance Program housed in the Office of Business and Permitting Services in DNREC's Office of the Secretary.

Programs that have direct regulatory responsibilities (such as permitting, compliance inspections, and enforcement) are typically more limited in the amount or type of assistance they can provide, often due to resource constraints or potential liabilities for providing guidance that may not completely solve a problem that is subject to an enforcement action. Not all DNREC staff can provide assistance on all issues, and sometimes a facility's need for guidance will be beyond the scope of what DNREC can provide even with all applicable programs working together, so there will be times when DNREC will suggest that a consultant be retained.

DNREC also strongly supports financial assistance for regulated entities, especially those in the public sector that rely on public monies to fund operations and compliance activities. DNREC takes an active role in identifying areas where financial assistance is

needed, such as in removing old underground petroleum storage tanks, and upgrading domestic wastewater disposal systems, and manure management at animal feeding operations and in supporting legislation to provide for such assistance. A brief description of existing financial assistance programs (e.g. SRF, FIRST Fund, PLUS Loans) can be found in the Appendix II – 2 (*Reserved at this time*).

### **SECTION III. PENALTY MITIGATION OPPORTUNITIES**

The Delaware Department of Natural Resources and Environmental Control (DNREC or Department) wishes to promote voluntary compliance with environmental requirements. DNREC believes that the protection of the environment and public health and safety rests, in part, on voluntary compliance with environmental laws. Voluntary compliance begins with an awareness of environmental problems and is often achieved through the implementation of compliance assessments or audits. The Department will provide meaningful incentives to encourage large and small businesses to develop and implement an environmental management system and to conduct regular compliance assessments. The Department's current Penalty Mitigation Policy is attached in Appendix II - 3. A detailed discussion of opportunities, procedures and requirements associated with the self-reporting of violations is contained in Chapter 8.

### **SECTION IV. PUBLIC INFORMATION POLICY – ENFORCEMENT ACTIONS**

The Department of Natural Resources and Environmental Control is granted the authority through numerous state statutes to enforce laws and regulations designed to protect public health, water, air, plants, animals and other natural resources.

A major element of that authority is DNREC's responsibility to ensure that businesses, industrial facilities and other regulated and non-regulated parties are complying with state and federal environmental laws and regulations. DNREC also has an obligation to inform the citizens of Delaware about the State's progress in achieving compliance. This includes reporting, through a variety of mechanisms, the compliance activity of the regulated and non-regulated community in Delaware.

When parties violate laws, regulations or permit conditions, DNREC has a number of enforcement tools it can use to achieve compliance and/or punish violators. These include Administrative actions, civil actions and criminal charges. Formal Administrative actions include Secretary's Orders, Notice of Administrative Penalty Assessment, Cease and Desist Orders and Imminent Hazard Orders. Civil actions occur when a lawsuit against a violator is filed in court.

#### **A. USE OF THE INTERNET**

##### **a. Enforcement Action Postings**

DNREC will post a listing on the Department's Internet Web site ([www.dnrec.state.de.us](http://www.dnrec.state.de.us)) of all administrative, civil and criminal actions, notices of

violations and unclassified misdemeanors, taken after such actions have been issued. Information on the web will include, but not be limited to:

- name of the party or facility to whom the order was issued;
- date the order was issued;
- a summary of the violations;
- the amount of the penalty assessed;
- a description of any supplemental environmental project funded as part of the settlement;
- status of the order including final resolution

Staff with the Office of the Secretary will coordinate with appropriate Division staff to ensure that the information is posted on the Web in a timely manner (within three working days).

#### **b. Delaware Environmental Navigator**

The Delaware Environmental Navigator (“DEN”), located on DNREC’s Internet Web site ([www.dnrec.state.de.us](http://www.dnrec.state.de.us)) will currently allow the public to view all facility information, violations, enforcement actions and monitoring results pertaining to Air Quality, Waste Water, Hazardous Waste, Landfill, Recycling, Waste Transfer Stations, Infectious Wastes, Underground Tanks, Petroleum Vapor Recovery, Land Development and Erosion Control. The DEN also contains limited information on Salvage Yards, Above Ground Tanks, Tire Piles, Animal Operation, Artificial Reef, Nature Preserve, Historic Monument Site, Open Spaces, Parks, Playgrounds, and Wildlife Areas

Future Plans for the DEN: Work is in progress to integrate Contaminated Site Cleanup, Septic Permits, and Ground Water Usage information into the DEN. These will be completed by March 2003. Further work is needed to integrate Wetlands, Hazardous Waste and Underground Tank Corrective Action Sites, Toxic Release Inventory, Above Ground Tanks and Ambient Monitoring Data. These are expected to be completed by September 2004. More Natural Resource programs data are expected to be integrated into DEN by June 2005.

### **B. PRESS RELEASES**

Press releases on all enforcement actions taken by DNREC shall be issued at the discretion of the DNREC Secretary.

Under no circumstances will DNREC waive or forfeit its right to issue a press release on any enforcement action as part of the negotiation or settlement of any action.

Parties that fund an environmental improvement project as part of the settlement of an enforcement action may not initiate, solicit or accept any recognition for that project.

The Department will consider a number of issues, including the following primary factors, in deciding whether to issue a press release on any enforcement action:

- Violations of environmental laws, permits or regulations may have resulted in or had the potential to harm human health or the environment;

- The company or individual is considered to be a chronic violator against whom DNREC is stepping up enforcement efforts;
- DNREC believes the enforcement action will have a deterrent effect on other possible violators.

### **C. DNREC NEWS**

DNREC will include press releases on enforcement actions in ***DNREC News***, the Department's regular newsletter.

## **SECTION V. PUBLIC NOTIFICATION OF ENVIRONMENTAL RELEASES**

### **A. ENVIRONMENTAL RELEASES**

The Department has established processes and procedures for notifying the public in a timely manner of environmental releases. For these purposes the term "environmental release" means any emission, discharge, or delivery into the air or waters or on the lands of this State, of any garbage, refuse, rubbish, sewage, oil, industrial waste, liquid waste, solid waste, hydrocarbon chemical, restricted chemical material, vessel discharge, air contaminant, pollutant, or other wastes. These procedures are:

1. The Department will, within twelve hours of its occurrence, notify the public, who have subscribed to the system, of any release exceeding the threshold levels through its Environmental Release Notification System. The notification would occur by email, phone, or fax as designated by the public.
2. The Department will also publish on the Department's Web site, any self-reported environmental release from industry, and upon confirmation, any environmental release that involves off-site contamination, or any environmental release that involves significant environmental impact without regard to notifying party. The notice of such a release will identify therein: (i) the nature of the release (including identification of the components of the release where possible); (ii) the geographic area in which the release occurred; and (iii) whether or not the Department is investigating the release. Information posted in accordance with the foregoing will be derived from the initial reporting. As such, the initial posting may be inaccurate and subject to substantial revision.
3. The Department will update the environmental release information on the Department's Internet Web site to include the most recent information regarding: (i) the nature of the release if known (including identification of the components of the release where possible); (ii) the geographic area in which the release occurred; (iii) whether or not the release posed a threat to the public health; and (iv) the status of the Department's investigation, if any, into the circumstances surrounding the release; and (v) a summary of any actions taken by the Department on the matter.
4. Exemptions - The following discharges or emissions are not considered "environmental releases" for the purposes of communication to the public:

- Discharges or emissions in compliance with a validly issued state permit or in compliance with state or federal regulations that are routine, anticipated and intermittent during normal operations or treatment processes
  - Discharges or emissions that are wholly contained within a building or which are wholly contained in a secondary containment system.
  - Discharges or emissions of pollutants, which are identified in operating permits and normally reported as excess emissions or exceedances during regular or routine operating conditions as required by state or federal permits or regulations.
  - Continuing discharges or emissions that are a matter of public record from site investigations of historical land uses and the site is listed for remediation on any one of the following lists: Leaking Underground Storage Tank Sites, RCRA Corrective Action Sites, Inventory of HSCA Sites, Voluntary Clean-up Sites, Solid Waste Closure, Debris Pit Priority, or Debris Pits.
  - Discharges or emissions associated with an activity that is the subject of a criminal investigation provided there are no threats to public health. Upon completion of the investigation the exemption no longer applies and notice is to be provided as soon as practicable thereafter.
5. Nonetheless, episodic discharges such as those associated with accidents, equipment malfunctions, emergency shutdowns, or pipe ruptures are to be considered as environmental releases and reported in accordance with provision (B) above.

## **B. INDUSTRIAL INCIDENT REPORTING**

In July 1990, Section 6028 was added to 7 Del. C. Chapter 60. Legislation required the Department of Natural Resources and Environmental Control (DNREC) to implement regulations. The *Reporting of a Discharge of a Pollutant or an Air Contaminant* regulation was adopted on April 1, 1991. Several programs from the Division of Air and Waste Management, including Air Engineering and Compliance, Emergency Response, Emergency Planning and Community Right-to-Know, Accidental Release Prevention, Enforcement, Solid Waste Management, and Hazardous Waste Management participated in the regulation development effort.

Delaware Code requires that the Delaware Reportable Quantity (DRQ) be the most stringent of the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) threshold quantity (TQ), the Clean Water Act (CWA) TQ, or Department regulations with TQ's. State regulations may also be used to amend the list of chemicals. In 1990, some of the federal TQ's were set at a default amount of one pound. Calculated TQ's have replaced many of the default amounts in the federal regulations. Subsequently, the federal list of chemicals has changed with additions and deletions.

The Department is preparing revisions to the existing regulations that govern the discharge or emission of pollutants into the air, surface water, ground water or on the land in excess of quantities that may be specifically allowed or permitted under state law or regulations. The Accidental Release Prevention Group in the Air Quality Section has been given the responsibility for the regulation revision process.

The initial focus will be on revisions to 7 Del C Chapter 60 §6028 and associated regulations. General issues of concern have been identified that include: adding substances, modifying the reporting thresholds, methods of communication, mandatory duties and information management needs.

The regulation revision will address the following issues:

1. The List of Chemicals needs to be reviewed and revised.
2. The DRQs need to be reviewed and revised.
3. Submission of a written report should be made mandatory.
4. The use of the *Incident Report* form should be made mandatory. Several of the data elements from the latest form revision should be added to the regulation. The format of the form should be reorganized to match the new regulation.
5. The *Incident Report* form should be posted on Department web pages for electronic use.
6. A single repository within the Department for submission of the report should be identified.
7. The group responsible should communicate the incident to I&E for public disclosure of the incident and distribute the report to the various Department programs.
8. A mechanism should be developed to ensure that the current verbal notification of a release is communicated internally to the various programs.

## **CHAPTER THREE: INSPECTIONS AND INFORMATION REQUESTS**

### **SECTION I. INTRODUCTION**

The goal of ensuring compliance requires DNREC to undertake activities that support a determination of whether a person who is subject to environmental laws is in compliance. In many cases, an inspection of a site, facility, or activity is the key to an accurate compliance determination. An inspection may be a regular (e.g., annual) visit to a facility, it may be part of a pre-determined targeting strategy, or it may be part of the response to a citizen complaint or other source of information which leads DNREC to believe that a violation may have occurred or may be occurring. An inspection can include (but is not limited to) photographing or videotaping activities or conditions, sampling actual or suspected wastes/contaminants and process streams, and interviewing employees of the regulated entity or other potentially knowledgeable individuals. The circumstances surrounding the inspection (including the reason for the inspection) will determine what specific activities are needed.

Site/facility representatives should be aware that although DNREC is doing more multi-media inspections, most inspections are still single-media based. This means that an inspection by staff from one DNREC program (e.g., NPDES/surface water discharges) probably will not cover compliance with requirements of other DNREC programs (e.g., RCRA-C/hazardous waste), and it certainly does not preclude any other applicable DNREC program from doing an inspection of the same site/facility/activity. Also, an inspection by DNREC does not preclude an inspection by EPA under the same program or under a different one. Finally, site/facility representatives should be aware that they may be subject to regulation by more than one state agency (e.g., Department of Labor, Department of State), and that information given to one state agency does not mean that all state agencies have the information.

In addition to conducting inspections, DNREC frequently requests a regulated entity to submit information as part of a compliance determination. For example, such requests may be made for records that were not available at the time of an inspection (e.g., records kept at the home office of a company that has more than one location) or for reports that are required by environmental laws to be submitted on a regular basis but that were not received by DNREC on time.

Since DNREC typically does not know whether a site, facility, or activity is in compliance prior to doing an inspection, all field work must be conducted in such a way that an enforcement action can be supported if it is the most appropriate follow-up response. Not only is it important for DNREC to gather all necessary information and properly document it, but it is also important for the work to be done in a safe manner that does not jeopardize an individual's health or well being.

### **SECTION II. INSPECTIONS**

#### **A. NATURE AND SCOPE**

The nature and scope of an inspection depends, as noted above, on the reason for the inspection and what information is needed to make a compliance determination. This can vary widely from one DNREC program to another. For example, an inspection done under the Storm Water Program, may involve comparing "before" and "after" topography of a site, looking at building plans or staked areas on the property to determine the

appropriate construction and materials management. This is quite different from an inspection of a wastewater treatment facility, where DNREC will observe the facility's operations, inspect daily laboratory records and other log sheets, and sample effluent. This in turn is quite different from an inspection of a hazardous waste transporter, which involves examining the vehicle in which hazardous wastes are being transported, inspecting the containers in which the hazardous wastes are being carried, and checking the transporter's permit and the manifests required to accompany the wastes during transport. A transporter inspection in turn is quite different from an inspection relative to dredging and filling in wetlands, for which DNREC will observe (and possibly sample) vegetation, hydrology, and soil types on disturbed and undisturbed areas of a property.

## **B. INSPECTORS**

All inspections are done by trained staff. All DNREC staff carry photo-identification cards that clearly identify the individual as a DNREC employee and most carry business cards. Occupational safety and health training is provided to all DNREC staff whose job tasks require such training. Staff members whose jobs require specific safety training, such as use of personal protective equipment, confined space entry, etc., receive that training in accordance with applicable recommendations and requirements as set forth by OSHA, NIOSH, etc. All personnel are encouraged to be safety pro-active. Programs have identified the safety issues most likely to be encountered during a typical inspection and have tried to ensure that inspectors are equipped appropriately, e.g., with safety glasses, steel-toed boots, high visibility/reflective vests, etc.

## **C. RIGHT TO INSPECT**

Each statute underlying a regulatory program implemented by DNREC authorizes DNREC to inspect land and buildings on or in which the regulated activity may be occurring, subject to the requirements of the statute.

## **SECTION III. INFORMATION REQUESTS**

As noted in the Introduction to this chapter, DNREC occasionally requests a regulated entity to submit information as part of a compliance determination. Whether the regulated entity is required to submit the information may depend on the basis for the request.

### **A. STATUTES**

Certain statutes implemented by DNREC authorize DNREC to require the submittal of information. For example:

7 Del. C. Chapter 40 Sediment and Stormwater Law

7 Del. C. Chapter 60 Section 6028

7 Del. C. Chapter 74 Sections 7405 and 7408

If a request for information is made pursuant to these authorities, the person is legally obligated to provide the information.

### **B. REGULATIONS**

Many programs have developed regulations that require certain records to be maintained. Some of the regulations require that these records be submitted periodically to DNREC, while others only require the records to be made available upon request by DNREC. If DNREC requests records that are required by regulation to be maintained, the regulated entity is legally obligated to provide the records upon request, and failure

to do so constitutes a violation separate and distinct from any violation that may be shown by the information in the records.

### **C. PERMITS**

If a site, facility, or activity is required by statute to have a permit, the permit itself may contain record keeping or reporting requirements. As with records required by regulation, if DNREC requests records that are required by a permit to be maintained, the regulated entity is legally obligated to provide the records upon request, and failure to do so constitutes a violation separate and distinct from any violation that may be shown by the information in the records.

### **D. ORDERS**

If DNREC issues an Administrative Order, the order may contain a requirement to keep records not otherwise required to be kept (e.g., logs of more frequent sampling than otherwise required) and to submit such records as provided in the order. If a regulated entity receives an order that contains a requirement to maintain or submit records, the regulated entity is legally obligated to provide the records, and failure to do so constitutes a violation of the order separate and distinct from any violation that may be shown by the information in the records.

## **CHAPTER FOUR: DETERMINING THE APPROPRIATE RESPONSE TO VIOLATIONS**

### **SECTION I. INTRODUCTION**

The statutes and regulations that are reflected in the Scope of the CERG provide enforcement options from which DNREC may select to address noncompliance. The selection of an appropriate enforcement response is integral to the DNREC enforcement program. Upon discovering alleged noncompliance, DNREC managers and staff will be guided by the following practices and presumptions in determining an appropriate response. The practices and presumptions apply to all regulated entities, except as otherwise provided.

### **SECTION II. GENERAL DEPARTMENT PRACTICES**

- A.** Whenever DNREC staff discovers noncompliance, the noncompliance will be addressed by an appropriate enforcement response, which will, at a minimum:
1. document the noncompliance;
  2. achieve a prompt return to compliance should noncompliance be continuing;
  3. whenever feasible, remedy the adverse impacts of noncompliance;
  4. escalate as appropriate based upon the conduct and compliance history of the violator and other relevant factors;
  5. impose sanctions which are credible and proportional to the nature and severity of the offense; and
  6. impose sanctions which are severe enough to deter future noncompliance effectively by the regulated entity and others in the regulated community.
- B.** A verbal warning alone is not an appropriate enforcement response to the occurrence of noncompliance. When a verbal warning is given, it should be supported by an appropriate enforcement response, e.g., a written notice alleging noncompliance (NOV) or a penalty assessment.
- C.** A warning letter is not an appropriate enforcement response to the occurrence of noncompliance, and should not be used in lieu of a written notice alleging noncompliance (e.g., NOV, an order or a consent order), unless the use of a warning letter is specifically authorized by a Division Director, to effectuate the purposes of a comprehensive compliance assurance initiative.
- D.** As a general rule, whenever, during a reinspection, DNREC staff discovers that a regulated entity failed to comply fully with a NOV, and that additional violations not previously observed during the initial inspection are evident, DNREC will address all

noncompliance through one enforcement response. The appropriate response will address the recurring or continuing violations appropriately, and will, at a minimum, provide notice of, and require compliance with, the newly observed violations. Examples of this situation include:

1. During an inspection, DNREC staff observes several violations that it appropriately addresses with a NOV. Upon reinspecting for compliance with the NOV, DNREC observes that some of the original violations remain uncorrected, and that some new violations, never before observed, now exist. The new violations, if otherwise observed alone, would warrant a NOV. In this case, DNREC responds appropriately by seeking execution of an order in which a penalty is sought for the recurring violations, and notice is provided, and compliance is sought for all violations observed during the reinspection.
2. During an inspection, DNREC staff observes several violations that it appropriately addresses with a NOV. Upon reinspecting for compliance with the NOV, DNREC observes that some of the original violations remain uncorrected, and that violations not observed during the earlier inspection now exist. A file review indicates that some of the new violations were observed two years ago and addressed then with a NOV and some were observed three years ago and addressed with a NOV. Because the noncompliance observed in past years and addressed with a NOV is evidence of a pattern of noncompliance, DNREC may seek a penalty for those violations as well as the most recent violations. DNREC thus responds appropriately by seeking execution of an order in which a penalty and compliance is sought for all violations observed during the reinspection.

### **SECTION III. WRITTEN NOTICE ALLEGING NONCOMPLIANCE**

A written notice alleging noncompliance may take the form of a Notice of Violation or an Administrative Order. There are significant differences between a NOV and an order in content and in the consequences for noncompliance. The differences render each type of notice appropriate for use in particular circumstances, and thus they may not be used indiscriminately.

#### **A. NOTICE OF VIOLATION (NOV)**

A written notice alleging noncompliance must specify:

1. the requirement(s) with which the regulated entity allegedly failed to comply;
2. occasion(s) on which the alleged noncompliance was observed or discovered by DNREC;
3. a reasonable deadline or deadlines by which the regulated entity is required either to:
  - a. come into compliance with the requirement(s) described in the NOV, or
  - b. submit to DNREC a written proposal setting forth how and when the regulated entity proposes to comply with the requirement(s) described in the NOV

DNREC has two options for how it may seek compliance through a NOV. Under the first option, DNREC may use a NOV to require compliance with a requirement when the means or method of compliance is relatively straightforward or specifically detailed by permit or regulation. Under the second option, DNREC may use a NOV to require a written proposal describing how and when the regulated entity proposes to comply when there is uncertainty about how and when a regulated entity may reasonably comply. Issuance of a NOV does not mean that an administrative order, penalty, civil or criminal action will be taken. However, past NOVs will be taken into account in determining appropriate enforcement responses.

In those cases in which DNREC wants to establish a legally enforceable deadline for compliance or cessation of activity, or where options for compliance exist and DNREC wants to specify the terms of compliance, DNREC should use an Administrative Order, as discussed below. A regulated entity generally has the right to appeal a unilateral order. Failure to comply with a NOV is not itself a violation of law subject to a penalty, and thus DNREC may not assess a penalty for violation of a NOV independent of the violations cited within the NOV, as it may do for violating an order (discussed more fully below).

#### **B. ADMINISTRATIVE ORDER**

Like a NOV, an Administrative Order requires a regulated entity to take appropriate action to achieve and/or to maintain compliance with statutory or regulatory requirements by a specific date(s). An Administrative Order, however, differs from a NOV in content and significance, and consequently, an order issued unilaterally by DNREC is subject to adjudicatory appeal.

An order, rather than a NOV, must be used when DNREC requires:

- compliance by a particular means or method not already specifically prescribed in detail by law or regulation;
- submission of information, a schedule or other action beyond what is specifically prescribed in detail by law or regulation;
- correction of noncompliance by a legally enforceable deadline (generally to prevent further harm or risk of harm; and/or
- cessation of an activity pending regulated entity's return to compliance.

An order, rather than a NOV, should be used when:

- DNREC observes numerous violations involving different programs, especially where significant violations are evident;
- DNREC oversight of regulated entity's return to compliance is required; and/or
- a substantial amount of time is required for the regulated entity to return to compliance.

In addition to the differences in content between a NOV and an order, the consequences for noncompliance with an order are more severe than for noncompliance with a NOV. DNREC Administrative Orders are issued under the authority of laws, which state that violation of a DNREC order constitutes violation of the law. Therefore, once an order is effective, failure to comply with it constitutes additional grounds for further enforcement action, independent of enforcement for underlying violations.

## **SECTION IV. LICENSE OR PERMIT SANCTIONS**

Suspension or revocation of an approval previously issued by DNREC may be necessary or appropriate in order to address the source of a noncompliance problem effectively, particularly in cases in which either:

- the actual or potential harm posed by continued noncompliance is high, and/or
- other enforcement options have previously been used, and have been insufficient to induce compliance or deter repeated noncompliance.

This option may be used alone, or together with other enforcement options. Relevant provisions in program-specific statutes, regulations and/or approvals identify the permissible grounds for suspension or revocation which vary among programs. Note that only DNREC may suspend or revoke an approval that it has issued. Suspension or revocation of an approval is generally effective and enforceable only after all required adjudicatory hearing procedures have been completed (i.e., either when no hearing has been requested within the prescribed deadline, when the case has been settled by agreement, or when a final decision has been rendered).

