



DEPARTMENT OF ENVIRONMENTAL PROTECTION

NON-COMPLIANCE RESPONSE GUIDANCE

- 1. PURPOSE.** This document is for use by the Maine Department of Environmental Protection (DEP) in its efforts to promote compliance, and pursue the timely, consistent and equitable resolution of violations of the laws, rules, licenses, and orders the DEP administers. It also provides the framework from which program-specific compliance policies must be developed. Program-specific policies should establish specific descriptions of how the general guidance in this document will be applied under the unique laws administered by a program. This guidance expands on, repeals and replaces what was previously titled DEP's *Compliance Policy* (June 1, 1997).
- 2. APPLICABILITY.** This Guidance is applicable to all DEP programs conducting non-compliance response activities. DEP program managers are responsible for ensuring the implementation of this Guidance by their staff. Program managers and staff are responsible for conducting a good-faith assessment of instances of non-compliance and pursuing an appropriate response within the provisions of this Guidance.
- 3. OBJECTIVES.** The DEP's non-compliance response objectives are to:

 - A.** Encourage voluntary compliance with environmental laws, rules, licenses, and orders;
 - B.** Remove incentives or opportunities gained by violating environmental requirements;
 - C.** Ensure violations of a similar nature are responded to in a consistent way;
 - D.** Ensure that appropriate corrective and future preventative actions are taken once a violation has occurred;
 - E.** Implement legislative penalty authorities in an appropriate and consistent manner;
 - F.** Deter future violations; and
 - G.** Ensure that enforcement resolutions are attained efficiently.
- 4. DEFINITIONS.** For the purposes of this Guidance, the following terms are defined as follows.

 - A. Financial Gain.** *Financial gain* refers any benefit to a violator as a result of their non-compliance in the form of avoided cost, economic benefit, or ill gotten gains.
 - B. Good-Faith Negotiations.** *Good-faith negotiations* refers to timeliness and use of honest intent while working through the process to resolve an enforcement matter. The concept of good-faith infers the application of reasonable standards for conduct during the negotiation process, and is important in determining whether parties to a negotiation are fostering resolution or unnecessarily causing delay.
 - C. New Regulatory Requirement.** The term *New Regulatory Requirement* typically refers to requirements being newly administered in an area not previously addressed or when wide-ranging substantive amendments are made within an existing regulatory structure.
 - D. Extensively Regulated Enterprise.** The term *Extensively Regulated Enterprise (ERE)* refers to entities engaging in activities extensively regulated by State and federal environmental laws.
- 5. CONSIDERATIONS FOR DETERMINING AN APPROPRIATE NON-COMPLIANCE RESPONSE.** While the compliance tools that may be applied in response to a violation vary



according to a number of factors, the DEP's goals are always to gain compliance, protect the environment, and treat each violator in an evenhanded manner. The considerations described in this section provide the guiding principles that all DEP programs will follow when determining the appropriate response to discovered non-compliance. The following are factors to be considered in program-specific policies established pursuant to this Guidance. No one factor should be dispositive of the DEP's response; the response should be determined by the collective assessment of all applicable factors.

