

ENFORCEMENT RESPONSE POLICY

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Effective
June 1, 1999

ENFORCEMENT RESPONSE POLICY

I. INTRODUCTION

The goal of the enforcement programs of the Department of Environmental Protection is to improve and protect the environment of the State by accomplishing the following:

- (1) Prevention and prompt cleanup of pollution and its sources; protection and restoration of natural resources at the site where a violation occurs and at other sites; protection of public health and safety;
- (2) Prompt compliance with legal requirements that have been violated;
- (3) Deterrence
Specific (this violator)
General (the regulated community as a whole)
- (4) Removal of any economic advantage or savings realized by noncompliance;
- (5) Punishment of violators, with an escalation of the punishment for recurrent violations or repeat violators;
- (6) Satisfaction of federal funding and program authorization requirements, and
- (7) Increased public awareness, understanding and support and increased regulated community's knowledge of environmental requirements.

The Department intends to meet these goals by taking timely, visible and effective enforcement actions against violators and by promptly responding to any actual or potential harm to the environment. This Enforcement Response Policy ("ERP") sets forth a violation classification system and enforcement response procedures.

The policies in this document are intended solely for the guidance of employees of the Department of Environmental Protection. The policies are not intended to, nor do they, constitute rulemaking by the Agency, and they may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department may take an action that is at variance with the policies or procedures contained in this document if appropriate in a specific case.

II. APPROPRIATENESS OF ENFORCEMENT ACTIONS

1. Overview

Under the ERP, determining the appropriate enforcement action in a given case is a two-step process:

A. **Classify the type of violation.**

The classification of the violation dictates both the priority and the type of enforcement response which the Department will pursue. There are two classes of violations: High Priority Violations ("HPVs") and Secondary Priority Violations ("SPVs"). HPVs are violations for which a prompt response by the Department to correct the violation is necessary to protect public health, safety, or the environment or for important policy reasons. The Department will consider these violations its highest enforcement priority. SPVs are violations which may still be significant, but for which there is less of a need for a prompt response. The classification of a violation as "secondary priority" should not be construed as an indication that correction of the violation and remediation of any harm is not important for the public and the environment. Rather, it is an indication that responding to and correcting SPVs is second in priority for the Department to responding to and correcting HPVs. The classification system is not intended to imply that the Department will respond to all HPVs before it takes actions with respect to any SPVs. Rather, the classifications are meant to guide the Department generally in prioritizing its response to violations.

B. **Determine the appropriate enforcement action.**

The appropriate enforcement response in a given case, and the priority of that case compared to other cases, is determined by the classification of the violation. There are two types of enforcement response:

- Formal Enforcement Response
- Informal Enforcement Response

The Department will respond to an HPV with a Formal Enforcement Response, such as an order, consent order, or referral to the Attorney General's Office, except in unusual or unique circumstances.¹ In responding to an HPV, the Department will usually seek a penalty in addition

¹Limited programmatic exceptions may be made based on an immediate, effective response obtained through informal action, i.e., a Notice of Violation, as detailed in the appendices.

to injunctive relief necessary to bring the violator² into compliance. With respect to an SPV, the Department will assess, based on its enforcement priorities and the circumstances at issue, whether a Formal Enforcement Response or an Informal Enforcement Response is warranted.

2. Violation Classification

A. High Priority Violations

High Priority Violations have the potential to have such a serious impact on public health, safety, or the environment or represent a substantial deviation from the legal requirements of the program to the extent that the substance and intent of the requirements are seriously undermined and that a Formal Enforcement Response is appropriate. A civil penalty is usually appropriate when responding to an HPV, even if the violator does not have a poor compliance history and did not economically benefit from the violation. A number of individual violations that are High Priority Violations are listed separately in Appendix D for each program, but other violations may also fall within this category.