## **SECTION V. JUDICIAL ENFORCEMENT OPTIONS**

### **A. CIVIL JUDICIAL PROSECUTION**

As a general matter, cases involving the following situations should be considered for referral to the Attorney General (AG) for civil judicial prosecution:

- the violation or threat to public health, safety and welfare, or the environment is so serious that administrative processes are inappropriate;
- administrative processes have already been used and have not been sufficiently effective to induce the regulated entity to respond appropriately;
- legal issues raised are of such value that they should be litigated in court in order to establish legal precedent; or
- attachments of property or other up-front financial security should be sought because of potentially large costs to the State.

A case referred to the AG does not automatically have to be handled in its entirety by the AG. In appropriate cases, it is permissible to handle some aspects of a case through the judicial process, and other aspects handled through the administrative process. When a case is considered for judicial referral at the Enforcement Panel (see Chapter 5), discussion should include consideration of whether the AG will handle the case in its

entirety or not. When a case is handled jointly, the division of effort should be carefully coordinated between DNREC and the AG.

Civil judicial prosecution has several advantages. In the event of an emergency, a judge can generally be found on short notice to hear the case, and impose some form of injunctive relief. Sanctions for violation of a court order are more severe than for violation of Administrative actions. Effectively compelling a regulated entity to respond appropriately has a high deterrent value, and may result in DNREC conserving its enforcement resources.

This option also has some disadvantages. Court proceedings are subject to more stringent rules of procedure and evidence than those in force in administrative proceedings. Therefore, preparing a case for court requires a commitment of effort and resources from both DNREC and the AG. In addition, the AG, on behalf of DNREC, must compete with others for the time and resources of the court, and must be able to persuade the judge about what is necessary and in the public interest.

In determining an appropriate enforcement response, DNREC staff should consider the value of the following enforcement mechanisms that are available through civil judicial prosecution.

### **1. Injunctive Relief**

Injunctive relief, in the form of a temporary restraining order, preliminary injunction, or permanent injunction, may be appropriate in cases:

- involving a significant release or threat of significant release of hazardous material, or significant harm or threat of significant harm involving violation of air, hazardous waste or water pollution control requirements; and/or
- in which activity must be immediately halted, or immediately initiated, to respond adequately to a significant threat to public health, safety, or welfare, or the environment; and
- in which a written administrative notice alleging noncompliance either will not be sufficient to induce a regulated entity to respond immediately and appropriately, or will otherwise not be an appropriate enforcement response.

### **2. Civil Judicial Penalty**

Imposition of a civil penalty by a court requires referral of the case to the Attorney General. In addition to prosecuting cases on behalf of DNREC, the Attorney General has the right to seek a civil penalty in court independent of any recommendation by DNREC.

Imposition of a civil penalty by a court has some advantages. The chief advantage is that in many cases, the potential amount of the penalty is much greater than that available with civil administrative penalties. Also, a court-imposed penalty attaches the added stigma associated with having a penalty assessed by a court rather than by an administrative agency.

A civil penalty imposed by a court is an option that is available in all cases to the extent appropriate and available. The option is particularly appropriate in cases in which:

- a civil administrative penalty is unavailable, inappropriate, or appropriate but would be too low due to limitations imposed by statute and regulations;
- violations caused, or potentially could have caused significant actual harm to public health, safety or welfare, or the environment has occurred;
- the occurrence of violations can be proved by a preponderance of the evidence; or
- criminal prosecution is not appropriate or available based on the evidence of the case.

### **3. Cost Recovery**

Recovery of the DNREC costs associated with the investigation of noncompliance should be included in any settlement that addresses the noncompliance. Pursuant to 7 Del. C. § 6005(c), DNREC may seek recovery of these costs, and may recover other costs under certain circumstances. For amounts in excess of \$10,000 referral of the case to the Office of the Attorney General should be made.

### **4. Compensation for Damage to Natural Resources**

If a release or threat of release of a hazardous material resulted in injury to, or destruction or loss of natural resources, DNREC may seek damages for such injury, destruction, or loss, pursuant to 7 Del. C. § 6028 and the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), [42 U.S.C. §9602], and the Clean Water Act of 1980 [33 U.S.C. §1321]. Such damages may include the costs of assessing and evaluating injury, destruction, or loss. DNREC may seek such damages regardless of whether or not DNREC or its contractor conducts assessment, containment, and/or removal action. This option requires referral of the case to the Office of the Attorney General.

## **B. CRIMINAL PROSECUTION**

In the case of criminal actions the Attorney General represents the State of Delaware and has sole discretion in the initiation and settlement of criminal prosecutions. An exception exists for criminal cases brought by DNREC Enforcement Officers within their jurisdiction. Criminal prosecution requires referral of the case to the AG. In addition to prosecuting cases referred by DNREC, the Attorney General has the right to initiate criminal prosecution independent of any recommendation by DNREC.

As a general matter, referral for criminal prosecution should be considered in cases in which:

- the occurrence of violations can be proved in court beyond a reasonable doubt;

- the violations actually caused, or potentially could have caused, significant harm to public health, safety, or welfare, or the environment;
- the violations were the result of willfulness and/or negligence and/or indifference so serious that society should respond by imposing the stigma and punishment associated with being convicted of a crime.

The chief advantage of criminal prosecution is that it is the only option for which imprisonment is a possible punishment. As such, it carries the greatest deterrent value of any other enforcement mechanism. Also, it is the only option that attaches the stigma associated with being "convicted" of a "crime".

## **SECTION VI. RESPONSE TIME TARGETS**

Often, a significant issue to a regulated entity that has been inspected is when it will find out what action DNREC proposes to take. Regulated entities reasonably want "closure" after an inspection, and some may have reporting requirements that may be impacted by an enforcement action (e.g., annual reports to shareholders or regulatory agencies may have to list actual and contingent liabilities). DNREC also needs to close out cases as quickly as reasonably possible so that other matters can be worked on. It is thus very important to establish guidelines for when a response should be made.

### **A. FEDERALLY AUTHORIZED PROGRAMS**

DNREC programs that are federally delegated, authorized, or approved typically are subject to federal "timely and appropriate" requirements. "Appropriate" means that the enforcement response adequately addresses all compliance issues and imposes an appropriate penalty. "Timely" means that the enforcement action is initiated within the period of time specified in the federal policy. For programs where a federal timely and appropriate policy applies, actions should be initiated within the specified times. Appendix VI identifies key EPA "timely and appropriate" guidance documents.

### **B. STATE PROGRAMS**

For programs that are not subject to federal timely and appropriate requirements and which do not have program-specific time lines established by statute or regulation, the guidelines shown below will be applied. As with all other provisions of the CERG, these are GUIDELINES ONLY, and DO NOT create any enforceable rights or obligations. Enforcement actions REMAIN VALID even if they do not meet these guidelines.

1. Decisions on whether additional information is needed from the regulated entity should be made as soon as possible, consistent with the nature of the inspection and the complexity of the records that must be reviewed. For simpler/more straightforward violations or situations, the target is 1 to 10 calendar days from the inspection date; for more complicated violations or situations, the target is 5 to 25 calendar days from the inspection.
2. Conclusions about what violations exist should be reached within 10 calendar days of having complete information.
3. Decisions on what type of response is appropriate should be made within 10 calendar days of identifying all violations.

4. If the decision is to issue a Notice of Violation (NOV) or Letter of Deficiency (NOD), the NOV/NOD should be issued within 30 calendar days of reaching the decision.
5. If the decision is to refer the case to the DNREC Enforcement Officers for criminal investigation and prosecution, the referral by a Division/Section/Branch should occur immediately upon discovery for "in progress" offenses and within 24 hours for investigative referrals.
6. If the decision is to suspend or revoke an approval previously issued by DNREC, the appropriate legal document should be drafted within 15 calendar days of reaching the decision and should be issued (i. e., should be completely through all review processes and in final format and mailed) within 30 calendar days of reaching the decision
7. If the decision is to attempt a Notice of Conciliation (NOC), the NOC should be drafted within 30 calendar days of reaching the decision and should be sent to the regulated entity (i.e., should be completely through all review processes and in final format and mailed) within 45 calendar days of reaching the decision.
8. If the decision is to pursue a civil or administrative enforcement action, an enforcement panel packet (see Appendix V – 1) should be drafted within 30 calendar days of reaching the decision and should be submitted to the Department Enforcement Panel (i.e., should be completely through all review processes and in final format) within 45 calendar days of reaching the decision.
9. Upon conclusion of the review by the Department Enforcement Panel, the appropriate legal document (i.e., Administrative Order, civil complaint) should be drafted within 30 calendar days of the review and should be submitted to the Secretary (i.e., should be completely through all review processes and in final format) within 45 calendar days of conclusion of the review.
10. If the decision is to pursue a Cease and Desist Order issued under the authority of Chapter 60, Chapter 66, or Chapter 72, or an Imminent Hazard Order issued under the authority of Chapter 63 or Imminent Danger Orders issued under the authority of Chapter 91 so as to effectuate swift action by the Secretary to stop or prevent or react to environmental emergencies, the appropriate legal document should be drafted immediately and should be submitted to the Secretary (i.e., should be completely through all review processes and in final format) as soon as possible.
11. Similarly, if the decision is to pursue a Temporary Restraining Order, Preliminary Injunction or Permanent Injunction the appropriate legal document should be drafted immediately in conjunction with the Attorney General's Office and should be submitted to the Secretary (i.e., should be completely through all review processes and in final format) as soon as possible.

All NODs/NOVs and administrative enforcement actions should be sent to the responsible party via certified mail/return receipt requested or served by an DNREC Enforcement Officer.

Expedited enforcement actions (as referenced in Chapter 5) are exempt from these timeframes.

## **CHAPTER FIVE: GENERAL ENFORCEMENT PROCEDURES**

### **SECTION I. INTRODUCTION**

This section of DNREC's Compliance and Enforcement Response Guide will address general issues related to enforcement of Delaware's environmental laws and regulations. These issues include: general procedures utilized by DNREC staff and the Department of Justice in initiating an enforcement action, collection of costs associated with environmental violations, and an overview of the various enforcement mechanisms available. The focus of this effort will be a discussion of the provisions of 7 Del. C. Chapter 60. The reader is advised that other chapters of Title 7 can vary to significant degrees.

### **SECTION II. RELATIONSHIP BETWEEN DNREC AND THE DELAWARE DEPARTMENT OF JUSTICE**

The Delaware Department of Justice ("DOJ"), Attorney General's Office, assigns attorneys to its Environmental Unit to provide legal services to DNREC. Currently, there are six Deputy Attorneys General "(DAGs)" whose primary responsibility is to represent DNREC.

In the case of criminal actions, the DOJ represents the State of Delaware and has sole discretion in all criminal prosecutions in the Courts of the State. Currently, the DOJ exercises its sole discretion in criminal prosecutions in the Court of Common Pleas and the Superior Court while allowing DNREC Environmental Officers to exercise independent discretion in the Justice of the Peace Courts.

In addition to enforcement representation, both civil and criminal, the DAGs assigned to DNREC also perform legal services including, but not limited to, review of legislation, regulations, contracts, and providing formal and informal legal opinions and advice memoranda relating to specific program issues and questions.

### **SECTION III. DNREC ENVIRONMENTAL OFFICERS**

The Department employs Environmental Officers to investigate criminal complaints and referrals. For a description of the complaint and investigation process for these officers, please refer to Appendix V-3. As discussed in Section II above, DNREC Environmental Officers are delegated responsibility by DOJ for prosecuting cases in the Justice of the Peace Courts and refer cases for prosecution in the higher courts to the Department of Justice.

### **SECTION IV. ENVIRONMENTAL ENFORCEMENT COORDINATOR**

This position reports to the Cabinet Secretary or Deputy Secretary and has the responsibility of coordinating, streamlining, and ensuring consistent implementation of enforcement and compliance policies, (e.g. Compliance and Enforcement Response Guide), designing/developing statewide or case-specific enforcement strategies, and acts as DNREC's primary liaison internally and externally on compliance and enforcement issues. The Enforcement Coordinator also serves as the Administrator of the Department Enforcement Panel.

## **SECTION V. ENFORCEMENT PANEL**

### **A. PURPOSE OF ENFORCEMENT PANEL**

In the late 1980s, Department management created an "Enforcement Panel" to review potential enforcement actions and make recommendations to the Secretary. A primary goal of the Panel was to promote consistency in the way enforcement actions were taken, as well as amounts assessed for administrative and civil penalties. The Enforcement Panel was originally instituted to deal with Air, Water and Waste violations.

The Enforcement Panel meets on a monthly basis, usually the third Wednesday of the month, unless otherwise scheduled.

### **B. COMPOSITION AND DUTIES OF THE ENFORCEMENT PANEL**

The Department's Enforcement Panel is comprised of members: three (3) Division Directors (the Director of the Division of Air and Waste Management "DAWM"; the Director of the Division of Water Resources "DWR"; and the Director of the Division of Soil and Water Conservation "S&WC" or his designee); Four (4) Program Administrators or Branch/Section Managers (two each from DAWM and DWR); the Department Enforcement Coordinator; a representative from the Attorney General's Office; and the DAWM Chief of Enforcement, or their respective representatives. For the purposes of fulfilling the Department's objectives in establishing such a review process, attendance by a minimum of seven (7) members shall be required for the Panel to review a case.

On a rotating basis, the Division Directors of DAWM and DWR will serve as Chairperson of the Enforcement Panel. The term for each Chairperson will be one calendar year. On January 1<sup>st</sup> of each year, the position of Chairperson will rotate to the next Director. The Chairperson of the Panel will also be responsible for selecting an individual from their respective Division to provide administrative support to the Panel for the Chair's term. Administrative support will include: copying and distribution of the agenda and enforcement panel packets, recording meeting minutes of the panel, including the written recommendation of the Panel to the Secretary.

The Department Enforcement Coordinator will serve as the Administrator of the Enforcement Panel. As Administrator of the Panel, the Enforcement Coordinator will receive all new cases to be presented at the Panel, maintain the agenda, and facilitate Panel meetings. The individual providing administrative support to the Panel will work in conjunction with the Administrator in drafting the agenda, scheduling presentations, and in distributing the information to Panel members.

The participation by a representative of the Attorney General's Office does not obviate the need for further legal review nor preclude subsequent counsel to the Secretary.

Other Panel participants may include Division paralegal staffs, technical staff, or support staff of the program presenting violations.

### **C. RESPONSIBILITIES OF THE ENFORCEMENT PANEL**

The Enforcement Panel shall review violations brought to its attention to advise whether or not to pursue the recommended administrative and/or civil enforcement action. The Panel listens to the facts of the case presented, decides which enforcement mechanism is most appropriate for the circumstances of the case, decides whether corrective action

should be taken to rectify the problem, and collectively determines the amount of the penalty, if any, that should be recommended to the Secretary.

The Enforcement Panel shall review the recommended actions and give consideration based on consistency among the following:

- a. Programs and penalties;
- b. Potential multimedia implications or impacts; and
- c. The emergence of a trend in violations.

When reviewing a proposed penalty assessment, the Enforcement Panel shall assure that consideration has been given to the following factors, including, but not limited to:

- a. The nature, circumstances, extent, and gravity of the violations;
- b. The degree of culpability;
- c. Ability of the violator to pay;
- d. Any prior history of such violations;
- e. Economic benefit or savings (if any) resulting from the violation; and
- f. Such other matters as justice may require.

By consensus of its members, an Enforcement Panel shall either approve the recommended action or, in the alternative, advise another course of action. In the event that a consensus is not achieved, the Chair (Division Director whose program initiated the case) shall provide recommendations in writing to the Secretary along with a copy of the record of the proceedings before the Panel.

The Administrator of the Enforcement Panel shall use his/her discretion to determine the appropriate amount of cases to schedule for each Panel. In the event of a backlog of cases an Enforcement Panel will be scheduled twice a month

#### **D. GENERAL PROVISIONS**

When violations are determined by the appropriate managers to warrant possible enforcement action, the manager compiles the information designed to assist the Enforcement Panel in formulating a recommendation. At that moment, the compiled information becomes part of an investigatory file or non-public record pertaining to potential litigation and is not part of a "public record" as that term is defined in 29 Del. C. Chapter 100, the Freedom of Information Act ("FOIA") §10002(d). The compiled information and any deliberative process material, or other enforcement-related documents subsequently prepared relating to the violations at issue are not to be made available to the public until either the case is fully adjudicated or a decision not to pursue enforcement action has been made. The Enforcement Panel Guide and Checklist (See Appendix V-1) was created as a guide for Department staff to follow when preparing and presenting a case to the Enforcement Panel and shall be used when submitting a case to the Panel for consideration. Program Managers shall ensure that each case is evaluated for multimedia implications and coordinated through appropriate Branch, Section, or Division staff.

The investigating Section/Branch Inspector presents the facts of the case to the Panel and makes a recommendation as to the amount of the penalty to be assessed, corrective action needed, and the type of enforcement mechanism that will best suit the circumstances of the case.

## **E. RESPONSIBILITIES OF PARALEGAL STAFF**

In consultation with the Administrator of the Enforcement Panel, a Paralegal shall ensure that individual enforcement packets to be submitted for consideration contain all necessary information and that all required Division signatures have been obtained (See Appendix V-1 for Enforcement Panel packet form).

Upon conclusion of the Enforcement Panel meeting, the Paralegal will review the enforcement packet, gather any other pertinent information, draft the appropriate legal document (i.e. Administrative Order, civil complaint), ensure that a copy of the minutes of the panel meeting and the panel's recommendation is attached to the packet, and forward the entire package to the Legal Office for review by a Deputy Attorney General.

## **F. EMERGENCY ADMINISTRATIVE AND CIVIL ACTIONS**

Certain Administrative Orders and Civil Actions are not necessarily sent to the Enforcement Panel for review and approval. Cease and Desist Orders issued under the authority of Chapter 60, Chapter 66, or Chapter 72, Imminent Hazard Orders issued under the authority of Chapter 63 and Imminent Danger Orders issued under the authority of Chapter 91 are ordered by the Secretary when swift action is required to stop or prevent or react to environmental emergencies. Similarly, when the Secretary requests a Temporary Restraining Order, Preliminary Injunction or Permanent Injunction these actions generally do not go through the Enforcement Panel for review.

## **G. EXPEDITED ENFORCEMENT ACTIONS**

In other limited circumstances, the Secretary, upon written request from a Division Director, may waive the review by the Enforcement Panel when there is sufficient justification to expedite the enforcement action. In these instances, certain criteria must be met in order to justify the expedited action without review by the Enforcement Panel. These actions, referred to as Expedited Enforcement Actions, should only be initiated when:

- a) the company agrees or requests to enter into voluntary discussions to expedite an enforcement action;
- b) the company agrees in principle to the major elements of a settlement of the expedited enforcement action in writing, the terms of which have been approved by the Secretary;
- c) the underlying basis of the violations that give rise to the enforcement action have been or are in the process of being corrected; and
- d) the expedited enforcement action is determined by the Secretary to be a priority and does not conflict with or take resources away from completing higher priority enforcement cases.

# **SECTION VI. ENFORCEMENT AND ENFORCEMENT RELATED MECHANISMS**

## **A. INTRODUCTION**

In addition to Chapter 60, there are other Chapters of Title 7, in conjunction with the regulations promulgated under each Chapter, which prescribe enforcement mechanisms, cleanup measures, and penalty amounts and limits for violations of those specific Chapters of Title 7. Some examples of these Chapters are: Chapter 40, Sediment and Stormwater; Chapter 41, Drainage of Lands, Tax Ditches; Chapter 66, the

Wetlands Act; Chapter 63, the Hazardous Waste Management Act; Chapter 72, the Subaqueous Lands Act; Chapter 74, the Underground Storage Tank Act; Chapter 77, the Extremely Hazardous Substances and Risk Management Act; and Chapter 91, the Delaware Hazardous Substance Cleanup Act. It is important to note that when violations of these Chapters occur, the specific statute provisions govern.

## **B. NON-STATUTORILY AUTHORIZED INFORMAL ENFORCEMENT MECHANISMS**

Much of what the Department does is to attempt to bring facilities into compliance through the use of a variety of informal measures. These measures include non-adversarial, educational and consensual techniques that are referred to by numerous labels. They include but are not limited to: warning letters, notices of violation, post-inspection conferences, meetings, and telephone communications. These approaches are not generally considered appropriate for alleged violations that have or may result in environmental impact or a serious threat of environmental impact.

## **C. NOTICES OF CONCILIATION: 7 DEL. C. § 6005(b)(2)**

DNREC may endeavor by conciliation to obtain compliance with the requirements of Chapter 60. This is done by giving written notice to the responsible party of the alleged violation, proposing a timetable for its correction, providing the opportunity for a hearing and notifying the responsible party that the proposed timetable will be ordered unless a hearing is requested. DNREC may also convene a hearing on its own initiative.

## **D. ADMINISTRATIVE PENALTY ASSESSMENTS: 7 DEL. C. § 6005(b)(3)**

DNREC may impose an administrative penalty of not more than \$10,000 for each day of violation. DNREC shall give notice to the violator, who shall have 30 days to request a hearing. DNREC typically reserves the right, upon the request for a hearing, to withdraw the Administrative action and take a civil enforcement action in Superior Court. DNREC must consider certain statutory factors in assessment of the penalty. By statute, simultaneous violations of more than one pollutant parameter or other standard shall be treated as a single violation for each day. Nonpayment may be collected in Superior Court. In addition, interest, attorney's fees and costs are recoverable.

## **E. CIVIL PENALTY ACTIONS: 7 DEL. C. § 6005**

A civil action may be filed when, among other things: an Order of the Secretary has been violated or ignored; a threat to human health or the environment is present; there are continuing or ongoing violations at a facility; or the violator has a history of non-compliance.

## **F. CRIMINAL ACTIONS: 7 DEL. C. § 6013**

A criminal action may be initiated when criminal environmental laws are alleged to have been violated. 7 Del. C. § 6013. Criminal actions are strict liability offenses punishable by fines of \$50 to \$500 for each violation in the Justice of the Peace Courts. 7 Del. C. §6013(c). A traditional state of mind criminal provision is also found in Title 7 Del. C. §6013(a). Criminal actions for willful or negligent offenses are punishable by \$2,500 to \$25,000, for each violation, in Superior Court. 7 Del. C. §6013(a). In addition to Chapter 60, there are other statutory provisions within Title 7 that authorize criminal sanctions.

## **G. COST RECOVERY ACTIONS**

Pursuant to 7 Del. C. § 6005(c), when a violator has been found to be in violation of Chapter 60, through a criminal, civil, or administrative enforcement action, the violator shall be liable to the Department for all expenses incurred by the Department. These expenses include the costs associated with 1) abating the violation; 2) controlling a pollution incident related to the violation; or 3) cleanup and restoration of the environment.

Further, the expenses shall include, but not be limited to, the following:

- Costs of investigation by Department staff;
- Legal Assistance;
- Public Hearings;
- Materials;
- Equipment;
- Manpower;
- Contractual assistance; and
- Salary and Overtime pay for all state employees involved in the effort.