- A. Environmental Impact.** When the area impacted by a violation is large or particularly sensitive, where there is potential or actual environmental damage or human health effects, or when environmental impact has continued for an extended period of time, the likelihood of an enforcement response is high and the severity of that response increases. Similarly, there is an increased likelihood of enforcement for paperwork violations (e.g., failure to submit and maintain required records, monitor downtime, or renew a license) that affect the DEP's ability to determine whether a company has been in compliance, the level of non-compliance, or the extent and length of an adverse environmental impact resulting from non-compliance.
- B. Significance of the Violation.** Factors related to violation significance that will determine the nature of an enforcement response include, but are not limited to: whether the activity which caused the violation was inherently dangerous or the pollutants involved are hazardous; how far beyond standards or license limits the activity was; and the number of violations involved. Failure to comply with other requirements, such as training, should be evaluated on the actual or potential effect the failure does or can have on the ability to maintain compliance.
- C. Circumstances of Discovery.** Where the DEP discovers non-compliance during a compliance inspection or as a result of complaints from the public, the likelihood of an enforcement response is significantly greater than where a party voluntarily requests compliance or technical assistance, or where non-compliance is self-reported upon diligent discovery. DEP's Small Business Compliance Incentives Policy protects entities that voluntarily approach DEP seeking regulatory and technical assistance from most civil penalties, so long as any violations discovered for the first time are corrected within a prescribed time period. The DEP views immediate disclosure of compliance problems, particularly where disclosure is not required by law, and immediate work to permanently resolve issues as good-faith efforts that will be considered in determining an appropriate compliance response.
- D. Causes and Circumstances of the Violation.** DEP expects regulated parties to know of and comply with legal requirements. Violators that knew or should have known of legal requirements or that a violation was reasonably foreseeable are more likely to face an enforcement response. For example, if an entity ignores relevant training or technical assistance, is an ERE, has a history of similar compliance problems, or it is otherwise evident that they were in a position to avoid the violation, the likelihood of an enforcement response is high and the severity of that response increases, regardless of environmental impact. However, if a violation is inadvertent, involves a recently adopted regulatory requirement, is not part of a pattern or history of non-compliance, and/or could not have been prevented, then the likelihood and severity of an enforcement response is reduced.
- E. Action Once Aware of a Violation.** Environmental laws rely heavily on voluntary compliance and self-reporting. If a violation is reported immediately, corrective action is taken immediately, and environmental damage is restored immediately, the likelihood



and severity of an enforcement response diminishes. Likewise, the quality of those actions, whether they were taken before or after DEP involvement, whether or not they truly cured any immediate problem, and/or were designed to prevent future problems are all factors that determine a compliance response. A violator that permanently removes the potential for recurrence will be considered to have demonstrated a greater willingness to comply than a violator applying a temporary fix on a problem that resulted in non-compliance.

- F. Financial Gain Associated With the Violation.** In instances where a significant financial gain is associated with non-compliance, the likelihood that the DEP will pursue an enforcement response to assess penalties that at least recover any financial gain is high. Recovery of financial gain levels the playing field between those companies or individuals that are in compliance and those that are out of compliance.
- G. Regulated Party's Overall Environmental Record.** The DEP will consider a violator's environmental record in determining the nature of a compliance or enforcement response. A demonstrated commitment to voluntary compliance and a strong overall environmental compliance record should diminish the likelihood or severity of an enforcement response. This consideration will include aggregate performance in all media programs as well as any trend toward or away from overall compliance.

6. COMPLIANCE TOOLS. The DEP uses a variety of "tools" to bring regulated entities into compliance. Where non-compliance is discovered, the DEP evaluates facts and exercises its judgment in light of existing law and guidance to determine which tool or combination of tools are appropriate to achieve compliance with environmental requirements.

- A. Compliance Evaluations.** DEP uses a variety of methods to evaluate compliance with Maine's environmental laws, including on-site inspections, periodic self-monitoring and reporting, and record reviews. In all cases, these evaluations are used to monitor compliance and document findings in a way that supports any subsequent necessary action. DEP compliance staff must document all compliance evaluations. This documentation may be in the form of memoranda, facility-related compliance data, or as a trip report when on-site evaluations are performed. The discovery of non-compliance during an on-site inspection should be documented with additional means, for example facility records, sampling and analysis, photographs or video recordings, or a combination of all these. Inspections documenting situations that appear to require corrective action should typically have exit interviews conducted and written documentation of the findings left with or sent to a responsible official.
- B. Technical Assistance.** Technical assistance is targeted education and outreach where the expertise of the DEP is used to help solve a particular environmental problem at a particular location. Technical assistance may be provided informally during an inspection or in a telephone call, or more formally through one of the DEP's technical assistance programs and designated technical assistance staff. Regulatory assistance, *i.e.* helping entities to understand regulatory requirements, is also a primary focus of the DEP and available as part of the Department's daily activities. DEP staff providing technical assistance have no authority to "waive" violations, and may not advocate actions inconsistent with applicable laws and standards.
- C. Enforcement.** Compliance assessments by the State and enforcement of environmental requirements are key elements in ensuring compliance and maintaining public confidence in Maine's environmental regulatory system. While a variety of tools exists