(1) Definitive HPVs

The following types of violations shall be considered High Priority Violations:

(a) Actual harm or potential threat of significant harm to public health, safety, or the environment. A violation which has caused actual exposure or a substantial likelihood of exposure to pollutants in the air, water or soil, which poses a significant threat to public health, safety, or the environment, or which has caused or is likely to cause a significant or irreversible destruction or degradation of habitat.

All violations at a site should be considered in making this determination. Factors such as the frequency, duration and level of discharges or emissions, the extent and degree of pollution involved, the seriousness and duration of the potential impact of the pollutants or habitat involved, and the proximity to people and potentially affected environmental resources should be considered.

In examining whether there is a substantial likelihood of exposure or harm caused by a violator, the focus should be on the potential of a situation to cause exposure or harm.

(b) Prompt action is needed to prevent further environmental harm caused by the violating activity. A violation which, if not promptly addressed, will cause further harm to

²Enforcement action may also be taken against someone who is not necessarily a "violator," such as a landowner or other person who is legally responsible for correction of a violation or for remediation of an environmental problem. In the interest of simplicity, this ERP refers to all possible respondents and defendants as "violators."

public health or safety or the environment. Although the violation may not yet have caused significant environmental harm, the cumulative effects of its continued occurrence are likely to create a threat to public health, safety, or the environment.

(c) The violation involves fraudulent or criminal conduct. For example, if the violator falsified monitoring information submitted to the Department or covered up a spill or accidental discharge, the Department will treat the matter as one of its highest priorities.

(2) Possible HPVs

Other types of violations may be classified as HPVs for important policy reasons detailed below. There is no formula for determining whether a violation which does not fall within the definition of a definitive HPV is nonetheless an HPV. Rather, the Department will prioritize a violation relative to all of the violations before the agency and the resources available to address such violations. The Department will consider the following factors when prioritizing a violation and determining whether a violation will be classified as an HPV:

(a) Whether the violator is a chronic or recalcitrant violator. Regardless of the type of violations discovered, or whether taken as a whole they constitute a High Priority Violation, the actions of the violator may warrant classification of the violation as a HPV.³

Repeat violations (even if minor in themselves) or failure of a violator to quickly correct violations in the past or present may also cause the Department to characterize a violation as an HPV. Whether someone is a chronic or recalcitrant violator should be evaluated based on case-specific information, and should involve consideration of the following:

- (i) Whether the violator has a history of repeated violations or of delay in correcting violations, and whether that history indicates a general unwillingness or inability to comply with applicable requirements.
- (ii) Whether the violator repeatedly has violations which are not quickly resolved, or whether the violator repeatedly violates the same legal requirements.

In determining whether a violator is a chronic or recalcitrant violator, the staff should consider the compliance history of the violator in all aspects of their own program and in other DEP programs as well. The internal DEP coordination required by the "Enforcement Coordination Plan" will also assist the staff in determining whether a violator has a history of chronic violations or recalcitrance in other DEP programs. Other information such as prior enforcement action by EPA, other states or the Chief State's

³The particular violations may occasionally be so minor that they do not warrant the amount of resources that would be required to pursue a High Priority Violation.

Attorney's Office is also relevant.

In addition, if a violator is a business which has undergone a merger, consolidation, transfer of assets or other business change, the compliance history of the "old" business may be attributable to the "new" business. The staff should consult with DEP's Office of Legal Counsel or the Attorney General's Office if the violator appears to have undergone such a business change.

Where an individual, corporation or other entity owns several facilities in Connecticut, all such facilities should be considered in determining whether a violator is a chronic or recalcitrant violator. If the extent of control is unknown, the staff should discuss this issue further with DEP's Office of Legal Counsel or the Attorney General's Office. Staff should also consult the Department's Compliance History Policy for further guidance.

A violator may be a chronic or recalcitrant violator regardless of whether DEP has ever visited its facility, found violations or previously notified the violator of violations. For example, a violator who has maintained a regulated activity without a permit for a significant period of time is a chronic or recalcitrant violator even though DEP has never previously taken enforcement action against the violator for such activity. For many types of violations, it will be clear that the current violations have existed at the facility for a significant period of time, are continuing unaddressed, or are habitual, and that therefore the violator is a chronic or recalcitrant violator.