For example, in calculating such costs the Department will include all costs incurred after issuance of a Notice of Violation or an Administrative Order. Once a violation has been determined through an enforcement action, the Secretary of the Department, through the Division accounting sections, prepares a billing of the expenses and submits the billing to the violator. In the event the violator desires to challenge the billing, the violator can request an administrative hearing before the Department's Hearing Officer. The Hearing Officer then presents findings to the Secretary for a final determination. An appeal of the Secretary's final determination may be perfected in Superior Court within 30 days of the Secretary's determination.

## **CHAPTER SIX: CLASSIFICATION OF PRIORITY CASES**

### **SECTION I. AIR QUALITY MANAGEMENT PRIORITY CASE CLASSIFICATION**

#### **A. AIR QUALITY MANAGEMENT**

The Air Quality Management Section (AQM) within the Division of Air and Waste Management implements the State of Delaware, “Regulations Governing the Control of Air Pollution,” which satisfies the requirement of 7 Del. C. Chapter 60 to report and obtain approval of equipment which has the potential to discharge air contaminants into the atmosphere. Delaware is required to implement the Environmental Protection Agency’s (EPA) “Policy on Timely and Appropriate Enforcement Response to High Priority Violations” for all *major* (as defined by the Clean Air Act) stationary sources of air pollution in violation of a Federally Enforceable regulation. This policy only covers a subset of violations and was developed by the EPA to enable staff to identify and prioritize enforcement cases.

All violations are reviewed and addressed by the staff in the Engineering & Compliance Branch in an appropriate manner. All penalty calculations are evaluated using EPA’s “Clean Air Act Stationary Source Civil Penalty Policy.” This policy provides guidance on determining appropriate penalty amounts based upon factors such as: the size of the business, the violator’s full compliance history and good faith efforts to comply, the duration of the violation, adjustment factors, and seeks to assess the benefit the violator received during the period of violation, and the economic impact of the penalty on the business

#### **1. Engineering & Compliance Responsibilities:**

Engineering & Compliance is responsible for identifying and documenting violations. The DNREC Enforcement Officers (EPO’s) also identify and document violations based on their investigations and citizen complaints. The following procedures govern the response to violations of 7 Del. C. Chapter 60 the State of Delaware, “Regulations Governing the Control of Air Pollution,” state issued construction and operating permits including Regulation No. 30 (Title V) State Operating Permits.

Violations may be discovered through plant inspections, follow-up to citizen complaints, file reviews, stack testing of the source, etc. Violations may also be discovered through self reporting by the source in the form of regulatory required compliance certification reports, credible evidence, and/or internal audits. The Responsible Staff documents any alleged violations and considers various factors in recommending a course of action.

The Engineering & Compliance Branch does not have a separate permitting and inspection group. Environmental engineers and scientists assigned to the facilities in conjunction with their immediate supervisor and the branch supervisor are responsible for the following duties: permitting, inspection activities, compliance determinations, and enforcement recommendations. As such, the assigned engineer or scientist is responsible for maintaining a knowledge base in the following areas: State of Delaware, “Regulations Governing the Control of

Air Pollution”, 40 CFR Parts 60, 61, 63, 64, 70, 74; EPA’s High Priority Violations (HPV) Policy; EPA’s Clean Air Act Stationary Source Civil Penalty; and tracking of source obligations – includes permit terms and conditions which specify a time frame to complete compliance requirements (installation of a CEM, conduct stack sampling, reporting requirements, etc.)

The assigned engineer or scientist is responsible for ensuring that the immediate supervisor is informed at regular intervals regarding the compliance status and other pertinent information.

## **2. Enforcement Recommendations:**

Engineering & Compliance staff compiles compliance information in order to determine whether a source is in compliance with the State of Delaware, “Regulations Governing the Control of Air Pollution,” permit terms and conditions and federal requirements where the authority to enforce has been delegated to the State. The immediate supervisor is notified of violations and a preliminary enforcement response is determined. This enforcement response can be in the form of the following: Letter of Deficiency, Notice of Violation, Administrative Order, Civil Action, and/or Criminal Action. [Note: a Letter of Deficiency can escalate into a Notice of Violation followed by Administrative, Civil, or Criminal Action if the source fails to comply with the Letter of Deficiency requirements.]

Engineering & Compliance staff are required to review the violation in order to determine whether the violation meets the definition of a High Priority Violation (HPV). All other violations are reviewed to determine an appropriate enforcement response.

## **B. HIGH PRIORITY VIOLATIONS (HPV)**

**1. High Priority Violation (HPV) Policy:** AQM has adopted EPA’s policy entitled, “Issuance of Policy on Timely and Appropriate Enforcement Response to High Priority Violations” from Eric Schaeffer, Director Office of Regulatory Enforcement dated December 28, 1998. The High Priority Violations (HPV) Policy applies to all major (as defined under the Clean Air Act) stationary sources of air pollution which are in violation of a Federally Enforceable Regulation. This policy is meant to enable agencies such as AQM to give priority attention to those violators and violations which they believe are the most environmentally important and to permit an increased degree of agency flexibility in identifying and resolving HPVs. This policy provides for specific timeframes to resolve the HPV.

EPA’s HPV Policy supersedes previously issued policy documents related to Significant Violators (SV) and Timely and Appropriate (T&A) Policy. The HPV policy applies to all States, Locals, Territories, and Tribes within the United States and any “major” (as defined by the Clean Air Act Amendments of 1990 (CAAA) or subsequent revisions, or as clarified in national guidance) stationary sources of air pollution which are in violation of Federally-enforceable regulations. This policy also applies to “synthetic minor” sources as described in the general criteria. A “synthetic minor” source is any source that avoids Title V or New Source Review (NSR) permitting by means of a minor source permit

limiting its potential to emit below major source thresholds. Additional violations, whether major or minor sources, may rise to the level of a high priority violation at the mutual agreement of EPA Region III and AQM on a case by case basis.

A copy of EPA's "Timely and Appropriate Enforcement Response to High Priority Violations" is attached in Appendix I - 1

Any violation that meets the criteria listed in Table No. 1 is classified as HPV.

<b>Table No. 1 – HPV Criterion</b>	
<b>General Criterion #</b>	<b>General HPV Criteria and Description</b>
1	Failure to obtain a PSD permit (and/or to install BACT), an NSR permit (and/or to install LAER or obtain offsets) and/or permit for a major modification of either
2	Violation of air toxics requirement (i.e., NESHAP, MACT) that either results in excess emissions or violates operating parameter restrictions
3	Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR, or Title V statuses
4	Violation of any substantive term of any Local, State or Federal order, consent decree, or administrative order
5	Substantial violation of the source's Title V certification obligations
6	Substantial violation of the source's obligation to submit a Title V permit application
7	Violations that involve testing, monitoring, recordkeeping, or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits
8	Violation of an allowable emission limit detected during a reference method stack test
9	CAA violations by chronic or recalcitrant violators
10	Substantial violation of CAA Section 112(r) requirements
<b>HPV Matrix Criteria and Descriptions</b>	
1	Violation of allowable emission limitation, detected by stack testing
2	Violation of applicable emissions limitation, detected by coatings analysis, fuel samples, other process materials sampling, or raw/process materials usage reports
3	Violation of parameters limits where parameter is direct surrogate for an emissions limitation, detected by continuous/periodic parameter monitoring
4	Accidence of applicable non-opacity standard, detected by CEMS
5	Exceedance of applicable opacity standard (detected by COMS or by VE)

## 2. Timeframe of HPV:

One purpose of the HPV policy is to ensure timely and appropriate response to violations through standardized criteria and timeframes.

### a. Day Zero

The clock starts (i.e., day zero) no later than 45 days after AQM first receives information concerning a Federally enforceable violation (e.g., date of inspection, stack test or continuous emission monitoring system report). If, during this 45-day period, the enforcement agency decides that additional monitoring or analysis is required to determine or confirm the violation, the clock does not start until the earlier of the date of receipt of such additional data or on the 90<sup>th</sup> day after the violation was initially discovered. This additional period (up to 45 days) provides sufficient time for agency evaluation of the data to determine if a Federally enforceable violation occurred.

### b. Day Sixty

Unless AQM requests that EPA issue the Notice of Violation, by Day 60 AQM shall issue a Notice of Violation (NOV). If the State has not taken such action, EPA shall immediately issue an appropriate notice.

Any EPA issue of a NOV or Finding of Violation (FOV), in a case where the State has the lead, will indicate that EPA is still looking to the State to resolve the matter, and further EPA action will be required only in the absence of an acceptable, prompt resolution by the State. If the violation clearly impacts upon the air quality of an adjacent State, EPA will also transmit a copy of the NOV or FOV to that State as well.

### c. Day 150

If AQM has the initial lead and the case has not been resolved/addressed by Day 150, the EPA and AQM will have a case-specific consultation concerning overall case strategy, including a discussion of effective means for expeditiously addressing/resolving the case. Possible strategies could include continued deferral to AQM, EPA assumption of the case, or continuation of the case in a work-sharing arrangement between EPA and AQM.

### d. EPA Responsibilities After It Assumes the Lead

After EPA assumes the lead in a case, it will have up to an additional 150 days to get the source into compliance, onto a schedule, issue a Section 113(a) administrative order (including administrative remedies), a Section 113(d) administrative enforcement action, or subject the source to a Section 120 action or judicial referral. EPA will encourage continued State participation even in situations where EPA takes over the lead. The possibility of a joint action should be considered as an alternative to a unilateral EPA action where feasible.

**e. Day 270 (no lead change) or Day 300 (lead change)**

By Day 270 (or 300 with lead change to EPA), the case shall either be resolved or addressed, i.e., the issuance of a legally enforceable administrative or judicial order, or be subject to a referral to the State of Delaware Attorney General or (Federal) Department of Justice for an adjudicatory enforcement hearing or judicial action. In some complex cases, more time may be required. The State should discuss with the Region that a case's complexity will require additional time as soon as those factors are determined.

**f. Definitions**

Resolved: means that the violation is addressed and closeout memo has been issued, all penalties have been collected and the source is confirmed to be in compliance.

**C. ALL OTHER VIOLATIONS**

All non-HPV violations are reviewed to determine an appropriate enforcement response. The goals of Engineering & Compliance is to ensure compliance with the State of Delaware "Regulations Governing the Control of Air Pollution," and the ensuing construction and/or operating permit issued pursuant to these regulations, to ensure that the facility is not interfering with the attainment or maintenance of national and state ambient air quality standards, and that the health, safety, and welfare of the citizens of the State of Delaware are not endangered.

Typically, procedural violations which are limited in nature to monitoring, record keeping, and reporting which do not substantially interfere with Engineering & Compliance staff determining the compliance status of the source or minor work practice standard violations are considered minor and result in a Letter of Deficiency or Notice of Violation. Should the facility still fail to comply, the Engineering & Compliance Branch may recommend an Administrative action, refer for civil action, or refer for criminal action. A minor violation can be elevated to HPV status at any time upon mutual agreement between EPA Region III and AQM.

**Timeframe:**

Violations that occur at natural minor sources or violations that occur at major stationary sources but are not determined to be HPVs, are still subject to enforcement review and the enforcement mechanisms available to AQM - Letter of Deficiency, Notice of Violation and administrative, civil, or criminal action.

Although non-HPV violations are not subject to the timeframes specified in the EPA's HPV Policy, Engineering & Compliance prioritizes these cases and adheres to a similar timeframe of resolution.

**D. ASBESTOS ABATEMENT FROM RENOVATION AND DEMOLITION (R/D) ACTIVITIES**

On June 2, 1987 Senate Bill No. 95 amended Part VII, Title 16 of the Delaware Code by adding Chapter 78, "Asbestos." In the interest of the public it is the purpose of this

Chapter to control, reduce and prevent the exposure of the public to asbestos from R/D activities where the general public can reasonably be expected to have access.

Via the authority of Chapter 78, the Department of Administrative Services adopted the regulation entitled, "Regulation Governing the State of Delaware Contractor/Supervisor/Worker Asbestos Training and Certification Program and Training/Certification for Asbestos Professional Services." The regulation was first adopted in 1988 and later amended in 1991. In accordance with Chapter 78, the Department of Administrative Services, Division of Facilities Management, Environmental Section administers the Regulation. The Department of Natural Resources and Environmental Control (DNREC) is charged with enforcing the Regulation.

The enforcement of the training/certification requirements for asbestos abatement contractors, professional service persons/firms, field technicians, abatement workers and supervisors will reduce the public exposure to life-threatening asbestos exposure from R/D activities. Such training/certification will assure asbestos operations are performed by qualified personnel in accordance with state of the art work practices.

In addition to Chapter 78 and the regulation identified previously, DNREC adopted the federal asbestos abatement regulation via the State of Delaware, "Regulations Governing the Control of Air Pollution," Regulation No. 21 by incorporating 40 Code of Federal Regulations Chapter 61 Subpart M, "National Emission Standard for Asbestos." This subpart gives the Department additional asbestos abatement authority.

Upon discovery of R/D abatement violations, Department personnel have all enforcement options provided in 7 Del. C., Chapter 60.

## **SECTION II. SOLID AND HAZARDOUS WASTE PROGRAM PRIORITY CASE CLASSIFICATION**

### **A. BACKGROUND**

Delaware's hazardous waste program, authorized by the United States Environmental Protection Agency (EPA), implements statewide hazardous waste compliance activities and enforcement through the application of regulatory, permitting and enforcement authorities contained within 7 Del. C., Chapter 60, 7 Del. C., Chapter 63 and *the Delaware Regulations Governing Hazardous Waste* (DRGHW). As an authorized state, Delaware implements its program in a manner consistent with EPA's, including addressing enforcement actions consistent with EPA's "1990 RCRA Civil Penalty Policy" (RCPP) and "Hazardous Waste Civil Enforcement Response Policy of March, 1996" (ERP). These policies provide guidance on timely and appropriate enforcement responses, escalation of enforcement actions for lack of compliance achievement, and calculation of gravity based penalties.

Delaware's solid waste program implements solid waste compliance activities and enforcement statewide through the application of regulatory, permitting and enforcement authorities contained within 7 Del. C., Chapter 60 and the *Delaware Regulations Governing Solid Waste* (DRGSW). While not directly applicable to the solid waste program, the EPA Enforcement Policies referenced above have been adapted to reflect the statutory provisions of 7 Del. C., Chapter 60 and are applied to the solid waste program in a manner similar to that used within the hazardous waste program.

### **B. INSPECTOR RESPONSIBILITIES**

The goal of the solid and hazardous waste compliance monitoring programs is to ensure solid and hazardous waste handlers are properly complying with the requirements of the statutory provisions of 7 Del. C., Chapters 60 and 63 and the DRGSW and DRGHW as applicable. This requires monitoring of handlers by staff experienced in the solid and hazardous waste programs and the application of program regulations. Program staff members receive both on-the-job and classroom training, and are afforded guidance from EPA and state prepared inspection manuals.

In addition to being adequately trained in preparing for inspections, staff members are required to complete certain activities. Such activities include identifying the scope of the inspection, review of facility files to gain a thorough understanding of a facility, identification of the regulations applicable to a facility, development of an inspection plan, obtaining inspection equipment, and determining health and safety requirements. An important component of this review includes becoming familiar with a facility's compliance and enforcement history, information valuable in determining the type of enforcement to be sought should violations be identified. Each responsible staff member is familiar with the enforcement authorities of 7 Del. C., §6005, and for hazardous waste program staff, also 7 Del. C., §6309. While solid waste staff members have knowledge of EPA's ERP and RCPP as amended by the program, hazardous waste staff members are thoroughly familiar with the ERP and RCPP as developed by EPA, and the suggested enforcement timeframes therein. Additionally, in both the solid and hazardous waste programs, each staff member has an annually developed performance plan which includes the expected timeframes for the completion of inspection reports, enforcement action recommendations and the actual preparation of administrative enforcement

documents. All reports, recommendations and prepared enforcement documents are presented to the responsible staff member's program manager for concurrence. In the case of escalated enforcement requiring review by the Enforcement Panel, documentation is submitted through the program manager to the Division's Paralegal. Staff members are responsible for tracking each inspection, resulting violations, as well as enforcement actions and return to compliance. While the solid waste side of the program maintains this information in an in-house database, hazardous waste information is maintained in a shared state/EPA database designated as "RCRA Info". The immediate supervisor verifies the data contained in "RCRA Info" on a periodic basis.

## **C SIGNIFICANT NON-COMPLIERS**

Facilities receive classification based on factors of overall compliance, recalcitrant behavior or a history of non-compliance. The first of these classifications, Significant Non-Compliers (SNC) are facilities that cause an actual exposure or a likelihood of exposure to hazardous waste or its constituents, or a solid waste posing a substantial threat to public health or the environment. The SNC designation is also given to recalcitrant or chronic violators, those that substantially deviate from the requirements of statute or regulation, a permit, order or agreement. A facility may also be classified as a SNC, should it fail to achieve compliance in the timeframe specified by the Department. The SNC designation is formerly attached by the State to hazardous waste handlers within the "RCRA Info" database. The facility remains a SNC until the State removes the designation following a facility's return to compliance. The facility's new designation within the "RCRA Info" database becomes SNN, indicating the facility was once a SNC, but has achieved compliance.

## **D. SECONDARY VIOLATORS**

Facilities are designated as secondary violators (SV) when they do not meet the criteria of a SNC. SVs are usually reserved for first time violators, those posing no actual threat or a low potential threat to hazardous waste or its constituents, or a harmful solid waste, and those without a history of non-compliance or recalcitrant behavior. Violations incurred by a facility designated as a SV are easily corrected resulting in a timely return to compliance. In the event a SV fails to address its violations in a specified timeframe, the SV designation is changed to that of a "SNC".

## **E. VIOLATION CLASSIFICATION EXAMPLES**

The following examples are provided as a means in assisting determination of a facility's designation as SNC or SV. The examples do not intend to encompass all criteria evaluated in making a SNC or SV determination, for example, a recalcitrant or chronic violator.

### SNCs

- Failure to carry out waste analysis for a waste stream.
- Operating without first obtaining appropriate permits.
- Commencing construction prior to permit approval.
- Failure to comply with the manifest system for generators and transporters of infectious solid waste or hazardous waste.
- Disposal of solid or hazardous waste at a non-permitted facility.

- Storage of hazardous waste in a container in poor condition, increasing actual or potential exposure.
- Failure to date and label hazardous waste tanks or containers.

#### SVs

- Failure to maintain a copy of a closure plan onsite. Failure to prepare a closure plan results in a SNC designation.
- Failure to submit required annual reports.
- Minor deviations from schedule of closure.

### **F. TIME SCHEDULES FOR PROCESSING SNCS/SVS**

Enforcement actions are divided into two categories, informal and formal. Informal actions, for example, Letters of Warning, Notices of Violation, or Notices of Deficiency, are the minimum appropriate for a SV. SNCs are addressed via formal actions. Examples of formal actions include Notices of Conciliation, Notices of Administrative Penalty Assessment, and Secretary's Orders. Civil actions filed in the Court of Chancery or Superior Court, and criminal actions filed in Superior Court are formal actions. In accordance with the ERP, the hazardous waste program has 90 days from the date of inspection to make SV or SNC determinations. Those facilities determined to be a SV, must receive an informal hazardous waste action and achieve compliance within 180 days of the date of the first inspection. Typically, informal actions are issued prior to the 90<sup>th</sup> day from the date of inspection with compliance achieved before the 180<sup>th</sup> day. Facilities, upon receiving an informal hazardous waste action, have 30 days in which to achieve and demonstrate compliance. This timeframe is specified in 7 Del. C., §6309(a). Should a facility fail to achieve compliance in the timeframe specified, that facility receives the designation of SNC, and in most instances, enforcement is escalated to that of a Secretary's Order which may include penalties up to \$25,000 per day for each continued day of non-compliance.

As outlined above, the hazardous waste program has 90 days from the date of first inspection to make SNC or SV determinations. If it is determined that the facility is a SNC, the program has 300 days from the date of initial site evaluation to enter into a Consent or Administrative Order with the facility. For cases requiring judicial action or referral to the DOJ, the case must be referred within 210 days from the site inspection date.

While the solid waste program is not bound by the ERP or the timeframes specified therein, the policy is informally applied to solid waste enforcement actions taken pursuant to 7 Del. C., §6005.

## **SECTION III - NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM PRIORITY CASE CLASSIFICATION**

### **A. BACKGROUND**

The NPDES Program reviews violations as the program becomes aware of the violations to determine whether enforcement is warranted. Factors considered in determining the proper enforcement response for a violation include, but are not limited to: the nature, circumstances, extent and gravity of the violation, or violations; ability of the violator to pay; any prior history of such violations; the degree of culpability; economic benefit or savings (if any) resulting from the violation; and such matters as justice may require (Chapter 60).

### **B. SIGNIFICANT NONCOMPLIANCE**

Significant noncompliance (SNC) is a subset of violations. SNC is not a regulatory distinction. SNC is a program definition used for management purposes and serves to classify those violations that merit priority enforcement attention. Facilities are considered in SNC when certain reports are late by 30 days or more, violations of compliance schedule milestones by 90 days or more, violations of effluent limits that exceed the Technical Review Criteria (TRC) or other permit requirements (pretreatment).

### **C. EXCEPTIONS LIST**

EPA's Timely & Appropriate policy states that SNC violations be addressed within one quarter of their occurrence. Rigid compliance with this policy, however, may result in hasty action that does not lead to a desired long-term solution. As a result, EPA developed an "Exceptions List" process.

The "Exceptions List" is a report which identifies Major water program permittees that are in SNC for two consecutive quarters. Any Major permittee listed on the QNCR for two consecutive quarters for the same instance of SNC (e.g., same pipe, same parameter for effluent violations; same milestone for schedule violations; same report for reporting violations; and same requirement for "other" violations) must be listed on the Exceptions List unless the facility was addressed with a formal enforcement action prior to the completion date of the second QNCR.

DNREC's goal is to address alleged violations before they become SNC.

## SECTION IV. ACCIDENTAL RELEASE PREVENTION (ARP)

### A. PROGRAM DESCRIPTION

The purpose of this regulation is to protect the lives and health of citizens living and working in the vicinity of facilities handling extremely hazardous substances (EHS).