for preventing and resolving compliance problems, the DEP consistently pursues written and legally binding resolutions where corrective action and/or penalties are appropriate. The DEP will select an appropriate course of action for enforcing Maine's environmental requirements based upon the facts of a case and guidance associated with each tool as described in this document and in program specific guidance documents established consistent herewith. As a result, the DEP may use any one enforcement tool, or combination of tools, as appropriate to achieve compliance with environmental requirements.

- 7. NON-COMPLIANCE RESPONSE ACTIONS.** DEP staff should consider all relevant environmental, human health, and violator-related circumstances when determining which enforcement tool is appropriate. The tools in Maine's environmental enforcement system may be viewed as graduated, with the consequences increasing in severity as relevant considerations detrimentally increase.

A. Compliance Evaluation Documentation.

- 1) **Use.** The minimum action required after the discovery of any instance of non-compliance is documentation of the violation in Department records. Non-compliance may be documented in inspection reports, self-reported records, annotated photographs, spreadsheets, or other means developed by a program.
- 2) **Content.** Compliance documentation should include all information necessary to fully document the nature and severity of the violation should any future enforcement action be appropriate.
- 3) **Timing.** Instances of non-compliance should be documented in accordance with program specific practice, U.S. Environmental Protection Agency (EPA) requirements, if applicable, or established due dates for mandatory self reporting.
- 4) **Outcome.** The Department maintains a record of all instances of non-compliance necessary to make an assessment of an entity's compliance history or to include in a future cumulative enforcement action.

- B. Letter of Warning.** DEP staff may use a Letter of Warning (LOW) with suspected violators where the matter at issue is isolated and relatively minor, and, as a result, additional enforcement action is not anticipated if the violation is corrected within the time period set forth in the LOW.

- 1) **Use.** LOW use is appropriate in a number of situations, which are completely dependent on the circumstances.
 - a. **EREs.** Establishing a consistent record of standardized communications on non-compliance matters is highly important for all programs. LOWs may be appropriate as the only enforcement response with EREs for minor violations where there is minimal history of that violation at the facility. A LOW may also be appropriate for first-time violations of reporting, notification, or other filing requirements, and it is the minimum enforcement action that must be taken when corrective actions are necessary beyond an immediate fix made while the inspector is present.
 - b. **Individuals.** LOWs are appropriate for issuance to individuals under broader circumstances than with EREs since the regulatory relationship is typically not as consistent and established. As such, violations with more significant corrective action requirements may be appropriate for resolution of a LOW with an individual than with an ERE.