Other information about the violator, such as the degree of negligence, willfulness or knowledge involved in the violations, the economic benefit derived from noncompliance, or whether the violator may remove all his/her assets from the state or otherwise try to shield them from the Department,⁴ may also indicate that classification of the violation as a High Priority Violation is warranted.

(b) Whether there is a significant risk of damage to the regulatory program. An individual violation that represents a significant deviation from program requirements may warrant classification as a HPV. For example, a failure to respond promptly and

⁴If the Department has any indication that the violator may remove assets from the state, file for bankruptcy protection, dissolve, or transfer land or other assets to another business or individual, it may be appropriate to refer the case to the Attorney General's Office, even though a penalty may not be warranted. The Department often has greater powers to investigate and to protect its interests in these situations when a case is in a judicial rather than administrative setting, and prompt action can be very important. For example, the Attorney General's Office has the power to require a violator to answer questions under oath, and may be able to file a lien or otherwise attach property. If the staff suspects that one of the above situations may arise in a given case, they should promptly discuss the case with a lawyer in the Attorney General's Office or the DEP's Office of Legal Counsel.

meaningfully to a violation may encourage future noncompliance by the same or other parties.

(c) The extent to which the violator deviates from a permit, order, consent order or judgment. Deviation may be significant either because a requirement is not met, or is not met in a timely manner, or work is not performed in the manner required.

The level of deviation which is “significant” will be determined based on the facts of each case. In some cases, a violation of a permit, order, consent order or judgment may be so minor that it would not merit the resource commitment necessary to pursue a Formal Enforcement Response, as is generally required for High Priority Violations. But for any violation of an order, consent order or judgment which is significant, and which therefore warrants enforcement action, the enforcement action should be escalated above the type of action which was already taken -- for example, violation of an order would result in a referral to the Attorney General's Office, since someone who violates an order is unlikely to take a second order any more seriously than the first.

The following should be considered in determining the significance of the deviation:

-- Failure to perform work specified in an order, consent order, judgment or permit.

-- Whether the violation of the order, consent order, judgment or permit might interfere with the violator's ability to timely and fully comply with other terms of that order, consent order, judgment or permit.

-- Where a compliance schedule is significantly missed, classification as a High Priority Violation is indicated unless (1) timely compliance was impossible because of an event beyond the reasonable control of the violator which was unforeseeable and the results of which could not have been avoided or repaired in order to prevent the noncompliance, and (2) the violator promptly notified the DEP of the problem under the notification of non-compliance provision found in each order, and DEP agreed to necessary schedule changes.

(d) Whether the violation gives the violator a significant economic benefit over its competitors. When a violation saves the violator a significant amount of money as compared to competitors that did comply with applicable environmental regulations, when the violation involves an unpermitted activity that allows the violator to operate at a lower cost than its competitors, or when the violator increases its profits because of non-compliance, the Department shall classify the violation as a High Priority Violation in order to remove the economic incentive for non-compliance and recoup the economic benefit conferred on the violator.

(e) Whether action is necessary to halt improper construction. If the construction creates a fixed or permanent structure, the Department should act quickly if it will become difficult or impossible to remedy the violation or retrofit or reconstruct the facility to

permissible standards if the construction is not stopped promptly.

(f) Whether the violation occurs in the context of a pre-approved Department compliance assistance initiative. When the Department has implemented a compliance assistance initiative, a violation which occurs during the course of such an initiative may be considered a High Priority Violation regardless of their environmental significance. Conversely, the Department may forego, reduce, or postpone its enforcement response if a historic violation is discovered during the course of a compliance assistance initiative.⁵ The Department will only consider pre-approved compliance assistance initiatives and will not alter its enforcement response merely because the violator seeks compliance assistance after violations have been discovered.