1. Delaware's ARP group obtains its authority from 7 Del. Code, Chapter 77 and the *Accidental Release Prevention Regulation* (ARP Regulation). The Department has applied to EPA Region III for delegation of the EPA's *Chemical Accident Prevention Provisions* 40 CFR Part 68 that is also known as Section 112(r) of the Clean Air Act Amendments of 1990 (CAAA).
2. The ARP program has been in existence since the enactment of the *Extremely Hazardous Substances Risk Management Act* (EHSRMA) in 1988. The Department developed the regulation that became effective on September 25, 1989 in cooperation with environmentalists and industry experts. With the enactment of this regulation, Delaware became the third state to develop an accident prevention regulation and became the first state to go beyond the regulation of toxic substances to include both flammable substances and highly reactive substances.
3. The Delaware regulation became the model for similar federal regulations. The CAAA of 1990 established the federal authorities for OSHA to develop its *Process Safety Management Standard* 29 CFR 1910.119 (published February 24, 1992) and EPA to develop the *Chemical Accident Prevention Provisions* 40 CFR Part 68 (published June 20, 1996). The CAAA also created the federal *Chemical Safety and Hazard Investigation Board* that acts to oversee the two federal agencies. The ARP Group continues to work with all three federal agencies.
4. In 1998, EHSRMA was updated to reflect EPA terminology. A new regulation was developed and became effective on January 11, 1999. This regulation duplicated 40 CFR Part 68 in Section 5 and added a "Delaware Only" Section 6 that retained original Delaware list of EHS and Delaware's lower thresholds.
5. Risk Management Plan. The risk management plan is a document that summarizes the facility's risk management programs. The risk management plan was to be submitted to EPA and to Delaware on June 21, 1999. This plan must be updated once every five years unless the facility updates its plan sooner. The plan must be updated:
  - a. When the facility introduces a new regulated substance to an existing process.
  - b. When the facility begins operation of a new process that contains a regulated substance.
6. Risk Management Program. The risk management programs are the activities that must be performed by the facility to comply with this regulation.

There are three Program Levels (or three types of compliance program levels).

- a. Program Level 1 applies to facilities having no off-site consequence for their worst-case scenario and allows these facilities to have no prevention program.
  - b. Program Level 2 applies to facilities that are not regulated by OSHA 29 CFR 1910.119 (typically municipal chlorination facilities). This allows facilities to implement a streamlined prevention program.
  - c. Program Level 3 applies to all other facilities and requires facilities to implement the full risk management program.
  - d. The risk management Program Level 3 (or prevention program) consists of fourteen major elements while the risk management Program Level 2 consists of nine major elements:
    - Management Systems (Program Levels 2 and 3)
    - Process Safety Information (Program Level 3) or Safety Information (Program Level 2)
    - Process Hazard Analysis (Program Level 3) or Hazard Review (Program Level 2)
    - Operating Procedures (Program Levels 2 and 3)
    - Training (Program Levels 2 and 3)
    - Mechanical Integrity (Program Level 3) or Maintenance (Program Level 2)
    - Management of Change (Program Level 3)
    - Prestart-up Review (Program Level 3)
    - Compliance Audits (Program Level 2 and 3)
    - Incident Investigation (Program Level 2 and 3)
    - Employee Participation (Program Level 3)
    - Hot Work Permit (Program Level 3)
    - Contractors (Program Level 3)
    - Emergency Response (Program Level 2 and 3)
7. See the program web page at [www.dnrec.state.de.us/air/aqm\\_page/arp.htm](http://www.dnrec.state.de.us/air/aqm_page/arp.htm) for more information concerning this program.

## **B. INSPECTOR RESPONSIBILITIES**

The inspectors for this group are chemical engineers that have extensive experience working in the chemical industry. This regulation requires inspections of chemical plant operations involving EHS by staff experienced in the application of the program's regulation. This group has trained third party inspectors for Delaware and EPA Region III for an EPA pilot project. The group has developed inspection protocols that can be found on our web page. These protocols are used to evaluate a facility's risk management program elements and the risk management plan that is submitted to EPA and Delaware. Delaware inspectors keep their training current by attending continuing education courses and by attending workshops and conferences.

## **C. INSPECTIONS**

The following is based on 7 Del. Code, Chapter 77:

1. The Accidental Release Prevention group inspects all facilities that are subject to the ARP regulation.
2. At the end of the inspection, the ARP group holds a closing conference with the facility's management. The ARP group discusses the findings of the inspection. The findings include both exceptional practices and any deficiencies.
3. The ARP group sends a report reflecting the closing conference to the facility's management within 45 days after completing the inspection.
4. The facility's management has 60 days to respond to the inspection report with either a description of the additions and changes that were implemented to resolve the deficiencies or with a remediation plan and schedule that must be approved by the ARP group.
5. If the facility's management and the ARP group fail to agree, then the ARP group may issue a "Notice of Violation."

## **D. CLASSIFICATION OF INSPECTION FINDINGS**

The following is based on 7 Del. Code, Chapter 77:

1. Deficiencies often involve paper work omissions or an interpretation that a particular risk management program element is not complete. A deficiency may become significant non-compliance if there are many deficiencies coupled with recalcitrance to implement a remediation program or if the facility fails to implement the Department's recommendations or the agreed remediation program within the agreed schedule.
2. Significant Non-Compliance or Violation involves missing or non-functioning elements of the risk management program. These elements are designed to work together to prevent accidental releases of EHS. Missing or non-functioning elements represent a potential danger to citizens living near facilities handling these EHS.
3. Criminal Violation involves knowing falsification of records or documents required by Chapter 77.

## **SECTION V. UNDERGROUND STORAGE TANK PROGRAM**

### **A. PROGRAM AREA**

The Underground Storage Tank Program is responsible for enforcing both the *Regulations Governing Underground Storage Tank Systems* and the Vapor Recovery portion of the *Regulations Governing the Control of Air Pollution*. Both sets of regulations are adopted pursuant to 7 Del. C. Chapter 60 and the *Regulations Governing Underground Storage Tank Systems* are adopted pursuant to 7 Del. C. Chapter 74. As a result, there are two enforcement procedures available for the *Regulations Governing Underground Storage Tank Systems*. The Chapter 60 procedures can be used for both sets of regulations and will be described first.

### **B. PRIORITIZATION OF COMPLIANCE ASSESSMENTS AND ENFORCEMENT ACTIONS**

The Underground Storage Tank (UST) Program including the Vapor Recovery Program has developed a prioritization system for conducting compliance assessments. The system is based on environmental protection, potential risk to the environment and public health and the type of UST system. The weighted factors in the system are: distance to a water supply; sensitive water resource; product stored; tank material of construction; piping material of construction; type of leak detection; age of the tank and piping; pressurized or suction piping; existing or former leaking underground storage tank (LUST) site; and have there been previous violations at the site. This will be used to determine the sites to be assessed in any given year. However, other sites may be moved ahead of the priorities for reasons such as an emergency response at the facility.

### **C. ENFORCEMENT PROCEDURES**

The project officer conducts an inspection, reviews a file or receives a release report and identifies violations that exist at a facility or a group of facilities owned by the same owner. On site or at the time of review, the project officer determines if a warning letter should be issued immediately, an Enforcement Officer should be called to issue a criminal citation or the violations are serious enough to warrant deciding on the administrative process in collaboration with other project officers and managers. If an Enforcement Officer is called to issue a criminal penalty under Section 6013(c), the project officer calls the office to discuss the issue with the program manager prior to calling the Enforcement Officer. All criminal actions must be referred to the Enforcement Section. If the case follows the administrative path, the project officer discusses the site with other project officers and the program manager, a decision is made as to whether the violations warrant moving immediately to an administrative order with a penalty under Section 6005(b)(3) or if Section 7411 will be followed.

### **D. CHAPTER 60 PROCEDURES**

If a decision is made to proceed with a Chapter 60 enforcement package, the project officer develops the Enforcement Panel Package that is then reviewed by the program manager and the Paralegal. Based on the nature of the violations and the degree to which we have had cooperation with the company, either a Notice of Conciliation and Administrative Penalty Assessment or Notice of Administrative Penalty Assessment and

Secretary's Order is recommended. The project officer uses the UST and/or Vapor Recovery Penalty calculation to determine the recommended penalty.

If the violation is such that it is causing an immediate threat to human health, public safety or the environment, a Cease and Desist Order can be issued under Section 6018. This Order is good for 30 days after which an injunction must be obtained. This option is used in very few cases.

Section 6013 also provides for penalties for willfully or negligently violating and for knowingly making false statements, representations or certifications to the Department. These violations are under the jurisdiction of Superior Court.

## **E. CHAPTER 74 PROCEDURES**

When Section 7411 is used for enforcement, a Notice of Violation must be issued. Should the violation extend beyond 30 days, a Secretarial Order with penalties is issued. Should the violations continue, the Department may choose to revoke any permits issued to the violator. The penalties under this Chapter are \$1000 to \$25,000 per day of violation. Finally, Section 7411(f) allows for a civil penalty not to exceed \$1000 to be brought in Justice of the Peace Court for violations that consist solely of failure to register or submit other notifications required by the Department.

## **SECTION VI. SEDIMENT AND STORMWATER PROGRAM**

### **A. BACKGROUND**

The Sediment and Stormwater Law - Chapter 40 Title 7 Del. C. became effective June 15, 1990. The accompanying Regulations became effective January 23, 1991. While the Sediment and Stormwater Regulations (Regs) give DNREC the authority to regulate land disturbing activity over greater than 5,000 square ft., the program elements of plan review, and construction inspection are delegated to local agencies and Conservation Districts, with the exception of State and Federal projects.

The authority for delegation of program elements is contained in 7 Del. C. Chapter 40, Section 4007. The local agencies must develop programs that are consistent with Sediment and Stormwater Regulations. DNREC conducts regular meetings and field visits with all of the delegated agencies to monitor program performance. Also, a formal program review must take place every three years. General construction review (inspection) is undertaken to be consistent with section 14 of the Regs.

There is a federal level of oversight concerning Land Disturbing Activities, which are regulated by EPA through the NPDES Stormwater Program. The EPA Stormwater Program regulates runoff from land disturbing activities as a permitted category of industry. Since Delaware has a statewide program for managing stormwater, EPA has allowed the requirements for this permit to closely follow State requirements. A Notice of Intent (NOI) to begin construction serves as the notice of permit application. All land disturbing activities unless exempted by the Regs must have an approved Sediment and Stormwater Plan for the proposed activity. It is often adherence to the approved plan, rather than a specific reference to the Regs that is the basis for issues of non-compliance and enforcement.

Some of the terminology and procedures for the State's Sediment and Stormwater program may differ from the DNREC policy because it is defined that way in the regulations. Local inspections of construction sites by all of the delegated agencies are performed regularly. A written inspection report is generated describing the items that need to be corrected. The local agencies may continue with written correspondence referencing local ordinances or codes as adopted, to cite additional violations.

Typically, a local agency implementing the Sediment and Stormwater program will utilize a variety of local enforcement options including withholding building permits, and certificates of occupancy, as a way of enacting compliance with an approved Sediment and Stormwater Plan. A locally delegated agency also has the option to refer a project to DNREC for enforcement action under the Regs.

DNREC under the current Section 16 of the Regs may pursue penalty action under 7 Del. C. Chapter 40, as a criminal action in either Justice of the Peace Courts or in Superior Court if the activity is intentional. All criminal actions must be referred to the Enforcement Section. A violation of the Sediment and Stormwater Regulations however, may place the owner in violation of the Stormwater General Permit and conditions imposed in 7 Del. C. Chapter 60, Section 9 Construction, (9.1.02). Administrative penalties could be appropriate under a violation of this statute.

DNREC Sediment and Stormwater program will post for public notice any Notice of Violation that is sent by DNREC. There may be earlier correspondence sent that could include an Inspection Report or a Notice to Comply. A Notice of Violation is the last correspondence sent before an enforcement action is sought.

## **B. ENFORCEMENT PROCEDURES**

This policy establishes a formal enforcement procedure to be followed by the Department of Natural Resources and Environmental Control (DNREC) and Delegated Agencies (DA) when enforcement action is necessary on sites that do not comply with the State's Sediment and Storm Water Management law and regulations. Enforcement cases can be generated in any of three ways: (1) through the construction review process; (2) through referrals from delegated agencies; and (3) through complaints from individuals, groups, etc. Procedures to be followed for each of these methods are outlined below.

### **1.0 Construction Review**

Every effort is made to use the Construction Review process to correct deficiencies in site compliance whenever possible. Should that process fail to achieve expected results or if the site reviewer feels that a violation is serious enough to warrant enforcement action, the following procedures shall be followed:

#### **a. Issuance of Notice to Comply:**

If site deficiencies have not been corrected in accordance with the construction review report, the owner/developer or authorized agent shall be given a notice to comply. A copy shall also be given to the contractor's representative or responsible person on site. In the event that no authorized person is on-site, a copy of the inspection report and notice to comply shall be sent certified mail to the owner/developer. The notice to comply shall be specific as to the noted violation, corrective measures to be taken, and time frame allowed to complete the work.

#### **b. Compliance Review**

At the end of the time period specified above, a follow-up site inspection shall take place to determine whether compliance has been achieved. Depending on that determination, the following actions may occur:

##### **1. Site Violations Corrected:**

If all previous site violations have been corrected, the site reviewer shall issue an inspection report stating that fact and the site shall be returned to a normal Construction Review status.

##### **2. Previous Violations Not Corrected:**

If previously noted violations have not been satisfactorily corrected, the further actions may be initiated as outlined in Section 2.0.

## **2.0 Enforcement Options for Failure to Comply**

- a. DNREC may issue a cease and desist order to any persons violating any provision of Chapter 40, and/or the regulations by ordering that all site work stop except that necessary to comply with any Administrative Order.
- b. DNREC may request that the appropriate plan approval agency refrain from issuing any further building or grading permits until outstanding violations have been remedied.
- c. DNREC may initiate penalties as stipulated in Section 16 of the Delaware Sediment and Storm Water Management Regulations.

Complete information concerning enforcement and penalties is contained in Chapter 40 Title 7 of the Delaware Code and the Delaware Sediment and Storm Water Regulations, effective January 23, 1993 as amended March 11, 1993.

## **SECTION VII. COASTAL ZONE ACT ENFORCEMENT**

### **A. BACKGROUND**

The Delaware Coastal Zone Act (CZA), 7 Del. Code, Ch. 70, is primarily a land use law which regulates certain activities within Delaware's Coastal Zone. Specifically, the law prohibits new heavy industry uses within the Coastal Zone and requires permits for other manufacturing uses not otherwise prohibited by the Act. Coastal Zone permits, however, are land use permits and do not ordinarily contain emission limits, performance standards or other regulatory requirements often found in other DNREC permits. Permits simply authorize the use of a parcel of land for a particular purpose, and once granted, do not expire. Facilities constructed within the Coastal Zone under a coastal zone permit are still required to obtain all other state and federal permits and are otherwise subject to enforcement procedures under those other permits as detailed in this guide.

The Act addresses enforcement in Sections 7010, 7011 and 7012 of Title 7 with respect to cease and desist orders, penalties and injunctions, respectively. The recent "Regulations Governing Delaware's Coastal Zone" (May 11, 1999) briefly discuss the Secretary's enforcement powers and refer back to the enforcement provisions found in the Act.

A regulated facility has "violated" the Act by beginning construction on new production lines, process equipment, boilers, etc or by initiating new manufacturing operations without first having obtained a permit. Upon such a finding, a DNREC employee will contact the company, inform them of the requirements of the CZA, require that all construction work must immediately stop and provide them with an application for a status decision or a permit to be filed with DNREC within 30 days. This process has historically been very effective. In the Act's almost 30 years, there has been no known fine or cease and desist orders issued against a regulated facility for violating the Act.

### **B. ENFORCEMENT PROCEDURES**

**1. *New or expansion or extension of a regulated use without a CZA Permit.*** The CZA enforcement policy consists of a tiered approach with escalating consequences for failure to adhere to the Act.

- a. At first report of a possible violation: DNREC personnel are dispatched to the site for evaluation (this includes determining if site is in Coastal Zone, is changing land use or new project likely to be a regulated use).
- b. If the site is in the Coastal Zone and the use appears to be a regulated use, the DNREC official will inform the company representative/contractor to stop operations and file for a CZA Status Decision or Permit within 30 days. The Coastal Zone administrator then immediately follows up the site inspection with a certified letter requiring the filing of an application.
- c. If work does not stop, the Attorney General's Office may issue a cease and desist order and may pursue fines as authorized in Sections 7010 and 7011 of Title 7.

- d. Failure to adhere to the Cease and Desist Order may result in an injunction from the Court of Chancery as authorized in Section 7012 of Title 7.

## **2. Failure to implement and/or maintain Environmental Offset Project**

Under most CZA Permits issued after May 11, 1999, an 'environmental offset proposal' is made a part of the CZA Permit. This project must be implemented on schedule as proposed within the company's application and permit. If the offset proposal is not carried out as required, the following enforcement actions would be taken:

- a. Once the issue is brought to the Department's attention, the Secretary will send a Letter of Deficiency via certified mail to the company. This letter will give the company 10 business days to inform the Secretary, in writing, why the offset project has not been fully implemented or maintained and provide to the Secretary the applicant's plan to correct the deficiency. The Secretary may accept the applicant's "cause of non-compliance" and reschedule the final date of implementation, or reject the applicant's stated "cause of non-compliance" and immediately revoke the CZA Permit.
- b. If the company does not proceed with the offset project as originally required or according to a revised schedule as approved by the Secretary, the Secretary may immediately revoke the CZA Permit as specified in the Regulations Governing Delaware's Coastal Zone.

## **CHAPTER SEVEN: ADMINISTRATIVE AND CIVIL CHARGE CALCULATIONS**

### **SECTION I. AIR QUALITY MANAGEMENT PROGRAM**

#### **A. ADMINISTRATIVE ACTIONS**

The Administrative remedies available to the Department include the authority to issue an administrative penalty pursuant to 7 Del. C. § 6005(b)(3), which may be assessed at not more than \$10,000 for each day of violation. Simultaneous violations of more than one pollutant or air contaminant parameter or of any other limitation or standard imposed under Chapter 60 are treated as single violations for each day. If this is viewed as a constraint to achieving penalties commensurate with situations involving numerous or multimedia violations, the Department may consider a civil remedy.

If a public hearing is requested on an administrative penalty and not quickly settled by negotiation, the Department has the option of proceeding with the administrative hearing, or to withdraw the order and file a civil action in Superior Court.

The Department may endeavor by conciliation to obtain compliance with the requirements of 7 Del. C. Chapter 60 by issuing a conciliation order pursuant to 7 Del. C. §6005(b)(2). A conciliation order gives written notice to the responsible party that specifies the complaint and proposes a reasonable time for its correction and compliance with Chapter 60.

The Department may issue a Cease and Desist Order to any person violating any rule, regulation, order, permit condition or provision of Chapter 60, pursuant to 7 Del. C. §6018. This type of Administrative action directly orders the violator to cease the action that is causing the violation. A Cease and Desist order may be issued by the Department as a first step before seeking an injunction. Cease and Desist orders expire 30 days from their issuance date unless it is withdrawn by the Secretary or suspended by injunction.

The Department may use its authority under 7 Del. C. §6308 to issue an imminent hazard order if the Secretary receives information that the storage, transportation, treatment or disposal of any hazardous waste may present an imminent and substantial hazard to the health of persons or to the environment. An imminent hazard order directs the violator to prevent or eliminate the activity constituting the hazard. The Secretary may also direct Department personnel to undertake cleanup of the site and recover costs of the cleanup from the responsible party.

#### **B. CIVIL ACTIONS**

The civil remedies available to the Department include an action in Superior Court where a civil penalty of not less than \$1,000 nor more than \$10,000 may be imposed for each completed violation, pursuant to 7 Del. C. §6005(b)(1). Each day of continued violation is considered a separate violation.

If the violation is completed and there is a substantial likelihood that it will recur, the Department may seek a permanent or preliminary injunction or a temporary restraining order in Chancery Court pursuant to 7 Del. C. §6005(b)(1). If the violation is continuing,

or threatening to begin, the Department may seek a temporary restraining order (TRO) or permanent injunction in Chancery Court pursuant to 7 Del. C. §6005(b)(2).

### **C. CRIMINAL ACTIONS**

There are three levels of criminal remedies available to the Department as specified in 7 Del. C. §6013.

A person who willfully or negligently violates according to 7 Del. C. §6013(a) shall be punished by a fine of not less than \$2,500 nor more than \$25,000 for each day of violation. All criminal actions must be referred to the Enforcement Section. The Superior Court has jurisdiction of offenses under this subsection.

A person who knowingly makes any false statement, representation, etc., according to 7 Del. C. §6013(b) shall, upon conviction, be punished by a fine of not less than \$500 nor more than \$10,000 or by imprisonment for not more than 6 months, or both. The Superior Court has jurisdiction of offenses under this subsection.

The Department also has the option to charge the company/individual in a Justice of the Peace Court for violation of Chapter 60, or any rule or regulation promulgated thereunder. That person shall be punished by a fine not less than \$50, nor more than \$500 for each violation, pursuant to 7 Del. C. §6013(c).

### **D. FEDERAL IMPLICATIONS**

The Department of Justice may share with EPA information and jurisdiction concerning criminal enforcement cases as appropriate.

The Department understands that EPA may assume the lead, or overfile in cases where it becomes apparent that the State is unable or chooses not to act in accordance with this guidance to resolve a violation in a timely and appropriate manner.

### **E. IMPEDIMENTS OR ENFORCEMENT CONSTRAINTS**

Other than those previously identified, there are no other legal impediments that prevent the State of Delaware from adequately resolving a significant violation, even those such as the recovery of the economic benefit at state owned or operated facilities.

### **F. PENALTY DETERMINATIONS**

Penalties against violators require consideration of the following factors pursuant to 7 Del. C. Section 6005(b)(3): nature, circumstances, extent and gravity, ability of a violator to pay, prior history of such violations, degree of culpability, and the economic benefit gained by the violator. The AQM Section takes these factors into consideration to determine the penalty that will be recommended to the Enforcement Panel.

The Department's recommendation of civil or administrative penalties reflects sufficient magnitude to maintain a credible deterrent effect. The Department considers the economic benefit of non-compliance. However, in some instances, the risks involved in litigating the case or the violator's inability to pay a penalty may justify not assessing a penalty that recaptures the full economic benefit. Legitimate litigation risks include

adverse legal precedent and evidentiary problems. The inability of a violator to pay a penalty may be demonstrated by the violator through financial information analyzed by the Department.

The penalty reflects the seriousness of the violation. Consideration of the seriousness of the violation takes into account violations that may not have a readily calculated economic benefit, but are critical to the program's integrity, such as monitoring, reporting, record keeping and testing violations. This amount may be adjusted in some instances to reflect the violator's history of compliance with air pollution laws and regulations, and the source's good faith efforts to comply.

AQM relies on the October 25, 1991 memo from EPA in determining the Clean Air Act Stationary Source Civil Penalty which was clarified on January 17, 1992 to address all violations that are not considered minor in nature regardless of whether the violation meets the definition of a HPV.

The Air Civil Administrative Penalty is broken down into three categories, which include subsets. These include the Benefit Component, the Gravity Component, and the Unique Adjustment Factors.

**The Benefit Component:**

The Benefit Component is included in order to ensure that penalties recover the significant economic benefit of noncompliance. The benefit of noncompliance can include but is not limited to the benefit the source received from delayed costs or the benefit the source received from avoided costs.

**The Gravity Component:**

The Gravity Component is used to deter future violations and reflect the seriousness of the violation. The economic gravity component takes into consideration a variety of factors and circumstances.