- 2) **Content.** A LOW typically is sent in the form of a letter with a subject line reading "Letter of Warning". A LOW identifies the violation(s) and, when necessary to effect compliance, identifies and contains a schedule for completing corrective actions.
 - 3) **Timing.** LOWs should be issued promptly after discovering non-compliance when time-sensitive corrective action is necessary, and in accordance with program specific practice, or EPA requirements, if applicable, where documenting violations in correspondence with a violator is appropriate.
 - 4) **Outcome.** DEP views prompt correction and avoidance of repeat violations as essential. A history of LOWs or a LOW not followed with timely corrective action increases the likelihood that DEP will undertake escalated enforcement action. The failure to comply in a timely manner with a LOW corrective action schedule will typically result in issuance of an NOV.
- C. Notice of Violation.** DEP uses a Notice of Violation (NOV) as the written form of communication with a suspected violator to document enforcement taken where a significant violation, or pattern of less significant but previously resolved violations, exists. A pattern of less significant resolved violations will have been documented in file memos, inspection reports, LOWs, or other enforcement actions.
- 1) **Use.** A NOV is always sent to EREs when non-compliance is associated with a regulated entity where there is a repeat of a prior adjudicated violation or documented significant violation, whether or not an additional action appears warranted. A NOV may be sent for repeat minor violations at staff's discretion. A NOV may be appropriate as the sole means for resolution with EREs when a documented violation has little or no adverse environmental effects or threats associated with it and there is no history of that violation by the regulated entity. By law, the DEP must issue a NOV prior to initiating resolution through an Administrative Consent Agreement, an enforcement hearing, a Rule 80K prosecution in District Court, or civil referral to Maine's Attorney General.
 - 2) **Content.** A NOV typically consists of two documents: a cover letter and NOV form. Drafting requirements for NOVs are contained in DEP's Standard Operating Procedure for *Notices of Violation* (OC-PE-011).
 - 3) **Timing.** NOVs should be issued immediately after discovering non-compliance when time-sensitive corrective action is necessary to avoid harm, or threatened harm, to public health, safety, or the environment. When time-sensitive corrective action is not necessary to avoid harm, or threatened harm, to public health, safety, or the environment, NOVs should be issued within 90 days of the Department's discovery of the violation. The time periods for issuing a NOV are suspended if after the Department discovers the violation the Department has insufficient evidence to determine the responsibility of a violator or after making a good-faith effort the Department is unable to determine the identity of a violator. Failure to issue a timely NOV may be considered a mitigating factor in determining penalties.
 - 4) **Outcome.** Timely correction and avoidance of violations addressed in a NOV is essential to avoiding an additional enforcement action when such an action would otherwise be unwarranted. A failure to take timely action to address documented violations is an aggravating factor in making subsequent enforcement decisions.
- D. Administrative Injunctive Relief Actions.** DEP has several authorities that allow unilateral orders to be issued requiring corrective actions for certain kinds of violations.



Such orders are enforceable in Maine Superior Court by the AG on the agency's behalf. Compliance orders are used when timely action is essential to avoiding significant or irreparable harm to human health or the environment. Issuance of a compliance order does not preclude an additional enforcement action to seek monetary penalties or criminal sanctions. DEP also has the authority to hold hearings regarding any violation, at the conclusion of which an order may be issued by the commissioner to require that corrective actions be taken. This Guidance expands on provisions that apply to agency-wide Emergency Orders and enforcement hearings. Any order provision specific to a program's enforcement authorities should be addressed in program-specific non-compliance response guidance that is otherwise consistent with this Guidance.

- 1) **Commissioner's Emergency Order [38 M.R.S.A. § 347-A(3)].** DEP may unilaterally require that actions be taken to correct conditions causing substantial and immediate danger to public health or the environment.
 - a. **Use.** "Whenever it appears to the commissioner, after investigation, that there is a violation of the laws or regulations which the DEP administers or of the terms or conditions of any of the department's orders, which is creating or is likely to create a substantial and immediate danger to public health or safety or to the environment, the commissioner may order the person or persons causing or contributing to the hazard to immediately take such actions as are necessary to reduce or alleviate the danger." 38 M.R.S.A. § 347-A(3).
 - b. **Content.** The information contained in an Emergency Order consists of Findings of Fact, Conclusions of Law, and an Order.
 - c. **Timing.** Any situation discovered that appears to present "substantial and immediate danger to public health or safety or to the environment" where the persons responsible do not immediately take required actions should immediately upon discovery be brought to the attention of program managers and the DEP Enforcement Director for their consideration.
 - d. **Outcome.** Issuance of an Emergency Order has three likely outcomes: compliance, non-compliance, or appeal. Given the circumstances under which an Emergency Order is issued, an additional enforcement action involving monetary penalties is highly likely regardless of the outcome of the Order. A failure to take timely action to address documented violations is an aggravating factor in making subsequent enforcement decisions and when calculating monetary penalties; such a failure also should immediately result in referral of the matter to the District Court Enforcement Manager or AG for, at least, enforcement of the Emergency Order. *Bona Fide* appeal is not an aggravating factor in making subsequent enforcement decisions and when calculating monetary penalties.
- 2) **Enforcement Hearings [38 M.R.S.A. § 347-A(1)(A)(3)].** DEP may schedule and hold hearings as the precursor to issuing an injunctive order aimed at requiring correction of a violation.
 - a. **Uses.** The DEP schedules enforcement hearings when injunctive relief is needed for efficient and effective resolution, without involving the resource commitment and expense of court action.
 - b. **Content.** Enforcement hearing notices are legal documents that contain a significant amount of standardized language as well as a complete and concise description of facts surrounding the enforcement case. The drafting of enforcement



80K are to efficiently and effectively resolve violations without the relatively significant expense and inefficiency of pursuing actions in Superior Court.