(g) Whether the violation is one of multiple violations at a site or facility. Even though a violation may not be classified as a High Priority Violation individually, when multiple violations are evaluated collectively they may merit classification as High Priority Violations, particularly if together they involve:

- (i) Actual exposure or a substantial likelihood of exposure to pollutants in the air, water or soil which pose a significant threat to public health, safety, or the environment;
- (ii) Significant deviation from the terms of an order, consent order, judgment or permit; or
- (iii) Significant deviation from statutory or regulatory requirements.

(h) Whether the Department is acting in coordination with the Environmental Protection Agency or other governmental agencies. When the Department is working with EPA or other governmental agencies on an enforcement case, the Department may consider the enforcement strategies of such agencies or work together with such agencies in determining an appropriate enforcement response.

B. Secondary Priority Violations

SPVs are those violations which merit enforcement action by the Department for the same reasons as HPVs: the violation poses an actual or potential threat to the environment, the violator is a chronic or recalcitrant violator, there is a risk of damage to the regulatory program, the violator deviated from a permit, order, consent order or judgment, the violation gives the violator an economic benefit over its competitors, action is necessary to halt improper construction, or the violation occurs in the context of a pre-approved Department compliance assistance initiative.

⁵If the permittee discovers the violation during an environmental audit, the Department's Policy on Incentives for Self-Policing may affect the Department's enforcement response.

However, for purposes of prioritizing enforcement actions, the Department, after weighing the severity of all the violations before the Department and the resources available to address such violations, considers these violations to be second in priority to High Priority Violations.

3. Determining the Appropriate Enforcement Response

A. General

All current violations (including those corrected following inspection) should be assessed together to determine whether they are HPVs, SPVs, or a combination of both. Staff should then determine whether the violations as a whole warrant a Formal Enforcement Response. A Formal Enforcement Response should address all known violations.

The issuance of a Notice of Violation ("NOV") is usually appropriate even in cases in which an order or consent order will be issued or a referral will be made, especially if the Formal Enforcement Response cannot be commenced quickly. Prompt issuance of an NOV in these circumstances puts the violator on notice of the violations, allows the violator to promptly reduce or eliminate the impacts of the violation, and may result in compliance without the need for a Formal Enforcement Response. For these reasons, an NOV should also be issued when the Department decides that a Formal Enforcement Response is appropriate but one cannot be commenced promptly (i.e., within a month). NOVs should generally include all violations noted during an inspection unless a violation is already addressed and corrected through the issuance of a Warning Notice issued pursuant to C.G.S. § 22a-6s.

If the violator has already corrected all violations and documented the corrections to the Department's satisfaction by the time that an enforcement action is to be taken, it may not be necessary to issue an order or NOV, since what the Department would be telling the violator to do has already been done. However, if the case warranted a Formal Enforcement Response before the violations were corrected, then a penalty action after the violations were corrected may still be appropriate (especially where there is economic benefit associated with non-compliance) and can be obtained by means of a consent order or referral to the Attorney General's Office. In addition, it may still be appropriate to issue an order or NOV, even though the violator has returned to compliance. For example, the Department may issue an NOV or order if the violator has a history of violations and the latest violations should be documented by the Department, and, in the case of an order, finally adjudicated or admitted to be true, or if the violator does not appear to fully understand the violations which occurred or the importance of maintaining compliance.

B. High Priority Violations

High Priority Violations are those which involve issues or circumstances of greatest concern to the Department. These are the most serious cases handled by the Department, and should receive the fastest and most stringent enforcement response available. Except in unusual or unique circumstances, the Department will pursue a Formal Enforcement Response for every HPV.

If a decision is made not to pursue a penalty for a High Priority Violation, the reasons must be documented in the Enforcement Action Summary.