**Adjusting the Gravity Component:**

The goal of the administrative penalty is the equitable treatment of the regulated community. In order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts for each case. These factors include:

- Degree of willfulness or negligence
- Degree of cooperation
- Prompt reporting of noncompliance
- Prompt correction of environmental problems
- Cooperation during pre-filing investigation
- History of Noncompliance
- Environmental Damage

## **SECTION II. SOLID AND HAZARDOUS WASTE PROGRAM**

Civil enforcement and related penalties for violation of solid waste program statutes and regulations are found in 7 Del. C., §6005(b)(1) and (2). As specified in Delaware Code, the solid waste program may impose civil penalties of not less than \$1,000 or more than \$10,000 for each completed violation. Each day of continued non-compliance is considered a separate violation. Penalties are calculated through the informal usage of EPA's "1990 RCRA Civil Penalty Policy" (RCPP), with modification to the penalty ranges as specified in state statute. Hazardous waste program civil and administrative enforcement and penalty procedures for violations of its statutes and regulations are set forth in 7 Del. C., §6309(b) and (d) of the Hazardous Waste Management Act. Hazardous Waste civil penalties may range from not less than \$1,000 or more than \$25,000 for each day of violation. The hazardous waste program utilizes the RCPP as written, for guidance when preparing administrative penalty calculations.

### **A. CONSENT ORDERS WITHOUT CIVIL PENALTIES**

Consent Orders may be negotiated without civil penalty in instances where activities of regulatory violation had no or minimal environmental impact, or in instances where a facility is not a recalcitrant or chronic violator or demonstrates a good faith effort to comply. Solid and Hazardous Waste Management Branch (SHWMB) staff, based on evaluation of a case, may make recommendations for not imposing penalties. Recommendations along with justification are submitted through the Branch program managers to the Division's Paralegal for presentation to the Enforcement Panel.

### **B. CONSENT ORDERS WITH CIVIL PENALTIES**

Consent Orders with civil penalties are levied in instances where solid or hazardous waste violations result in a release or have an environmental impact; when a site has a history of being recalcitrant or a chronic violator; or when there has been an economic benefit from non-compliance. For the hazardous waste program, civil penalties are calculated utilizing the RCPP, while the solid waste program utilizes a state-modified version of the document. The penalty for violations is calculated based on a determination of gravity based components, i.e., potential for harm and the extent of deviation from regulatory requirements, as well as economic benefits gained from non-compliance and penalty adjustments based on individual factors, for example, willingness to comply, history of non-compliance, or ability to pay. Recommendations along with justification are submitted through the Branch program managers to the Division's Paralegal for presentation to the Enforcement Panel.

### **C. GRAVITY BASED COMPONENTS**

#### **1. Potential for Harm**

The "Potential for Harm" resulting from a violation is based on two factors. These factors are the risk of human or environmental exposure to a harmful solid waste or to a hazardous waste or its constituents posed by non-compliance, and the adverse effect of non-compliance on the statutory or regulatory purposes for implementing the solid and hazardous waste programs. There are three degrees of potential for harm:

- a. Major – The violation poses or may pose a substantial risk of exposure to harmful solid waste, hazardous waste or its constituents by humans or other receptors,
- b. Moderate – The violation poses or may pose a significant risk of exposure to harmful solid waste, hazardous waste or its constituents by humans or other receptors, and
- c. Minor – The violation poses or may pose a relatively low risk of exposure to harmful solid waste, hazardous waste or its constituents by humans or other receptors.

## **2. Extent of Deviation**

The extent of deviation from the solid and hazardous waste statutory and regulatory requirements relate to the extent in which a violator deviates from the requirements. There are three degrees for extent of deviation.

- a. Major – The violator deviates from requirements of regulation or statute to an extent where most of the requirements are not met resulting in non-compliance;
- b. Moderate – A violator significantly deviates from requirements of regulation or statute, but some of the requirements are met; and
- c. Minor – The violator deviates somewhat from the requirements of regulation or statute, but most of the requirements are met.

## **D. MULTI-DAY COMPONENT**

The solid and hazardous waste program may recommend multi-day penalties for violations of statute or regulation. If it is determined that a violation has continued for more than one day, the next step is to determine the length of time each violation continued and whether a multi-day penalty is warranted. Multi-day penalties are usually calculated for days 2 through 180 of continuing violation. Use of a multi-day component beyond 180 days is discretionary. On occasion, multi-day penalty assessments may be waived for good cause.

## **E. DEGREE OF CULPABILITY**

Civil penalties may be increased significantly if there is evidence that the alleged violation was caused by facility negligence or a deliberate act.

## **F. COMPLIANCE HISTORY**

Compliance history, or rather a pattern of continued non-compliance, is when applicable, a factor that results in an upward penalty adjustment. When a facility has previously violated solid or hazardous waste statutory, regulatory or permitting requirements only to do so again, establishes a pattern of non-compliance. Further, it demonstrates previous enforcement actions failed to act as a deterrent to non-compliance. Unless the current or previous violation occurred by factors outside the control of the facility, consideration is given to adjusting the penalty upward. In determining the necessity of an upward adjustment, solid and hazardous waste program staff consider how similar are the past and current violations, how recent was the previous violation, the number of previous violations and the violator's response in correcting problems.

## **G. ECONOMIC BENEFIT OF NON-COMPLIANCE**

Civil penalty calculations take into consideration the economic benefit of non-compliance. Significant economic benefits are recaptured in the civil penalty, thereby removing economic incentives for non-compliance. In general, cases are not settled for penalty amounts less than the economic benefit of non-compliance, with four exceptions:

1. Economic benefit is less than \$2,500;
2. There are compelling public concerns that would not be served by taking a case to trial;
3. It is unlikely, based on facts of a case, that economic benefit will be recovered during litigation; and
4. The company has documented an inability to pay the total proposed penalty.

## **H. ADJUSTMENT FACTORS**

Civil penalties, excluding the amount of penalty for the economic benefit of non-compliance, may be increased or decreased based on the factors of 1.) good faith efforts to comply, 2.) degree of willfulness or negligence, 3.) history of non-compliance, 4.) ability to pay or, 5.) other factors unique to the alleged violator. It should be noted that after all adjustment factors are considered, the resulting penalty may not exceed the statutory maximum of \$25,000 per day for hazardous waste or \$10,000 per day per violation for solid waste.

Adjustment factors are cumulative, e.g., there may be an upward adjustment factor of 10% for history of non-compliance and a 10% upward adjustment factor for degree of willfulness and/or negligence, for a total upward adjustment of 20%. Adjustments either up or down can be made by a factor of 25% in ordinary circumstances to 26% to 40% of the calculated penalty amount in unusual circumstances.

### **1. Good Faith Effort to Comply/Lack of Good Faith**

Good faith efforts to comply are considered in a downward adjustment of a penalty if the alleged violator promptly identifies and reports non-compliance or begins taking measures to correct a violation prior to notification. Downward adjustments are not usually made if the good faith effort primarily consists of achieving compliance, or because the alleged violator lacks knowledge.

### **2. Degree of Willfulness and/or Negligence**

While committing knowing violations might support a criminal action, there are many instances of culpability which do not meet the criteria of a criminal act. In cases where civil penalties are levied, the penalty may be adjusted upward for willfulness and/or negligence. Conversely, there may be instances where a penalty will be adjusted downward based on the lack of willfulness and/or negligence. Factors considered include how much control the alleged violator had over the events, whether the alleged violator took reasonable precautions against the event, whether the alleged violator knew or should have known the hazards associated with a specific conduct or whether the alleged violator knew or should have known the regulatory requirements. Lack of knowledge in itself is not used as the basis of penalty reduction as it only encourages ignorance of the regulations.

### **3. History of Non-Compliance**

In circumstances where there is clear evidence that previous enforcement actions have not deterred an alleged violator, the history of non-compliance leads to an upward adjustment of penalties. Unless the alleged violations are entirely out of the control of the violator, an upward adjustment may be made. Factors considered before applying an adjustment include:

- a. How similar was the previous violation;
- b. How recent was the previous violation; and
- c. The number of previous violations and the alleged violator's response to the violations with regard to correction.

### **4. Ability to Pay**

Penalties beyond the means of a violator are generally not assessed if it would put a facility out of business. It is unlikely, however, a penalty would be reduced for ability to pay if a facility refuses to correct a violation or there is a long history of previous violations. The burden to demonstrate inability to pay rests with the facility. Usually, "Ability to Pay" is considered at the settlement stage, but only if the issue is raised by the facility. If insufficient information is provided to support a claim, adjustment of the penalty is disregarded.

### **5. Other Factors**

Every calculated penalty is reviewed for the potential of protracted litigation and the penalty amount most likely to be awarded from a trial or hearing. Every enforcement case is evaluated for the inherent strength of the case, e.g., the ability to prove violations, the probability legal arguments will be accepted, the availability of evidence, including witnesses, and the strength of the alleged violators equitable and legal defense. When it is determined a significant litigative risk exists, taken into account is any disproportionate resource outlay involved with litigation that might be avoided by entering into a settlement. Thus, downward adjustments of a proposed penalty might be warranted depending on these litigation considerations.

### **SECTION III. NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM**

#### **A. CHARGE PER VIOLATION/GRAVITY COMPONENT**

If the violation has been completed, a civil penalty of not less than \$1,000 nor more than \$10,000 for each completed violation may be assessed. Each day of continued violation shall be considered a separate violation.

#### **B. COST OF INJUNCTIVE REMEDY**

The cost of injunctive remedy may be used to reduce the fine amount.

#### **C. ECONOMIC BENEFIT**

Any economic benefit or savings resulting from the violation can be used to increase the fine amount.

#### **D. BASELINE CIVIL CHARGE**

The baseline Civil Charge is \$1,000 for each completed violation.

#### **E. ADJUSTMENTS**

Adjustments to the fine amount may be made for efforts made by the facility to correct the problem in an expeditious manner.

#### **F. FINAL RECOMMENDED CIVIL CHARGE**

The final recommended civil charge is the sum of above components.

## **SECTION IV. ACCIDENTAL RELEASE PREVENTION (ARP) PROGRAM**

### **A. TYPES OF VIOLATIONS** The following is based on 7 Del. Code, Chapter 77:

1. Risk Management Plan. Failure to submit a substantially complete risk management plan is a violation.
2. Risk Management Program. Failure to implement a substantially complete risk management program is a violation.

### **B. ENFORCEMENT**

1. The ARP group may issue a “Notice of Violation” explaining the potential violations, if the inspection identifies elements of the facility’s risk program are in substantial non-compliance.
2. When the ARP group issues a “Notice of Violation,” the ARP group presents the inspection findings and an enforcement action recommendation to the Enforcement Panel (see the discussion of the Enforcement Panel under Air Quality Management, Engineering and Compliance “Enforcement Resolution Procedure.”) The Enforcement Panel makes the determination whether or not the Department will take an enforcement action. Several actions are to the Department for ARP enforcement:
  - a. For Risk Management Plan violations, when a facility fails to submit a risk management plan, the Department may seek an administrative penalty of up to \$10,000 per day of violation.
  - b. For Risk Management Program violations, when a facility does not have a substantially complete risk management program, the Department may seek an administrative penalty of up to \$10,000 per day of violation.
  - c. The Department may seek a civil penalty imposed by Superior Court of not less than \$1,000 or more than \$10,000 per day per violation.
  - d. The Department may proceed with a criminal investigation and seek a criminal penalty of not more than \$25,000 per day per violation or imprisonment for 1 year or both. All criminal actions must be referred to the Enforcement Section. These provisions apply when any person “. . . knowingly makes a false statement, representation or certification in any application, record report, plan or other document filed or required to be maintained under this chapter . . . or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter.
  - e. The Secretary may order those operations that present a real and imminent hazard to cease and the Secretary may seek injunctive or other relief in Chancery Court.

### **C. PENALTY MATRIX**

1. For each proposed penalty, the ARP group prepares a penalty matrix that is presented to enforcement panel. The penalty matrix must address:
  - The nature, the circumstances, the extent and the gravity of the violation.
  - Ability of the violator to pay.
  - Prior history of violations.
  - Degree of culpability.
  - Economic benefit.
  - Other factors.
2. The penalty matrix is specific to each situation of noncompliance.

### **D. RELEASES OF REGULATED HAZARDOUS SUBSTANCES**

Facilities that release regulated hazardous substances must report those releases to Department under 7 Del. Code, Section 6028. When the release is one of the regulated substances covered by the ARP regulation, the ARP group requests a written report from the facility that includes the results from the facility's accident investigation. We investigate most of these releases, once we have received the report.

We follow the enforcement guidelines outlined above, if deficiencies in the facility's risk management programs have contributed to the release. We must determine whether the factors resulting in a release are deficiencies or represent significant non-compliance. We seek fines for ARP program violations, not for the release itself.

## SECTION V. UNDERGROUND STORAGE TANK PROGRAM

### A. PENALTY ASSESSMENT

For UST violations, the penalties will be assessed based on the degree that the violation deviates from Delaware's requirements and the potential for harm to human health and the environment. The amount of the penalty will be determined per violation by determining if the violation is a major, moderate or minor deviation from the regulations and if it is a major, moderate or minor potential for harm. The penalty amount for a major, major violation is \$2,000 and a minor, minor violation is \$100. The penalty will be calculated from the day of notification of noncompliance and in the case of multiple violations, will not exceed \$25,000 per day per facility. Once the penalty has been determined, it may be increased or decreased up to 50% depending on the cooperation obtained from the owner, the owner's ability to pay, the willfulness of the violation, prior history of violations and other matters as justice may require.

The following are the definitions for each category of violation and potential threat.

- Major - The violation constitutes substantial noncompliance with the Delaware UST statute and regulations.
- Moderate - The violation results in noncompliance but the violator has implemented the requirements of the Delaware UST statute or regulations to some extent.
- Minor - The violator has met most of the requirements of the Delaware UST statute or the regulations but has deviated slightly from one or more requirements.
- Major - The violation is causing or may cause substantial or continuing risk to human health or the environment.
- Moderate - The violation is causing or may cause a significant risk to human health or the environment.
- Minor - The violation is causing or may cause low risk to human health or the environment.

### B. PENALTY MATRIX

#### 1. Extent of deviation from requirement

	MAJOR	MODERATE	MINOR
MAJOR	\$2,000	\$1,500	\$1,000
MODERATE	\$1,000	\$ 750	\$ 500
MINOR	\$ 200	\$ 150	\$ 100

## 2. Potential for harm

Examples of UST Violations are as follows:

- Major - Major Violations

- Failure to conduct Inventory Control
- Failure to conduct Release Detection
- Failure to Report a Release
- Failure to conduct an Investigation or Corrective Action

- Moderate - Moderate Violations

- Failure to provide notification of a Removal or Abandonment of a tank
- Failure to investigate inventory discrepancies
- Failure to contain a Release
- Failure to submit a Site Safety Plan

- Minor - Minor Violations

- Failure to post a Registration Certificate

For Vapor Recovery violations, penalties will be assessed based on the degree the violation deviates from the Delaware requirements and the potential for adverse impacts to human health or the environment. Each violation is assigned a weighted score on a sliding scale of one to five points with one point being minimal impact and five points being maximum impact. The scores for individual violations are summed and a multiplier is used to obtain the final violation points. The multiplier that is used will be determined by the maximum monthly throughputs will be assigned smaller multipliers than facilities with higher throughputs. For administrative violations such as record keeping where the impacts to human health or the environment are minimal, the lowest multiplier will be used regardless of the throughput of the facility. A penalty of \$100 per point per day of noncompliance will be used to calculate the amount of the fine.

The Vapor Recovery Penalty Matrix is as follows:

**Regulation 24, Section 26 - Gasoline Dispensing Facility - Stage I Vapor Recovery**

Applicable Regulation	Description of Violation	Points
Reg. 24; Sec. 26 a	Not constructed Stage I Controls	5
Reg. 24; Sec. 26 a	Improper fuel transfer operation	5
Reg. 24; Sec.26 c.1.i.	Absence of drop tube or fuel loading operation without a submerged fill	4
Reg. 24; Sec.26 c.1.ii.	Dry breaks not provided for vapor return line	4
Reg. 24; Sec.26 c.1.iii	Vapor return hose to truck damaged or frayed	3
Reg. 24; Sec.26 c.1.iv.	Absence of submerged drop tube for dedicated gauge wells	3
Reg. 24; Sec.26 c.1.v	Vapor tight caps not fitted on fill connections	2
Reg. 24; Sec.26 e	Failure to report excessive emissions	2
Reg. 24; Sec.26 d.	Failure to maintain daily records of deliveries for five years	1

**Regulation 24; Section 36 - Stage II Vapor Recovery**

Applicable Regulation	Description of Violation	Points
Reg. 24 Sec. 36 c. 1.	Failure to construct emission control device	5
Reg. 24 Sec. 36 c. 2.	Failure to construct/install CARB certified equipment	4
Reg. 24 Sec. 36 f. 1.	Failure to carry out performance testing requirements	4
Reg. 24 Sec. 36 i. 1.	Failure to tag and lock out defective equipment	4
Reg. 24 Sec. 36 d. 1. Sec. 36 d. 2. Sec. 36 d. 3.	Failure to meet the appropriate compliance deadline	4
Reg. 24 Sec. 36 g. 2.	Failure to report failures within Twenty-four hours	3
Reg. 24 Sec. 36 i. 3.	Failure to perform routine daily maintenance	3
Reg. 24 Sec. 36 d. 4.	Failure to retrofit systems with dual hoses and remote vapor check valves	3
Reg. 24 Sec. 36 i. 3.	Failure to provide adequate training and written instructions to the operator	2
Reg. 24 Sec. 36 j.	Failure to comply with record-keeping requirements	1
Reg. 24 Sec. 36 g. 1.	Failure to give written notification Prior to testing	1
Reg. 24 Sec. 36 h.	Failure to post operating instructions	1

**Regulation 2, Section 2 - Construction, Installation Alteration and Operation Permits**

Applicable Regulation	Description of Violation	Points
Reg. 2 Sec. 2.1	Failure to apply and obtain appropriate Permit for construction or alteration	3
Reg. 2 Sec. 2.2 Sec. 2.8	Failure to obtain operating permit	3

**Table of Throughput Versus Multipliers**

Throughput (gallons per month)	Multiplier
> 200,000	3
> 100,000 but ≤ 200,000	2
≤ 100,000	1

## **CHAPTER EIGHT: ENVIRONMENTAL IMPROVEMENT PROJECTS ASSOCIATED WITH ENFORCEMENT ACTIONS**

### **SECTION I. BACKGROUND**

In settlements of environmental enforcement cases, DNREC will require the alleged violators to achieve and maintain compliance with state environmental laws and regulations and to pay an administrative or civil penalty. To further DNREC goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Environmental Improvement Projects (EIPs), may be included in the settlement. This policy sets forth the types of projects that are permissible as EIPs, the penalty mitigation appropriate for a particular EIP and the terms and conditions under which they may become part of a settlement. The primary purpose of this policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this policy.

In settling enforcement actions, DNREC requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. DNREC also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, companies would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage companies to adopt pollution prevention and recycling techniques, so that they minimize their pollutant discharges and reduce their potential liabilities.

Alleged violators are sometimes offered the option of funding an environmental improvement project in lieu of a portion of a monetary penalty. Environmental Improvement Projects are a method to achieve environmental benefit while inspiring environmental and community responsibility by parties subject to enforcement actions. DNREC encourages the use of EIPs. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, EIPs can play an additional role in securing significant environmental or public health protection and improvements. EIPs may not be appropriate in settlement of all cases, but they are an important part of DNREC's enforcement program. EIPs may be particularly appropriate to further the objectives in the statutes DNREC administers and to achieve other policy goals, including promoting pollution prevention.

### **SECTION II. APPLICABILITY**

This section applies to settlements of all civil judicial and administrative actions filed after the effective date of the CERGL, and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of an EIP.

This section applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that DNREC administers. This section does not apply to settlements of claims for stipulated penalties for violations of consent decrees or other settlement agreement requirements.

This is a settlement guide and thus is not intended for use by DNREC defendants, respondents, or courts at a hearing or in a trial. Further, whether DNREC decides to accept a proposed EIP as part of a settlement is purely within DNREC's discretion. Even though a project appears to satisfy all of the provisions of the policy, DNREC may decide, for one or more reasons, that EIP is not appropriate (e.g., the cost of reviewing a EIP proposal is excessive, the oversight costs of the EIP may be too high, or the defendant/respondent may not have the ability or reliability to complete the proposed EIP).

This guidance establishes a framework for DNREC to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this section may not be appropriate, in whole or part.

### **SECTION III. DEFINITION AND KEY CHARACTERISTICS OF AN EIP**

Environmental Improvement Projects are defined as environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The three-bolded key parts of this definition are elaborated on below.

**“Environmentally beneficial”** means a EIP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases an EIP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

**“In settlement of an enforcement action”** means: 1) DNREC has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after the Agency has identified a violation (e.g., issued a Notice of Violation, Administrative Order, or complaint).

**“Not otherwise legally required to perform”** means the EIP is not required by any federal, state or local law or regulation. Further, EIPs cannot include actions that the defendant/respondent may be required to perform: as injunctive relief in the instant case; as part of a settlement or order in another legal action; or by state or local requirements. EIPs may include activities that the defendant/respondent will become legally obligated to undertake two or more years in the future. Such “accelerated compliance” projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

Also, the performance of an EIP reduced neither the stringency nor timelines requirements of State environmental statutes and regulations. Of course, performance of an EIP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

## **SECTION IV. GUIDELINES**

DNREC has broad discretion to settle cases, including the discretion to include EIPs as an appropriate part of the settlement. The following guidelines should be used in determining whether an EIP:

1. The Secretary may allow the alleged violator to undertake an environmental improvement project to reduce environmental impacts from the operation of facilities or activities under the control of the alleged violator.
2. The Secretary, in settling an administrative enforcement action, may allow the alleged violator the opportunity to fund or undertake an environmental improvement project. This project is above and beyond what the party is required to do to maintain compliance with the applicable regulatory standards and requirements.
3. Project must advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action. Further, a project cannot be inconsistent with any provision of underlying statutes.
4. DNREC may provide oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the EIP is not adequately performed.
5. The type and scope of each project are determined in the signed settlement agreement. This means the “what, where and when” of a project are determined by the settlement agreement.
6. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project (to be determined later after DNREC or the Department of Justice signs the settlement agreement) are generally not allowed.

## **SECTION V. PENALTY ASSESSMENTS**

1. Calculation of the final penalty is an important part of any settlement. A substantial penalty is generally necessary for legal and policy reasons. Without penalties there would be no deterrence as regulated entities would have little incentive to comply. Penalties are necessary as a matter of fairness to those companies that make the necessary expenditures to comply on time; violators should not be allowed to obtain an economic advantage over their competitors who complied. In cases involving government agencies or entities, such as municipalities or non-profit organizations, where the circumstances warrant, DNREC may determine, based on the nature of the EIPs being proposed, that an appropriate settlement could contain a cash penalty less than the economic benefit of non-compliance. The precise amount of the cash penalty will be determined by the applicable penalty policy. As a general rule, the costs to be incurred by a violator in performing an EIP may be considered in determining an appropriate settlement amount.