- a. **Uses.** The DEP typically uses 80K actions where administrative settlement efforts have failed, where such action is necessary to prevent environmental harm, or to prevent an alleged violator from subverting the administrative process. All Rule 80K actions seek to obtain a court ordered resolution that includes any necessary corrective action and penalties.
- b. **Content.** Court proceedings demand that very specific pleadings and papers be filed with the court. Details regarding 80K action development, drafting, and review are contained in the DEP's Standard Operating Procedure for *Civil Enforcement Actions Under Maine Rule of Civil Procedure 80K* (OC-PE-009).
- c. **Timing.** District Court actions should be filed in accordance with program specific practice, or EPA requirements, if applicable.
- d. **Outcome.** DEP pursues Rule 80K resolutions to obtain enforceable court orders. Cases involving parties expressing an interest in negotiating a consent agreement, but are not bargaining in good-faith, should be referred for court action.

2) Case Referral to the Department of the Attorney General. The AG is constitutionally responsible for acting as the DEP's primary legal counsel, and is the chief law enforcement agency for the State. The DEP may refer civil enforcement actions to the AG when administrative settlement can't be reached, violations determined inappropriate for resolution in district court are at issue (e.g. complex discovery is anticipated, multiple litigious parties are involved, substantial precedential effect is anticipated), and/or immediate injunctive relief is sought in a case likely appropriate for resolution in Superior Court. Criminal enforcement actions are always referred to the AG for pursuit in an appropriate judicial forum. The process for referral of such actions is governed by a Memorandum of Understanding between DEP and the AG.

G. Enforcement by Federal, State, and Local Entities. Independent authority to enforce certain environmental laws exists in federal, state, and local authorities, including the AG. The DEP works closely with these entities and, where appropriate, pursues joint enforcement actions. Every effort is made to coordinate enforcement actions among federal, state, and local entities.

8. NON-COMPLIANCE ASSESSMENT. Each DEP enforcement program must implement a mechanism to allow for discussion of instances of non-compliance between program compliance staff and program enforcement staff. Documented non-compliance is typically followed by some action by the compliance officer. The seriousness of a discovery and the steps anticipated regarding enforcement govern the non-compliance response by the DEP.

9. REFERENCES.

- A. *Organization and Powers*, 38 M.R.S.A. § 347-A
- B. *Administrative Consent Agreements*, Standard Operating Procedure, December 1, 2007.
- C. *Small Business Compliance Incentives Policy*, February 14, 1996.
- D. *Supplemental Environmental Projects Policy*, September 17, 2004.
- E. *Notices of Violation*, Standard Operating Procedure, September 1, 2006.



F. *Civil Enforcement Actions Under Maine Rule of Civil Procedure 80K*, Standard Operating Procedure August 1, 2005.

DONE AND DATED IN AUGUSTA THE 31ST DAY OF MARCH, 2011.

Darryl N. Brown [signature]
Darryl N. Brown, Commissioner

NOTE: THIS GUIDANCE DOCUMENT PROVIDES GENERAL GUIDELINES FOR THE DEP'S STANDARDIZED METHOD FOR DETERMINING NON-COMPLIANCE RESPONSE UNDER 38 M.R.S.A. § 347-A. THESE GUIDELINES ARE NOT RULES AND ARE NOT INTENDED TO HAVE THE FORCE OF LAW. THIS GUIDANCE DOES NOT CREATE OR AFFECT ANY LEGAL RIGHTS OF ANY INDIVIDUAL, ALL OF WHICH ARE DETERMINED BY APPLICABLE STATUTES AND LAW.