An appropriate Formal Enforcement Response to an HPV will be one of the following:

- (a) Administrative cease and desist order (if harm is imminent), with referral to the Attorney General for penalty;
- (b) Unilateral order, with or without referral to the Attorney General for penalty;
- (c) Administrative consent order without penalty, with penalty, or with referral to the Attorney General for penalty;
- (d) Referral to Attorney General for injunction and penalty; or
- (e) Criminal action by Chief State's Attorney or Environmental Protection Agency in conjunction with the Department.

(1) Administrative Orders

(a) Cease and Desist Order

A cease and desist order is an administrative order issued when the violation is causing actual and substantial harm or is threatening to cause such harm imminently. A respondent is required to obey a cease and desist order immediately upon receipt, and is entitled to a hearing only afterwards -- within 10 days under the governing statute. The Commissioner must issue a final decision affirming, modifying, or reversing the cease and desist order within fifteen days after the hearing (C.G.S. § 22a-7).

If immediate action is needed to prevent, stabilize or correct a release which poses an imminent threat to public health, safety, or the environment, the staff should work with the DEP Oil and Chemical Spills Response Division to determine whether the Department needs to undertake emergency action using emergency response funds.

The staff should discuss the issuance of a cease and desist order or the need for a temporary injunction with a lawyer from the DEP's Office of Legal Counsel or the Attorney General's Office. A cease and desist order can also be issued in cases in which there are substantial and continuous permit violations and it appears prejudicial to the public interest to delay action until after a hearing.

(b) Unilateral Order

Generally speaking, a unilateral order is used when substantial harm is not occurring or imminent. It is issued by the Commissioner pursuant to his statutory authority and the

recipient may request a hearing before the Department within 30 days. If the recipient does not request a hearing, the order becomes final and legally enforceable after 30 days. Thus, where an HPV is not causing or threatening to imminently cause substantial harm and there is no particular reason to refer the matter to the Attorney General's Office for an injunction (see such reasons below), a unilateral order should be issued. A unilateral order may also be appropriate when the violator has not cooperated in consent order negotiations or has not complied with a consent order or the requirements of a Notice of Violation. Under the following sections of the Connecticut General Statutes, a final order is recorded on the land records: section 22a-178(g) for orders issued under the air statutes, section 22a-225 for orders issued under the solid waste statutes, section 22a-434 for pollution abatement orders issued under the water pollution control statutes, and section 22a-402 for orders issued under dam safety statutes. An order becomes final 30 days after issuance if not appealed, or after exhaustion of all appeals.

(c) Consent Order

A consent order is a type of order issued by the Commissioner. It is not a contract and should not be labeled "consent agreement." A consent order is enforceable as an order, which means that statutory penalties are available for noncompliance with it, and a lawsuit to enforce the consent order will have precedence in Superior Court over other lawsuits. As with a final unilateral order, in the following programs a consent order is recorded on the land records: section 22a-178(g) for orders issued under the air statutes, section 22a-225 for orders issued under the solid waste statutes, section 22a-434 for pollution abatement orders issued under the water pollution control statutes, and section 22a-402 for orders issued under dam safety statutes.

(2) **Referral to the Attorney General**

A referral to the Attorney General is a formal request by the Commissioner that the Connecticut Attorney General institute an action in state court to obtain penalties and/or injunctive relief against a violator. A referral to the Attorney General should be made when the violation is particularly egregious, when consent order negotiations fail to resolve the case in a timely manner, when the violator appears to be unwilling or unlikely to comply with an order or consent order, or when the violator has not complied with a past order or consent order and thus is unlikely to comply with a subsequent order or consent order.

A referral should include information on all violations in the program making the referral which the Department is requesting that the Attorney General include in the lawsuit. For compliance history purposes, the referral should also include information on all orders, consent orders, and judgments within approximately the preceding five years (although the case may merit either a longer or a shorter time period). This ensures that any penalty may account for all such violations and that the Attorney General is aware of the violator's compliance history when pursuing the case. The referral should include an explanation of the time period of violations included in the package. Staff will prepare a penalty calculation for

all referred violations. (It may not always be necessary to prepare a penalty calculation for all such violations at the time of the referral; the referral package should however clearly identify the violations for which a penalty calculation has been done, and those for which it has not. The Assistant Attorney General assigned to the case may request additional penalty calculations as needed.) Current and previous violations in other DEP programs should be included in the same referral if coordination under the "Enforcement Coordination Plan" results in a determination that doing so is appropriate.