2. The Secretary shall not waive the entire monetary penalty assessed against an offending party in lieu of the party providing funding or undertaking an environmental improvement project.
3. Any administrative action taken against a party will ordinarily include a monetary penalty of at least 25 percent of the penalty assessed, and the cost of any environmental improvement project(s).
4. The payment of penalties shall be set forth in a clear schedule when possible including dates certain.
5. The Secretary shall not allow alleged violators to make only contributions to organizations in lieu of a monetary penalty assessment.

## **SECTION VI. COST RECOVERY**

The Secretary will make reasonable efforts to recover the expenses that are associated with executing an enforcement action. Violators shall be liable for the following expenses of the investigation incurred by the State after the notice of violation is issued: direct costs of investigation; legal assistance including paralegal assistance; public hearings; all other costs expressly determined by the Secretary as reasonably related to the investigation of the incident; and the indirect costs related to all of the above. Costs collected under this section will be used to fund the Department's Enforcement Coordinator position pursuant to Section 199 of SB 434, FY 2003 Appropriations Act.

## **SECTION VII. USE OF A THIRD PARTY**

7 Del. C. Title 29 §8003 prohibits the Secretary from directing that any person or entity pay monies to any entity other than the Department. This provision precludes the Department from directing that defendant/respondent subject to enforcement action pay monies to charities or other entities.

EIPs are generally performed either by the defendant/respondent itself (using its own employees) and/or by contractors or consultants. In the past, in a few cases, an EIP has been performed by someone else, commonly called a third party. Because of legal concerns and the difficulty of ensuring that a third party implements the project as required (since by definition a third party has no legal or contractual obligation to implement the project as specified in the settlement document), performance of an EIP by a third party is not allowed.

## **SECTION VIII. OVERSIGHT AND DRAFTING ENFORCEABLE ON-SITE EIPS**

The settlement agreement should accurately and completely describe the EIP. It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to DNREC. If an outside auditor is necessary to conduct this oversight, the

defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official and evidencing completion of the EIP should be required.

To the extent feasible, defendant/respondents should be required to quantify the benefits associated with the project and provide DNREC with a report setting forth how the benefits were measured or estimated. The defendant/respondent is prohibited from publicizing or being recognized for an EIP undertaken as the result of an enforcement agreement. The defendant/respondent should agree that whenever it makes public an EIP or the results of the EIP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

## **SECTION IX. FAILURE OF AN EIP AND STIPULATED PENALTIES**

If an EIP is not completed satisfactorily, the defendant/respondent should be required, pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. Stipulated penalty liability should be established for each of the scenarios set forth below as appropriate to the individual case.

1. Except as provided in paragraph 2 immediately below, if the EIP is not completed satisfactorily, a substantial stipulated penalty should be required. Generally, a substantial stipulated penalty is between 50 and 100 percent of the amount by which the settlement penalty was mitigated on account of the EIP.
2. If the EIP is not completed satisfactorily, but the defendant/respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the EIP, no stipulated penalty is necessary. The balance of the penalty offset by the EIP should be paid as a penalty.
3. If the EIP is satisfactorily completed, but the defendant/respondent spent less than 90 percent of the amount of money required to be spent for the project, a small stipulated penalty should be required. Generally, a small, stipulated penalty is between 10 and 25 percent of the amount by which the settlement penalty was mitigated on account of the EIP.
4. If the EIP is satisfactorily completed, and the defendant/respondent spent at least 90 percent of the amount of money required to be spent for the project, no stipulated penalty is necessary.

## **SECTION X. DNREC PROCEDURES**

### **A. TIMING AND STAFF INVOLVEMENT**

Any proposal to incorporate an EIP into a settlement should be made early in the settlement discussions in order to provide sufficient time for consideration and reasonable notice to the respondents regarding acceptance or rejection of the proposal.

Department staff may suggest project concepts to respondents expressing an interest in performing an EIP and who request project ideas. Staff's role in assisting with EIP formulation should be limited appropriately in order to prevent an excessive time commitment and involvement in actual development of a project.

## **B. DETAILS OF PROPOSAL**

A project proposal must be compiled and submitted in support of a respondent's EIP. Such proposal must include: a project description, name of the project implementor, the natural resources and geographic area benefited by the project, identification of the enforcement action, type of project, analysis of the feasibility and cost of the project, any regulatory requirements, expected project benefits to the public, environment and respondent; a schedule for implementation; certification that the project was not planned by the respondent prior to the enforcement action, and; otherwise meets the requirements of this section and the types of information that will be reported during the projects progress.

## **C. LEVEL OF APPROVAL**

Although this section is intended to be used by all staff, an EIP may not be allowed without the specific approval of the Secretary.

Upon submission of an EIP proposal, the assigned staff should review the proposal considering the five steps below:

- a. Ensure that the project meets the basic definition of an EIP.
- b. Ensure that all guidelines are satisfied.
- c. Ensure that the project is within one (or more) of the designated categories of EIPs.
- d. Ensure that the project satisfied all of the implementation and other criteria.

The staff should then forward a recommendation through their Division Director to the Secretary for final approval.

## **SECTION XI. CATEGORIES OF ON-SITE ENVIRONMENTAL IMPROVEMENT PROJECTS (EIP)**

On-site environmental improvement projects should be within the general geographic area where the violation occurred, within the media (air, water habitat, etc) that was affected by the violation. DNREC has identified seven categories of projects that may qualify as on-site EIPs. In order for a proposed project to be accepted as an on-site EIP, it must satisfy the requirements of at least one category as well as all the other requirements established in this section.

### **1. Public Health**

A public health project provides diagnostic, preventative and/or remedial components of human health care that is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of

potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy.

Public health EIPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the violations.

## **2. Pollution Prevention**

A pollution prevention project is one which reduces the generation of pollution through “source reduction,” i.e. any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project that protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. “In-process recycling” wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials.

## **3. Pollution Reduction**

If the pollutant or waste stream already has been generated or released, a pollution reduction approach – which employs recycling, treatment, containment or disposal techniques – may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as “pollution prevention”. This may include the installation of more effective end-of-process control or treatment technology. This also includes “out-of-process recycling,” wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment, disposal, consumption of energy or natural resources.

#### **4. Environmental Restoration and Protection**

An environmental restoration and protection project is one that goes beyond repairing the damage caused by the violation to enhance the condition of the ecosystem or immediate geographic area adversely affected. These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings. Also included is any project that protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem. Examples of such projects include: reductions in discharges of pollutants which are not otherwise required are not the subject of the violation to an effected air basin or watershed; restoration of a wetland along the same avian flyway in which the facility is located; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation, e.g., a reporting violation, did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects that provide for the protection of endangered species (e.g., developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation). With regards to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and leaded paint, which are a continuing source of releases and/or threat to individuals.

#### **5. Assessments and Audits**

Assessments and audits, if they are not otherwise available as injunctive relief, are potential EIPs under this category. There are four types of projects in this category: a. pollution prevention assessments; b. site assessments; c. environmental management system audits; and d. compliance audits.

- a. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. To be eligible for EIPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure to reduce the likelihood of future violations.
- b. Site assessments are investigations of the condition of the environment at a site or of the environment impacted by a site, and/or investigations of threats to human health or the environment relating to a site.
- c. An environmental management system audit is an independent evaluation of a party's environmental policies, practices and controls. Such evaluation may encompass the need for: (1) a formal corporate environmental compliance policy, and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation and maintenance programs; (4) environmental compliance officer programs; (5) budgeting and planning systems for environmental compliance; (6) monitoring, record keeping

and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification, risk assessment.

- d. An environmental compliance audit is an independent evaluation of a defendant/respondent's compliance status with environmental requirements. Credit is only given for the costs associated with conducting the audit. These costs need to be quantified, in a monetary amount, reflecting the actual cost of the audit/EMS, in the agreement with the Department. While the EIP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements. In general, compliance audits are acceptable as EIPs only when the defendant/respondent is a small business.

These two types of assessments and environmental management system audits are allowable as EIPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of the study are known is difficult. Further, for pollution prevention assessments and environmental management systems audits, many of the implementation recommendations from these studies may constitute activities that are in the defendant/respondent's own economic interest.

These assessments and audits are acceptable where the primary impact of the project is at the same facility, at another facility owned by the operator, or at a different facility in the same ecosystem or within the immediate geographic area (e.g., a publicly owned wastewater treatment works and its users). These assessments and audits are only acceptable as EIPs when the defendant/respondent agrees to provide DNREC with a copy.

## **6. Environmental Compliance Promotion**

An environmental compliance promotion project provides training or technical support to other members of the regulated community to: 1) identify, achieve and maintain compliance with applicable statutory and regulatory requirements; 2) avoid committing a violation with respect to such statutory and regulatory requirements; or 3) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the defendant/respondent's economic sector.

Environmental compliance promotion EIPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where DNREC has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act

pretreatment violations, the compliance promotion EIP must be directed at ensuring compliance with pretreatment requirements.

## **7. Emergency Planning and Preparedness**

An emergency planning and preparedness project provides assistance – such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training – to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs ) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness EIPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations. Further, this type of EIP is allowable only when the EIP involves non-cash assistance and there are violations of EPCRA or reporting violations under CERCLA §103 alleged in the complaint.

## **SECTION XII. OFF-SITE ENVIRONMENTAL IMPROVEMENT PROJECTS**

Off-site environmental improvement projects contribute generally to the enhancement of Delaware's environment

### **A. ENVIRONMENTAL IMPROVEMENT PROJECT BANK**

1. If a party is allowed to fund or undertake an environmental improvement project not relating to its own facility or operation, the party shall select, subject to the Department's approval, an environmental improvement project from the Environmental Improvement Project Bank.
2. DNREC, in consultation with the Governor's Advisory Council on Environmental Control, will develop an Environmental Improvement Project Bank. The Bank will be comprised of a listing of projects and corresponding descriptions that will be approved by the Council.
3. Projects may be submitted by private and public non-profit organizations or by the Department.
4. In order to be considered, projects must meet criteria developed by DNREC in consultation with the Council.
5. The cost of any single project in the Environmental Improvement Project Bank shall not exceed \$100,000.
6. The Bank will be organized according to: 1) the geographic location of the project; 2) by the media (air, water, habitat, etc.), and 3) general projects that result in environmental improvement when implemented.
7. Once the initial listing of projects is developed, the Council may add new projects to the list at any time after considering and approving such projects as part of its regular meetings.
8. The Department may request, at any time, any reasonable information pertaining to an Environmental Improvement Project from the party receiving funds.
9. The Council or Department will contact those organizations whose projects are in the bank pending funding at least once a year to determine if the project is still viable.

## **B. CRITERIA FOR OFF-SITE ENVIRONMENTAL IMPROVEMENT PROJECTS**

The following criteria are intended to provide guidance to applicants considering submitting a project to the Environmental Improvement Project Bank and to the Governor's Council on Environmental Control in considering projects that should be included in the Bank. To be considered, projects must clearly and convincingly improve Delaware's environment and meet all of the following three criteria in Section A and at least one of the criteria in Section B:

### Section A.

1. Projects must be fully implementable.
2. Projects must begin immediately and have a clearly defined end.
3. Projects must address an environmental priority as defined in DNREC's current Strategic Plan.

### Section B.

1. Project is innovative or demonstrative.
2. Project is a public – private partnership and/or can be used to leverage additional public or private resources.
3. Project provides hands-on experiences for school children or the general public or environmental education.

Other factors that may be considered include:

Whether the applicant has received prior funding from DNREC for projects, and if so, the performance of the applicant in carrying out the project(s).

## **CHAPTER NINE: ADMINISTRATIVE PROCEEDINGS: PUBLIC HEARINGS, ENVIRONMENTAL APPEALS BOARD (EAB) HEARINGS, AND APPEALS FROM EAB DECISIONS**

### **SECTION I. INTRODUCTION**

This section of DNREC's Compliance and Enforcement Policy addresses Public Hearings, Environmental Appeals Board (EAB) Hearings, and Appeals from EAB Decisions.

### **SECTION II. PUBLIC HEARINGS**

#### **A. SCOPE**

Public Hearings include, but are not limited to, hearings held on behalf of the public relating to the promulgation of rules, regulations, and plans, permit applications and permits, and alleged violations contained in Administrative Orders, including penalty assessments, variance requests, and hearings related to cost recovery billings. These hearings are presided over by the Department's Hearing Officer, who, based on findings of fact at the hearing, makes a recommendation to the Secretary. The Secretary's final determination is then set forth in the form of an Order, which outlines the facts, issues, and reasons for his/her final determination.

#### **B. PROCEDURES**

Whether on a permit application or on an administrative enforcement action, DNREC follows certain statutory requirements in providing a public hearing. DNREC must give twenty (20) days specialized notice by certified mail and by publication in certain newspapers. The applicant or violator may produce any competent evidence in its behalf. Subpoenas shall be issued at the request of either the applicant and/or violator. In the case of refusal by a party to obey a notice of hearing or subpoena that has been issued, the Superior Court in the county in which the hearing is held has the jurisdiction and authority, at the request of the Secretary, to issue an Order requiring the subpoenaed party to appear, testify, and/or produce evidence as the case may require. 7 Del. C. § 6006.

#### **C. HEARING OFFICER**

Public Hearings are conducted by a Hearing Officer, who, based upon the record generated in each case, makes recommended findings of fact, conclusions of law, and sanctions. DNREC has on staff a full-time Hearing Officer. Occasionally, directors and others will also serve as the Hearing Officer. The individual who will serve as the Hearing Officer for each case is appointed by the Secretary. The Hearing Officer, acting as the duly authorized designee of the Secretary, may administer oaths, issue subpoenas, and question witnesses.

## **D. PUBLIC RECORD**

All of the documentation received by the Hearing Officer from the parties involved, both in preparation for, during, and subsequent to the hearing(s) held in each case, constitutes what is known as the public record. The public record may consist of, but is not limited to, copies of the published hearing notices, exhibits submitted by any of the involved parties, a copy of the actual recorded transcript generated as a result of the public hearing, and any other tangible documentation introduced by the Secretary or other party to each case.

Often, the Hearing Officer will leave the record open after the public hearing has concluded, in order to receive agreed-upon post-hearing written submissions. If the record is left open subsequent to the conclusion of the public hearing, all parties are advised as to when the record will formally close, and are instructed to provide all requested post-hearing documentation to the Hearing Officer on or before the date on which the public record will be closed.

## **E. HEARING OFFICER'S REPORT**

After the public record has been formally closed on a particular case, the record generated in that matter is then reviewed in its entirety by the Hearing Officer. At that time, the Hearing Officer prepares a written report on the matter and submits the same to the Secretary for review and action. The Hearing Officer's Report consists of the following: (1) a background summary of the issues surrounding each case; (2) the findings of fact based upon the public record generated in the case; (3) the legal conclusions arrived at as a result of the Hearing Officer's review of the entire public record; and (4) the recommendations made to the Secretary by the Hearing Officer concerning action to be taken in each matter.

## **F. SECRETARY'S ORDER**

After receipt and review of the Hearing Officer's Report in each case, the Secretary then signs an Order that will best further the purpose of Delaware law with respect to conservation and environmental control mandates (7 Del. C., Chapter 60). The Secretary's Order includes reasons for the actions to be taken concerning the issues surrounding the public hearings. All parties involved in or affected by the Order are given written notice of the same by the Secretary.

# **SECTION III. HEARINGS BEFORE THE ENVIRONMENTAL APPEALS BOARD**

## **A. SCOPE**

Another type of administrative hearing, separate from the hearings conducted by the Department's Hearing Officer, is an appeal before the Environmental Appeals Board (EAB). The EAB hears appeals of case decisions rendered by DNREC. Decisions expressly appealable to the EAB include those involving the following Chapters of Title 7:

Chapter 60, General Environmental Protection, § 6007(b);

Chapter 63, Hazardous Waste Management § 6313;  
Chapter 66, Wetlands, § 6610;  
Chapter 71, Noise Control and Abatement, § 7113(a);  
Chapter 72, Subaqueous Lands, §7210;  
Chapter 74, Underground Storage Tanks, §7412; and  
Chapter 77, Extremely Hazardous Substances Risk Management, §7717.

Any person whose interest is “substantially affected” may appeal to the EAB, pursuant to 7 Del. C. § 6008(a). To prove standing under the “substantially affected” standard, a party is required to show an injury in fact, and that such injury is within the zone of interest sought to be protected by the statute. Oceanport Indus., Inc. v. Wilmington Stevedores, Inc., Del. Supr., 636 A.2d 892 (1994). A sole claim of economic injury is not enough. Id. A party claiming standing respecting an environmental problem must show that alleged environmental injury will actually affect it. Id.

## **DEPUTY ATTORNEY GENERAL REPRESENTATION**

One Deputy will represent DNREC, and another Deputy will represent the EAB. The Deputies must be careful not to engage in ex parte communications. This arrangement may raise questions with some, but the mere status of the Deputies as employees in the same agency is not a violation of due process or otherwise unfair. The mere prosecution of a case by one Deputy before another Deputy acting in an adjudicatory capacity is not sufficient to overcome the strong presumption of honesty and integrity in those serving as adjudicators, in the absence of specific evidence of bias. Blinder, Robinson & Co. v. Bruton, Del. Supr., 552 A.2d 466 (1989).

## **B. PROCEDURE**

### **1. Timing:**

The appeal to the EAB must be made “within 20 days after receipt of the Secretary’s decision or publication of the decision.” 7 Del. C. § 6008(a). The Board considers the 20 day appeal limit to be a jurisdictional limitation, and where an appeal is not filed within the time given, the Board lacks jurisdiction to consider the appeal. Appeal of the Delaware Waterman’s Association, Inc., EAB No. 92-10 (July 21, 1993).

### **2. Filing:**

All written statements shall be completed and addressed to the Environmental Appeals Board, 89 Kings Highway, Dover, Delaware 19901, attention: Administrative Assistant to the Environmental Appeals Board. EAB Reg. § 102(e).

### **3. Form:**

The request for an appeal shall be submitted in the form of a written statement. The statement shall set forth clearly and concisely the following: 1) the interest which has been substantially affected; 2) an allegation that the decision is improper; and 3) the reasons why the decision is improper. The request for appeal should be stated with sufficient specificity to notify the

Board and DNREC of the reasons for the appeal. The written statement shall also set forth an estimate of the number of witnesses and the time involved in preventing the appeal at the public hearing. EAB Reg. §§ 102(a) and (b).

4. Costs:

A \$50 “deposit for costs” shall accompany the statement of appeal. EAB Reg. § 102(c). Presumably, this is more accurately described as a payment for costs of the Board, and no further costs will be assessed.

5. Scheduling of Hearing:

The Board shall schedule, but not necessarily conduct, a hearing within 30 days following the receipt of the appeal. The EAB shall conduct, but not necessarily complete, the hearing within 180 days following the receipt of the appeal unless the parties agree otherwise. 7 Del. C. § 6007(c).

6. Quorum:

A simple majority of the EAB shall constitute a quorum. A simple majority of those members of the EAB present shall be required to override the decision of the Secretary. 7 Del. C. § 6007(c).

7. Witness and Documents Lists:

At least 10 days prior to the date set for the pre-hearing conference, DNREC and the appellant shall submit to the Deputy Attorney General assigned to the EAB (“EAB Deputy”) and to each other a list of witnesses and documents and other evidence proposed to be entered into evidence at the hearing. The parties shall submit final witness and documents lists and shall raise all objection to such witnesses and documents at the pre-hearing conference. Evidence not so identified shall be admitted into evidence only on a showing of reasonable cause. Evidence not identified may be introduced for purposes of rebuttal or surrebuttal at the discretion of the Board. EAB Reg. §§ 103(b), (c) and (d).

8. Discovery:

Generally, there is no discovery in administrative proceedings. There is no absolute due process right to engage in discovery as a matter of course. See Kotler, *supra* (in proceeding subject to the APA). The EAB’s Regulations provide for discovery by consent of the parties. EAB Reg. § 103(g).

9. Pre-Hearing Conference:

At least 20 days prior to the hearing, the EAB Deputy shall conduct a pre-hearing conference by telephone or in person. The purposes of the conference include identifying undisputed facts, identifying the witnesses and receiving a brief summary of the testimony of the witnesses, identifying documents, resolving procedural matters, and identifying issues. After the pre-hearing conference, the EAB Deputy may provide the Board members

with the list of witnesses, documents, and a memo summarizing the issues on appeal. EAB Reg. §§ 103(a) and (e).

#### 10. Subpoenas:

The Board is empowered to issue subpoenas by certified mail for witnesses or evidence. 7 Del. C. §§ 6006(3) and 6007(b). Parties requesting subpoenas shall do so no later than 15 days before the date of the hearing. EAB Reg. § 103(f).

#### 11. Date of Hearing.

Hearings are conducted on the second and fourth Tuesdays of each month. EAB Reg. § 105.

### **D. ADMINISTRATIVE PROCEDURES ACT**

The EAB is also subject to the Administrative Procedures Act. 29 Del. C. § 10161(a)(9). The EAB is required to give 20 days notice, in a particular format, prior to the hearing. 29 Del. C. § 10122. The EAB's power and conduct requirements for the hearing are found in 29 Del. C. § 10125. For example, the EAB is empowered to issue subpoenas for witnesses and other sources of evidence, either on the EAB's initiative or at the request of any party.

### **E. CHRONOLOGY/RECORD**

The EAB uses the term "chronology" for selected documents from the record of the proceedings below. The chronology should include the final letter or other document indicating the action of the Secretary, the permit if applicable, the Hearing Officer's Report if applicable, the transcript of the hearing before the Secretary unless the Board determines that it is impracticable to provide such transcript. The chronology shall be available for copying by the parties no later than five days before the pre-hearing conference. The chronology shall also include all statements of appeal. EAB Reg. §§ 104(a) and (b). The record before the EAB shall include the entire record before the Secretary. 7 Del. C. § 6008(b).

The parties may agree, or counsel for the EAB may order the parties, to submit pre-hearing memoranda and documentary evidence, which may be provided to the Board members prior to the hearing. See EAB Reg. § 104(c).

### **F. EVIDENCE**

The EAB may exclude any evidence which is plainly irrelevant, immaterial, insubstantial, accumulative, or unduly repetitive, and may limit unduly repetitive proof, rebuttal, and cross-examination. 7 Del. C. § 6008(b). The EAB has the power to expand upon the record by accepting competent evidence produced by any party to the appeal. Tulou v. Raytheon Service Co., Del. Super., 659 A.2d 796 (1995). Where the hearing before the Board is the initial hearing, the Board "should provide a full opportunity to present evidence on the subjects which are relevant to [the] merits of the Secretary's order."

T.V. Spano Bldg. Corp. v. Wilson, Del. Super., 584 A.2d 523, 530 (1990) (finding that the Board improperly limited evidence to information only available before a particular date).

On the other hand, where there is a full hearing below before the Secretary, evidence that could have been presented below should not be received for the first time on appeal. If the Board had concluded that the new evidence materially undermined the Secretary's decision, the only proper procedure would be a simple remand for the Secretary to consider the new evidence. Tunnell Companies, L.P./Baywood Greens Permit, EAB Appeal No. 97-01 (January 7, 1998).

Non-parties shall not present evidence. Appellants other than permit applicants or an alleged violator may only introduce evidence which was before the Secretary. Strict rules of evidence shall not apply. All evidence having probative value commonly accepted by a reasonably prudent person in the conduct of his or her affairs shall be admitted. EAB Reg. §§ 105(c) and (d). In practice, the EAB will usually admit evidence, deeming any objections to go to weight and not admissibility.

#### **G. ORDER OF PROOF AT HEARING**

Following opening statements, each party shall have an opportunity to produce evidence in support of such party's position. The appellant(s) shall produce evidence first, followed by DNREC and then followed by the permittee, if any. After initial testimony and cross-examination, any witness may be examined by any member of the Board. Rebuttal and surrebuttal evidence will be allowed. EAB Reg. § 105(h). In practice, the Board will often ask questions during direct examination.

#### **H. BYPASS TO SUPERIOR COURT**

At any time after the appeal to the EAB, the parties may, by stipulation, proceed directly to Superior Court. If this becomes the case, the Court may affirm, reverse, or remand the Secretary's decision, based upon the record before the Secretary and the Board, as well as whatever evidence the parties may submit by stipulation. 7 Del. C. § 6008(g).

#### **I. STANDARD AND SCOPE OF REVIEW**

The burden of proof is upon the appellant to show that the Secretary's decision is not supported by the evidence on the record before the EAB. 7 Del. C. § 6008(b). Where the Secretary makes a decision involving consideration of technical evidence following an adversarial proceeding below, the EAB must give the Secretary's decision some deference, since the EAB is holding a second hearing. It is impossible to quantify how much deference is due. The EAB must treat with greater caution technical evidence which the Secretary did not hear and weigh because otherwise the hearing before the Secretary is unduly depreciated. Where there is a full adversarial proceeding and the weighing of technical evidence below, the Appellant "must prove to the Board that the Secretary lacked evidence to support his decision." Tulou v. Raytheon, Serv. Co., Del. Super., 659 A.2d 796, 806 (1995).

## **J. RELIEF AUTHORIZED**

The EAB may affirm, reverse, or remand with instructions to the Secretary. The EAB is not expressly authorized to, on its own, modify any permit or order of the Secretary. See 7 Del. C. § 6008(b).

## **SECTION IV. APPEAL FROM EAB TO SUPERIOR COURT**

### **A. SCOPE**

Any person(s) aggrieved by any decision of the EAB may appeal to the Superior Court by filing a petition, duly verified, setting forth that such decision is illegal, and specifying the grounds of the illegality. Any such appeal shall be perfected within 30 days of the receipt of the written opinion of the Board. 7 Del. C. § 6009(a). The EAB ordinarily will refuse to participate as a party before the Superior Court on an appeal of one of its decisions.

### **B. RELIEF AUTHORIZED**

The Court may affirm, reverse, or modify the Board's decision. However, the Board's findings of fact shall not be set aside, unless it is determined by the Court that the records contain no substantial evidence that would reasonably support said findings. The Court may find that additional evidence should be taken into consideration. If this becomes the case, then the Court may remand the case to the Board for completion of the record. 7 Del. C. § 6009(b).

### **C. STAY OF ACTION**

No appeal will automatically stay an action of the Secretary. However, upon application, the Board or the Court of Chancery may stay the action for good cause, pending disposition of the appeal. 7 Del. C. § 6009(c).

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## APPENDIX I: DNREC AUTHORITIES - CONFIDENTIALITY PROVISIONS

### § 6304. Prohibitions; records.

(a) No person shall generate, store, transport, treat or dispose of hazardous wastes in this State without reporting such activity to the Department as required by this chapter and regulations promulgated hereunder.

(b) No person shall generate, store, treat, transport or dispose of hazardous wastes within this State except in compliance with this chapter and regulations hereunder.

(c) Information obtained by the Department under paragraph (10) of subsection (a) of § 6305 of this title or pursuant to any other provisions of this chapter shall be available to the public as provided in Chapter 100 of Title 29, unless the Department certifies such information to be proprietary. The Department may make such certification where any person shows to the satisfaction of the Department that the information, or parts thereof, if made public, would divulge methods, processes or activities entitled to protection as trade secrets. Nothing in this subsection shall be construed as limiting the disclosure of information by the Department to any officer, employee or authorized representative of the state or federal government concerned with effecting this chapter or the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, as amended from time to time [42 U.S.C. § 6901 et seq.]. Prior to disclosure of proprietary information to an authorized representative who is not an officer or employee of the state or federal government, the person providing the proprietary information may require the representative to sign an agreement prohibiting disclosure of such information to anyone not authorized by this chapter or the terms of the agreement. Such agreement shall not preclude disclosure by the representative to any state or federal government officer or employee concerned with effecting this chapter or Pub. L. 94-580, as amended.

(d) It shall be unlawful for any person to destroy, alter or conceal any records maintained and in existence as of July 11, 1980, with respect to any generation, treatment, disposal, storage or transportation of hazardous waste during or subsequent to any such operation. This requirement applies equally to facilities and sites closed prior to July 11, 1980. The Secretary shall prescribe by regulation terms and conditions upon which records shall be kept, including the period of retention.

(e) The Secretary shall issue such orders as may be necessary to carry out his duties under this chapter.

(f) Except with respect to its powers as set forth in the Hazardous Materials Transportation Act, §§ 8223-8230 of Title 29, the Commission shall serve in an advisory capacity to the Secretary and may consider all matters relating to the implementation of this chapter and regulations promulgated thereunder.

(g) No person shall transport or deliver hazardous waste to any facility operated by or on behalf of the Delaware Solid Waste Authority, except to the extent authorized by the Authority with respect to small quantity source separated designated materials which are delivered to recycling centers for disposal in an authorized manner. (62 Del. Laws, c. 412, § 3; 63 Del. Laws, c. 372, § 1; 67 Del. Laws, c. 432, § 6.)

## **§ 7107. Authority of Department of Natural Resources and Environmental Control.**

The Department of Natural Resources and Environmental Control shall have the authority to:

- (1) Conduct and supervise research programs for the purpose of determining the causes, effects and hazards of noise;
- (2) Conduct and supervise statewide programs of noise control education, including the preparation and distribution of information relating to noise control;
- (3) Enter and inspect any building or place, except private residences, for the purpose of investigating an actual or suspected source of noise and ascertaining compliance or noncompliance of any statute, rule or regulation of the Department. Any information relating to secret processes or methods of manufacture or production obtained in the course of such inspection, investigation or determination shall be kept confidential and shall not be admissible in evidence in any court or in any other proceedings except to the extent herein provided. If tests of any type are made for the purpose of determining whether or not a violation has occurred, or for any other purpose in connection with such entry and inspection, a duplicate of the results of the tests shall be furnished promptly to the person suspected of violating the statute, code or regulation;
- (4) With the approval of the Governor, cooperate with and receive money from the federal government, the state government or any county or municipal government or from private sources for the study and control of noise; and
- (5) Review and approve any plan to construct any highway corridor, the construction or operation of which may in the opinion of the Department cause or contribute to an amount of noise deemed excessive by the Department. (63 Del. Laws, c. 369, § 1.)

## **§ 7408. Inspection and monitoring.**

(a) For the purposes of developing or assisting in the development of any regulation or enforcing this chapter, any owner or operator of any underground storage tank used for storing regulated substances shall, upon the request of any duly designated officer or employee of the State, furnish information relating to such tanks or contents and permit such person at all reasonable times and in accordance with § 6024 of this title, to have access to, and to copy all records relating to such tanks and to conduct such monitoring as such officer deems necessary. For the purposes of developing or assisting in the development of any regulation or enforcing this chapter, such officer, employee or representative is authorized:

- (1) To enter at reasonable times an establishment or other place where an underground storage tank is located;
  - (2) To inspect and obtain samples from any person of such regulated substances and to conduct monitoring of the tanks, contents or surrounding soils. Each such inspection shall be commenced and completed with reasonable promptness.
- (b) In submitting data under this chapter, a person required to provide such data may:
- (1) Designate the data which such owner or operator believes is entitled to protection under this section; and
  - (2) Submit such designated data separately from other data submitted under this chapter.
- (c) Any such records, reports or information obtained shall be entitled to protection under § 1905 of Title 18 of the United States Code. (65 Del. Laws, c. 161, § 1.)

## § 7710. Inspection.

(a) Inspection program components. Essential components of a facility inspection shall include at a minimum:

- (1) A sampling of all required risk management program documentation;
- (2) A physical inspection of equipment associated with the process containing the EHS to verify implementation of the risk management program;
- (3) Evidence of the application of engineering and maintenance standards associated with EHS substances; and
- (4) Sampling interviews of personnel associated with EHS to verify that the provisions of the risk management program have been implemented.

(b) Confidential information. All documents (such as, but not limited to: inspection reports, responses to inspection reports, notices of violation, Administrative Orders and penalties, correspondences and facility RMPs) submitted to the Department or developed by the Department pursuant to this chapter shall be handled consistent with the Freedom of Information Act (Chapter 100 of Title 29) with the exception of the following which shall be maintained as confidential by the Department:

- (1) Sections of inspection notes containing or relating to trade secrets, and/or commercial or financial information observed, viewed or obtained orally during an inspection that may result in substantial harm to a business' competitive edge.
- (2) Sections of inspection notes containing the identity of persons interviewed during the inspection.

(c) Inspection program schedule. The Department shall develop and issue a phased initial inspecting program on the basis of degree of risk. Facilities with extremely hazardous substances having the highest substance hazard indexes shall be inspected before facilities with lower indexed extremely hazardous substances. Facility inspections shall continue during the regulation revision process and be an integral part of the revised regulation.

The Secretary may determine the frequency of inspection of a specific facility, based on:

- (1) Compliance history;
- (2) The recent occurrence of an incident involving an extremely hazardous substance; or
- (3) Recent compliance with this chapter.

Each facility shall be inspected at least once every 3 years.

(d) Inspection Protocol. All inspections shall be conducted by trained and tested state personnel or Program Inspection Protocol issued by the Department and adopted after public hearing. The Protocol consists of specific questions, facility characteristics, required risk management program components, physical observations and interviews.

(e) Inspection training program. The Department shall have a training program to periodically educate and test state employees or representatives responsible for inspecting regulated facilities. The program shall also be available to personnel responsible for operation of facility risk management programs in accordance with the purpose of this chapter. Preparation of such a training program shall make full use of appropriate available resources. Successful completion of such a training program is a requirement for all state employees or representatives responsible for inspecting regulated facilities or dealing with implementation of this chapter.

(f) Access to facilities and records. The Department has the right to enter any facility at any time to verify compliance with this chapter. Inspections for the purpose of document review shall be scheduled with the facility with reasonable advance notice and, when possible, mutual agreement. Inspectors shall comply with all safety regulations of the facility.

(g) A report of compliance or noncompliance. The Department shall issue an inspection report detailing the findings of compliance or noncompliance with the risk management program requirements for each inspection. This report shall contain the Department's recommendations based on inspection for potential improvements to a facility's risk management program. In the event that the Department has a finding of substantial noncompliance, the Department may issue a written Notice of Violation and may proceed as detailed in § 7715 of this title.

(h) Resolution of unfavorable inspection findings. Responsible person(s) of the facility shall respond to the Department's recommendations from the written inspection report within 60 days and notify the Department of any changes and additions to improve their risk management program or respond with a remediation plan and schedule for the Department's approval. Upon a finding of substantial noncompliance with the risk management program, with the risk management plan or upon a finding of failure to implement the approved remediation plan or schedule, the Department may proceed as detailed in § 7715 of this title.

(i) Written agreement. If the responsible person(s) and the Department agree on measures to correct risk management program deficiencies or omissions, the parties may enter into a written agreement.

(j) Issuance of Administrative Order. If, after notice to the responsible person(s) of the facility and an administrative hearing with written findings, the parties are unable to reach an agreement on improvements to the facility risk management program to bring it into compliance, the Department shall issue an Administrative Order requiring correction of deficiencies of the risk management program including a schedule for the corrections as detailed in § 7715 of this title.

(k) Injunctive relief. If, upon Department inspection and notice to the responsible person(s) of the facility, a functioning risk management program is lacking and a situation exists which demonstrates the purpose of this chapter is in real and imminent jeopardy, the Department may promptly seek injunctive relief in Chancery Court. (66 Del. Laws, c. 417, § 1; 71 Del. Laws, c. 308, § 1.)

#### **§ 7805. Trade secret protection.**

All trade secret information, written, verbal or observed, obtained pursuant to this chapter by the Department or any other state agency will be held as confidential unless such information is already a matter of public record or disclosure is required by law. Nothing in this section shall be construed as limiting the disclosure of information by the Department to any officer, employee or authorized representative of the state or federal government concerned with effecting this chapter. Prior to disclosure of trade secret information to an authorized representative who is not an officer or employee of the state or federal government, the person providing the trade secret information may require the representative to sign an agreement prohibiting disclosure of such information to anyone not authorized by this chapter or the terms of the agreement. Such agreement shall not preclude disclosure by the representative to any state or federal government officer or employee concerned with effecting this chapter. Any person who, by virtue of obtaining access to confidential trade secret information and knowing that disclosure is prohibited, knowingly and willfully discloses the information to any person not entitled to receive it shall be in violation of this chapter and subject to disciplinary actions provided by the Merit Rules, including dismissal. (67 Del. Laws, c. 361, § 1.)

### **§ 7902. Statement required.**

Applicants for National Pollution Discharge Elimination System (NPDES), air, hazardous waste, solid waste, commercial subaqueous and coastal zone permits issued under the authority of Chapters 60, 63, 70 and 72 of Title 7, except those facilities which have been permitted by the Department for a period of at least 5 years shall have on file at the Department, a statement containing the following information:

- (1) A complete list of all current members of the board of directors, all current corporate officers, all persons owning more than 20 percent of the applicant's stock or other resources, all subsidiary companies, parent companies and companies with which the applicant's company shares 2 or more directors;
- (2) A description of all notices of violation, criminal citations, arrests, convictions, or civil or administrative penalties assessed against the applicant or any other person identified under paragraph (1) of this section for the violation of any environmental statute, regulation, permit, license, approval or order, regardless of the state in which it occurred, for the 5 years prior to the date of the application;
- (3) A description of the disposition of any of the items identified pursuant to paragraph (2) of this section and any actions that have been taken to correct the violations that led to such enforcement actions;
- (4) A description of any felony or other criminal conviction of any person identified in paragraph (1) of this section that resulted in a fine greater than \$1,000 or a sentence longer than 7 days, regardless of whether such fine or sentence was suspended; and
- (5) Copies of any and all settlements of environmental claims, whether or not such settlements were based on agreements where the applicant did not admit liability. (68 Del. Laws, c. 419, § 1.)

### **§ 7903. Confidential information.**

(a) All information provided pursuant to § 7902(2) of this title shall be considered public information and shall be considered part of the public record pertaining to the permit application.

(b) If the applicant can demonstrate that information provided pursuant to paragraphs (1), (3), (4) and (5) of § 7902 of this title is not a matter of public record at the time of the application, and that the release of such information to the public would constitute an invasion of personal privacy or would seriously affect the applicant's business or competitive situation, the applicant may claim that such information is confidential information.

(c) Confidential information shall not be released to the public or made part of the public record and shall only be released to law enforcement personnel performing the background investigation, authorized representatives of the office of the Attorney General, or sworn law enforcement personnel of other jurisdictions performing similar investigations on the applicant. (68 Del. Laws, c. 419, § 1.)

**§ 9116. Confidentiality of proprietary information.**

Information obtained by the Secretary under this chapter shall be available to the public as provided in Chapter 100 of Title 29, unless the Secretary certifies such information to be proprietary. The Secretary may make such certification where any person shows to the satisfaction of the Secretary that the information, or parts thereof, if made public, would divulge methods, processes or activities entitled to protection as trade secrets or as confidential financial or commercial information. Nothing in this section shall be construed as limiting the disclosure of information by the Secretary to any officer, employee or authorized representative of the state or federal government to effectuate the purposes of this chapter. Furthermore, nothing in this section shall prevent the Secretary from including in the remedial decision record information concerning the cost of the remedy or the manner in which it is performed. Prior to disclosure of information certified by the Secretary to be proprietary to an authorized representative who is not an officer or employee of the state or federal government, the person providing the proprietary information may require the representative to sign an agreement prohibiting disclosure of such information to anyone not authorized by this chapter or the terms of the agreement. Such agreement shall not preclude disclosure by the representative to any state or federal government officer or employee concerned with effecting this chapter. (67 Del. Laws, c. 326, § 1; 70 Del. Laws, c. 218, § 32.)

## APPENDIX I – 2: CHRONIC VIOLATOR REGULATIONS *(Reserved)*

## **APPENDIX II – 1: REGULATORY DEVELOPMENT PROCESS**

### **GENERAL PROVISIONS**

- A. The process is comprised of 23 steps, beginning with the decision to start an action and ending with the distribution of the final regulations. This document outlines the individual components of each of these steps and indicates who is responsible for seeing that each of these components is satisfied.
- B. The purpose of this process is to ensure that, to the extent possible, everyone who is interested in a proposed action regarding a regulation is properly notified about it, that the Department follows a predictable and open process in developing, adopting, amending, and/or repealing such regulations, and that all these processes conform to legal and programmatic requirements. Many of the steps included herein are required by state law. Many of the steps can be done at differing times in the process depending on the specific regulation being promulgated. Still other situations will dictate a discretionary approach to when, if and how the optional steps are applied; optional steps are identified by the term “[opt]” following the step description. Responsibility for fulfilling this process and complying with all statutory requirements is vested in the Division promulgating the regulation.
- C. All electronic documents specified in this process shall be dispatched in Word 6.0 format using a 12 point font. For amendments to existing regulations, all additions shall be underlined and all deletions denoted as strikeouts. Color DNREC symbols shall not be used in the electronic submittals.

**APPENDIX II – 2: TECHNICAL AND FINANCIAL ASSISTANCE** *(Reserved)*

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL  
ADMINISTRATIVE POLICIES AND PROCEDURES

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Subject: D-0401 – DNREC Penalty Mitigation Policy

Section: D-0400 - Enforcement

Issued: April 1994

Revised: June 7, 2000  
September 10, 2003

Page: 1 of 6

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## **I. PURPOSE**

The Delaware Department of Natural Resources and Environmental Control (DNREC or Department) wishes to promote voluntary compliance with environmental requirements. DNREC believes that the protection of the environment and public health and safety rests, in part, on voluntary compliance with environmental laws. Voluntary compliance begins with an awareness of environmental problems and is often achieved through the implementation of compliance assessments. The Department will provide meaningful incentives to encourage large and small businesses to develop and implement an environmental management system and to conduct regular compliance assessments.

The business community reports that a major disincentive to undertaking environmental compliance assessments is the threat of administrative or civil sanctions. Responsible businesses examine their operations and take whatever steps are necessary to comply with the law. Ideally, businesses should not need penalty mitigation as an incentive to comply with the law. The Department does not condone conscious disregard by business of possible or probable environmental violations. Nonetheless, this policy is being undertaken in the hope that significant environmental benefits will accrue. Under this policy, the Department will grant penalty mitigation for self-reported violations under the circumstances and conditions set out below.

## **II. APPLICABILITY**

This policy applies to the Department's administrative and civil penalty assessment activities under 7 Del. C. Chapters 60, 63, 74, 74A & 77. The policy applies to compliance assessments which occur after the effective date of this policy. It is the responsibility of the person seeking the benefit of this policy to establish to the Department's satisfaction that the elements of the policy have been met. This policy is intended to affect only the relationship between DNREC and disclosing persons.

This policy only applies to disclosing persons with a total of 100 or fewer full time employees at one or more discreet facilities. Furthermore, this policy does not apply in any instance where the violation commenced or occurred greater than five years prior to the disclosure required in V. A. 1.b. below.

This policy will automatically apply to any business whose discovery and disclosure of a violation comes as a direct result of a compliance assistance effort provided by the Clean Air Act, Section 507 Small Business Ombudsman or the DNREC, Office of the Secretary's Pollution Prevention and Compliance Assistance Program, providing all other provisions of this policy are met and the violation is not one of the exemptions listed in Section V. C. herein.

### **III. DISCLAIMER**

This policy and its procedures are in no way intended to supplant existing legal requirements. Nothing in this policy shall affect such requirements, including statutory or regulatory requirements which mandate enforcement actions. This policy is limited in scope to actions for penalties, and shall not affect other actions, such as actions for injunctive relief or emergency administrative orders.

This policy is the procedure that DNREC will follow in the future to achieve compliance under the statutes listed in the above section on Applicability. This policy establishes the framework within which DNREC will exercise its discretion in assessing and pursuing administrative and civil penalties in matters involving self-reported environmental regulatory noncompliance.

### **IV. DEFINITIONS**

**Environmental Regulatory Requirements:** All approvals, written authorizations, and legally enforceable obligations, including those contained in environmental laws and regulations and those incorporated into permits or licenses issued pursuant to those environmental laws and regulations.

**Department:** The Delaware Department of Natural Resources and Environmental Control.

**Compliance Assessment:** Any mechanism used to evaluate environmental regulatory compliance. This could include consultant reports, audits, self-diagnosed compliance problems or any assessment that leads the disclosing person to believe that they are in non-compliance with environmental requirements.

**Disclosing Person:** A natural person, partnership, association or corporation, firm, trust, joint stock company, or business entity requesting consideration under this policy.

**Small Business:** A business that is independently owned and operated and which employs 10 or fewer full-time employees.

## **V. POLICY**

To encourage companies and individuals to perform compliance assessments, the Department will use the following when considering whether to pursue administrative or civil penalties applicable to environmental regulatory violations.

### **A. GENERAL POLICY**

1. The Department will not assess an administrative or civil penalty for violations of environmental regulatory requirements which are voluntarily disclosed following a compliance assessment provided:
  - a. the date and time of discovery of the violation is contemporaneously documented by written memorandum signed by an owner, officer, director or plant or facility manager of the subject facility, and;
  - b. within 21 consecutive days after the date of discovery, the disclosing person shall send to the Department, by certified mail, notification of the violations and a request for consideration under this policy, and;
  - c. the disclosing person provides: 1) a full and complete written description to the Department of the condition causing the violation, including planned measures to return to compliance or a compliance schedule to address the violation; and 2) fully cooperates with the Department regarding its investigation of the disclosed condition, and;
  - d. the disclosing person shall within 30 days after the Department receives the notification as provided in section b. above: 1) correct the violation; or 2) have a compliance schedule approved by the Department and incorporated into an enforceable agreement. Upon a showing by the disclosing person within the 30 day deadline above, of good cause and that compliance with the 30 day deadline is not possible, the Department may in its sole discretion extend the 30 day deadline. Nothing in this section or Policy shall be construed to require the Department to approve a compliance schedule or otherwise grant any approval or permit.
2. For voluntary disclosures concerning unpermitted or unauthorized operations, the Department may incorporate the compliance schedule as a condition to the permit or required authorization. For purposes of this policy, any and all monetary charges that would have been applicable and payable to DNREC or its designees by the person during the period of time in which

unauthorized or unpermitted activity occurred are not considered penalties and will be due and payable in full. Small businesses will be assessed a charge based on the actual time operating without a permit or authorization with a maximum retroactive assessment period not to exceed five years. Partial year assessments will be calculated on a monthly schedule based on 1/12 of the annual fee.

3. After receipt by DNREC of a certified letter as required in V.A.1.b. above, the Department will provide the person with a letter which:  
1) acknowledges receipt of the disclosure; and 2) indicates whether or not the disclosing person is initially qualified for penalty mitigation under this policy. Once DNREC has determined that the disclosing person has fully satisfied all terms and conditions of this Policy, fully qualified for penalty mitigation under this policy, and come into full compliance, DNREC will provide a letter so stating. However, discovery of new evidence that would have disqualified the disclosing person, after issuance of the letter of full qualification, shall not estop or preclude DNREC from disqualifying the disclosing person on the basis of the new evidence. The reporting person shall be responsible for providing DNREC with all relevant information in determining the reporting person's qualification under this policy.
4. The fact that penalty mitigation has been granted shall not prohibit the Department from using the fact of the violation in any future regulatory decision or penalty assessment, such as a consideration in penalty enhancement for a second offense.

## **B. VOLUNTARY DISCLOSURE**

1. Disclosure is voluntary if:
  - a. the disclosed violation was first discovered by the disclosing person performing a compliance assessment; and
  - b. the disclosure is not required by an administrative or civil enforcement action, environmental law, regulation, permit, license, order or other legal requirement or process or any environmental regulatory requirements; and
  - c. the disclosure identifies violations that were not known to the Department prior to the date of discovery.

## **C. EXCEPTIONS**

1. The Department, in its sole discretion, will determine whether a person is eligible for consideration under the terms of this policy. Other requirements are set out in other sections of this policy, but the terms of this policy are specifically not applicable if any of the following exist:

- a. the disclosure was not voluntary within the meaning of section B above;
- b. the person intentionally or knowingly committed the disclosed violation;
- c. the disclosing person does not correct the violation strictly in accordance with Section V.A.1.d.;
- d. significant environmental harm or a significant threat to public health was caused by the violation;
- e. substantially similar violation(s) occurred previously at the same facility within the last three years;
- f. significant economic benefit accrued to the person as a result of the non-compliance. In such cases the Department reserves the right to seek penalties commensurate with that economic benefit. Significant economic benefit does not include mere nonpayment of monetary charges within the meaning of V.A.2.;
- g. repeated environmental regulatory violations (not necessarily of the same kind) reveal a pattern of conduct or condition such that the Department determines that the disclosing person should not be afforded the benefits of this policy;
- h. the violation or disclosure involved fraud, misrepresentation or concealment;
- i. a person seeking consideration under this policy was in financial arrears for any reason to the Department for a period of six months or longer at the time of the violation. Financial arrears do not include mere previous nonpayment of monetary charges within the meaning of Section V.A.2.; and
- j. this policy shall not apply to persons who do not respond to requests, for information or affidavits, related to the violation or otherwise required by law from the Department in a complete and timely manner.

## **VI. RELATIONSHIP TO REGULATORY AUTHORITY**

The Department's authority to regulate facilities and activities and to require the collection, development, maintenance and reporting of documents, communications, reports, and other information is not affected by this policy.

## **VII. RELATIONSHIP TO FEDERAL LAW**

This policy shall not prevent the Department from pursuing enforcement actions specifically required by the federal government as a condition to receiving and maintaining program delegation or primacy. This policy in no way limits or precludes the U. S. Environmental Protection Agency or other governmental agencies from exercising their authority to enforce all requirements.

## **VIII. PUBLIC ACCESS TO INFORMATION**

Information concerning violations of environmental requirements, which are voluntarily disclosed, will be available to the public as a public record, except for information which otherwise is confidential under Delaware law.

## **IX. ELIGIBILITY DETERMINATIONS**

The Department in its sole discretion and judgment shall determine the sufficiency of all requirements for eligibility under this policy and whether exceptions may or may not apply.

## **X. TERM**

This Policy shall be effective until rescinded by the Secretary. Any disclosures provided to DNREC as specified in Section V.A above and received prior to the Secretary's rescission of this policy shall not be affected by the rescission and shall be afforded the benefits of this policy provided all policy conditions and requirements are met.

## **XI. CRIMINAL LIABILITIES NOT INCLUDED**

This policy shall not affect any criminal liability or penalties.

## **XII. CONTACT PERSONS**

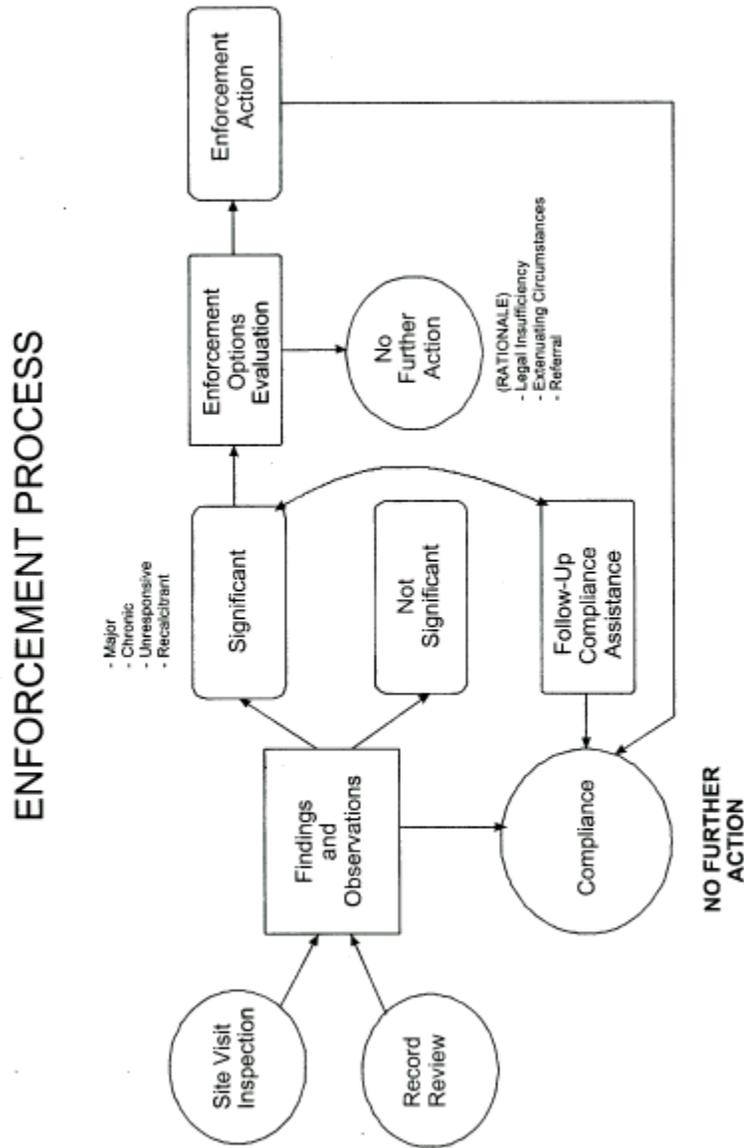
All disclosing persons, except those with 10 or fewer full time employees, receiving consideration under this Policy shall designate a contact person, including address and phone number, who shall be available and accessible to the Department and to the public to answer questions relating to consideration under the Policy. Such contact person shall provide a copy of the disclosure in sections V.A.1.b. and c. within 15 days to any member of the public who requests it. If desired, small businesses with 10 or fewer full-time employees may request in writing that DNREC's Planning and Compliance Assistance Section handle requests for information from the public concerning this policy.

  
Approved, John A. Hughes, Secretary DNREC

9-10-03  
Date

**APPENDIX III: STATUTORY INSPECTION AUTHORITIES** *(Reserved)*

# APPENDIX IV: GENERAL ENFORCEMENT RESPONSE PROCESS CHART



## APPENDIX V-1: DEPARTMENT ENFORCEMENT PANEL PROCESS

### PROCEDURES:

- A. Enforcement Panel meetings will be held on the *third Wednesday* of each month. If there is a need for an additional Enforcement Panel meeting during the month, one will be scheduled every other Wednesday, accordingly.
- B. An enforcement packet will contain compiled information that is part of an investigatory file or non-public record pertaining to potential litigation and is not part of a “public record” as that term is defined in 29 Del. C. Chapter 100, the Freedom of Information Act (“FOIA”) §10002(d). The compiled information and any deliberative process material, or other enforcement-related documents subsequently prepared relating to the violations at issue are not to be made available to the public until either the case is fully adjudicated or a decision not to pursue enforcement action has been made.
- C. All enforcement packets shall be submitted to the appropriate Division Paralegal by the *first Wednesday* of each month
- D. These time limits shall be strictly adhered to in order to allow time for the Paralegal to assemble the packet and obtain any required signatures. This will allow sufficient time for the material to be distributed and will also provide each Panel member adequate time to review the material and bring any comments or questions to the meeting. The appropriate Division Director **MUST APPROVE ALL** exceptions to this time limit.
- E. Each enforcement packet shall include an “Enforcement Panel Packet Guide and Checklist”. The Guide and Checklist shall be completed by the Branch/Section contact person to ensure all items have been taken into consideration. The “Guide” is provided to assist staff in compiling sufficient information for the enforcement packet. The Memo to the Panel should include the items listed within the Guide. The completed “Checklist” shall be made “Page 1” of each enforcement packet.
- F. Enforcement packets shall be provided to the appropriate paralegal according to the time frame provided in B above. Failure to meet this time frame will result in the case being scheduled for the following month’s Panel meeting.
- G. Each case presented will be limited to 45 minutes (20 minutes for presentation, 25 minutes for questions, discussions and enforcement recommendation). If there is a complex case that requires more time, it would be the exception and should be stated so prior to the Enforcement Panel meeting.
- H. The maximum amount of cases which takes 45 minutes to be completed will be 3; if cases are simple and not as complex as many as six can be accomplished at an Enforcement Panel.

## ENFORCEMENT PANEL PACKET GUIDE

**Please note:** The following information when included in an enforcement packet will contain compiled information that is part of an investigatory file or non-public record pertaining to potential litigation and is not part of a “public record” as that term is defined in 29 Del. C. Chapter 100, the Freedom of Information Act (“FOIA”) §10002(d). The compiled information and any deliberative process material, or other enforcement-related documents subsequently prepared relating to the violations at issue are not to be made available to the public until either the case is fully adjudicated or a decision not to pursue enforcement action has been made.

1. Summary Memo
  - a. Directed to the Panel, through your Section’s Paralegal
  - b. Applicable facts
  - c. List of alleged violations
  - d. Environmental significance/harm of alleged violation
  - e. Affirmative statement of multi-media coordination
  - f. Penalty worksheet and recommendation
  - g. Recommendation as to administrative or civil action, or another course of action(i.e., referral to another Section/Branch or Division)
  - h. Estimation of length of presentation (i.e., time it will take to present the case)
2. Reports
  - a. Inspection report
  - b. Emission report
  - c. Any documentation that is reported by the facility
3. Correspondence
  - a. Letters concerning the alleged violation, to or from the facility
  - b. NOV’s/Letters of Warning/etc.
  - c. Any other correspondence that is applicable to the case
4. Witnesses/Contacts
  - a. Department staff involved
  - b. List of Company witnesses or contacts
5. Permits
  - a. Any applicable permits held by the company/facility
  - b. If the company/facility does not currently have a permit, please list what permit(s) should be obtained
6. Defenses
  - a. List of possible defenses the Company may use
7. Potential for Chronic Violator Review

Note: All enforcement packets shall be submitted to the appropriate Division Paralegal by the *first Wednesday* of each month.

CASE NAME: \_\_\_\_\_

**ENFORCEMENT PANEL CHECKLIST**

ITEM TO BE CHECKED:	YES	NO	COMMENTS
<b>1. SUMMARY MEMO ITEMS:</b>  a. Directed to Panel, through Director and Paralegal?  b. Applicable Facts?  c. List of alleged Violations? (i.e. 7 <u>Del. C.</u> §6028)  d. Environmental Significance/Harm Noted?  e. Affirmative Statement of Multi-media Coordination?  f. Penalty Worksheet and Recommendation?  g. Recommendation for Civil or Administrative Action?  h. Estimation of Length of Presentation			
<b>2. INSPECTION/EMISSION/COMPANY REPORTS?</b>			
<b>3. APPLICABLE CORRESPONDENCE?</b>			
<b>4. APPLICABLE PERMITS?</b>			
<b>5. ACTUAL/POTENTIAL INVOLVEMENT OF ANOTHER DIVISION, BRANCH, OR SECTION?</b>			
<b>6. ACTUAL/POTENTIAL COST RECOVERY?</b> a. Which Divisions/Branches/Sections were involved? b. Cost Recovery Estimate Attached?			
<b>7. LIST OF POSSIBLE DEFENSES THAT COMPANY MAY USE</b>			
<b>8. POTENTIAL FOR CHRONIC VIOLATOR REVIEW?</b>			

*Note: This checklist is to be completed by the individual presenting his/her case to the Enforcement Panel. Please make sure that the entire form is filled out. Please also use the "Comment" column if there is a specific reason why an item from the checklist was not included in the packet.*

## **APPENDIX V – 2: COST RECOVERY AUTHORITY**

### **Expenses Related to Investigating Violations Associated with Enforcement Actions**

The Secretary will make reasonable efforts to recover the expenses that are associated with executing an enforcement action. Violators shall be liable for the following expenses of the investigation incurred by the State after the notice of violation is issued: direct costs of investigation; legal assistance including paralegal assistance; public hearings; all other costs expressly determined by the Secretary as reasonably related to the investigation of the incident; and the indirect costs related to all of the above. Costs collected under this section will be used to fund the Department's Enforcement Coordinator position pursuant to Section 199 of SB 434, FY 2003 Appropriations Act.

### **Cost Recovery for Violations of 7 Del. C. Chapter 60**

Section 6005(c) sets forth cost recovery authority when persons have been found to have violated Chapter 60. Section 6005(c) allows the Department to collect all expenses incurred in: 1) abating the violation; or 2) controlling a pollution incident related to the violation; or 3) cleanup and restoration of the environment. See 7 Del. C. §6005(c).

### APPENDIX V – 3: COMPLAINT AND INVESTIGATION PROCESS FOR DEPARTMENT ENFORCEMENT OFFICERS

Environmental complaints are reported to the Department’s Enforcement Section from a variety of sources including:

- Telephone calls from citizens
- Emergency reporting center notifications
- Referrals from programs within DNREC
- Referrals from other governmental entities
- Generated by officers during pro-patrol
- Self-reporting of violations/incidents by the regulated community
- Written and electronic correspondence
- In person from citizens

These complaints and notifications are divided into two categories, priority and non-priority. The prioritization table assists the on call staff in determining escalating or de-escalating an incident. All complaints regardless of ranking are ultimately investigated by the Department, or referred to other agencies.

Priority Complaints	Non-Priority Complaints
<ul style="list-style-type: none"> <li>• Request for Environmental Response Team activation.</li> <li>• Actual or potential major spills and/or releases</li> <li>• Incidents involving a significant threat/impact to public safety or the environment</li> <li>• Abandoned drums or containers</li> <li>• Infectious/medical waste complaints</li> <li>• Requests for response by an emergency reporting center, police departments, fire departments, the Coast Guard, or other Governmental Agencies</li> <li>• Complaints on facilities where specific response protocols have been outlined</li> <li>• In-progress complaints in which un-permitted activities are occurring</li> </ul>	<ul style="list-style-type: none"> <li>• Residential open burning</li> <li>• Solid waste and theft of services dumping that are not in progress</li> <li>• Sewage discharge and sanitary sewer overflow complaints</li> <li>• Checks on permitted industries or individuals</li> <li>• Requests for background checks</li> <li>• Outdoor odor complaints that are below action levels</li> <li>• Permit violations, not in progress</li> </ul>

The majority of the complaints and notifications received by the Department’s Enforcement Section are received on the Section’s 24-hour contact lines. The numbers are:

Toll free, in state only: 1-800-662-8802  
 Out of state: 1-302-739-5072

The phones are answered by two different systems:

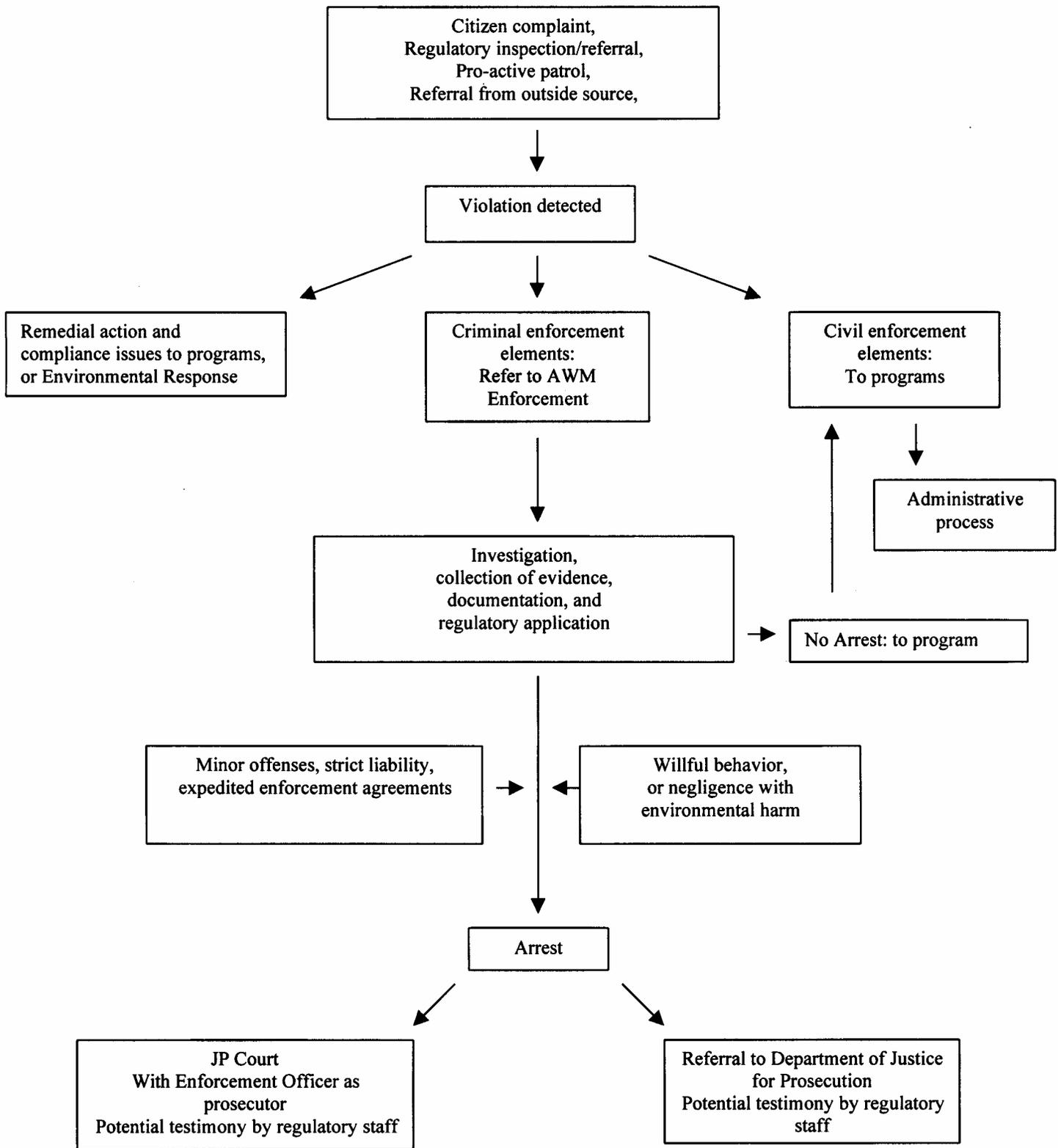
- During normal business hours Enforcement Section Staff answers the phones.
- After hours, the phones may be answered by the Department's electronic call taking system or the Kent County 911 Center.

Callers will be required to leave the following information, so that proper investigation can occur.

- Date and time of call
- Name of caller, or company affiliation
- Call back numbers (home and work)
- Date and time of incident
- Nature of incident
- Materials released or discharged
- Location of incident (include county)
- Suspect information
- Any other relevant information

The following chart portrays what happens to a complaint once DNREC Environmental Officers receive it.

**Department Enforcement Section  
Enforcement Action Flow Chart**



**APPENDIX VI: LIST OF EPA TIMELY AND APPROPRIATE GUIDANCE**  
*(Reserved)*

**APPENDIX VII: LIST OF EPA PENALTY POLICIES** *(Reserved)*

## **APPENDIX VIII ENVIRONMENTAL IMPROVEMENT PROJECT APPLICATION**

**Project Title/Description** (to include how Delaware's environment will benefit from implementation of the project, what environmental priorities will be addressed and how the project will be utilized and sustained in the future):

**Organization:**

**Contact Person:**

**Telephone Number and Fax:**

**Address:**

**Email:**

**Objective of the Project:**

**Project Location:**

**Major Actions Planned and Associated Timelines:**

**Start Date:**

**End Date:**

**Description of how the project will be evaluated** (Include measures of performance such as number of participants and/or environmental benefits and major actions completed):

**Partners/Participants:**

**Applicable criteria:**

**Project Budget:** (to include the amount of funds being applied for and how they will be spent – supplies/materials, contractual services, salaries, etc.) and the amount and sources of any other funds being applied to the project (contributions both in-kind and cash). A separate sheet may be submitted for budget information.

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**Authorized Signature**

If your project is selected to receive funding you agree to sign the attached Project Memorandum of Understanding.

**APPENDIX VIII (CONTINUED)**

**PROJECT MEMORANDUM OF UNDERSTANDING**

(To be signed, completed, and returned, if selected)

You have been awarded \$\_\_\_\_\_ to fund the

\_\_\_\_\_  
Environmental Improvement Project (approved application attached). By accepting these funds you agree to carry out the Environmental Improvement Project in accordance with your application and to file the attached project completion report.

\_\_\_\_\_  
Applicant/Awardee

**APPENDIX VIII (CONTINUED)**

**PROJECT COMPLETION REPORT**

The Project Completion Report should be submitted to the Office of the Secretary of DNREC with copies to the Department Financial Officer. The Department reserves the right to request Project Completion Reports as necessary to comply with any reasonable request for information regarding Environmental Improvement Projects.

Please summarize the results of the project. Include measures of performance such as number of participants and/or environmental benefits and major actions completed.

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Please explain how the project (data gathered, methodologies developed, etc.) will be utilized in the future.

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On your financial report, include an itemized accounting by budget categories. If all of the funds were not spent, how much of the allocated funds were not spent? Please return the unneeded funds along with this report or forward the plan to spend any unspent funds.

\_\_\_\_\_  
Authorized signature

\_\_\_\_\_  
DNREC Representative signature

Failure to submit this report within 30 days after completion of the project or as requested may result in the applicant losing eligibility to receive any funds in the future through this program.