(3) Criminal Action by the Chief State's Attorney's Office or the Environmental Protection Agency

This involves an action to bring criminal charges against a violator and is appropriate when the violator's conduct involves an element of criminal activity. If convicted, the violator faces fines or a prison sentence. Particular statutes administered by the Commissioner define certain activities as criminal and any fraudulent or deliberately false act may also be prosecuted criminally. Staff should consult with Counsel's Office if they suspect a violation involves criminal behavior.

C. Secondary Priority Violations

Secondary Priority Violations are those which are second in priority to High Priority Violations. The appropriate initial response to an SPV is one of the following:

(1) Informal Enforcement Response

(a) Notice of Violation (NOV)

An NOV should require compliance within no more than 30 days of issuance of the NOV.

(b) Warning Notice

For minor violations, the Commissioner may issue a warning notice under Conn. Gen. Stat. § 22a-6s. What constitutes a "minor violation" is narrowly defined by statute, so staff must be sure the violation fits within the definition before issuing such a notice.

(2) Formal Enforcement Response

(a) Unilateral order

with or without referral to Attorney General for penalty

- (b) Consent order
without penalty, with penalty or with referral to Attorney General for penalty
- (c) Referral to Attorney General for injunction and/or penalty

An NOV may only be the sole intended enforcement response when there is reason to believe that it will result in prompt compliance. If the NOV does not within 30 days result in full compliance or establishment of a compliance schedule, a decision must be made whether to escalate to issuance of an order or a referral.⁶

If in past dealings with a violator informal actions, such as NOV issuance, have not resulted in prompt compliance, informal action is not likely to produce compliance in the pending case. A Formal Enforcement Response should thus be pursued (although an NOV may nonetheless also be issued to put the violator on notice that the Department wants compliance). Similarly, if past orders against a violator have not been taken seriously or have resulted in drawn-out disputes, the appropriate response is a referral to the Attorney General's Office. Thus, a violation may be an SPV and nonetheless merit a Formal Enforcement Response.

D. Other Possible Actions to be Considered

DEP should also consider taking the following additional actions with respect to all violators:

- (1) When the violator is a corporation, imposition of penalties against the corporation as well as, where appropriate, responsible corporate officials.
- (2) Denial of pending or future permits, registrations, certifications or other licenses, and/or denial or revocation of any existing permit, registration, certification or other license.
- (3) Imposition of more stringent permit conditions such as audits or the posting of a surety in pending or future permits.
- (4) Publicizing of the enforcement action to serve notice on the regulated community as well as the general public that violators are caught and

⁶ A note of caution regarding repeat NOV's. Issuance of repeat NOV's for the same or similar violations, even if the violations that were the subject of prior NOV's were not corrected, is generally acceptable. However, in most situations a repeat NOV must not be the final enforcement action chosen. As discussed elsewhere in this policy, if a violator fails to respond appropriately to any enforcement action, including a previous NOV, our response should be to escalate the action.

punished. The staff may also negotiate an agreement between DEP and the violator that the violator will place a public notice in local newspapers admitting the violation.

III. TIMELINESS OF ENFORCEMENT ACTIONS

The following are the Department's general guidelines governing its response time to violations. These guidelines represent what the maximum response time to a violation should be. The Department can and will act more quickly if circumstances indicate that a prompt enforcement response is necessary or as resources allow.

In some cases the enforcement response time frames in this ERP may be insufficient to properly prepare the appropriate enforcement action in view of the complexity of the case, a need for special coordination among the bureaus, novel legal issues, complex technical questions or unusual resource constraints at a given time. Additional response time may be approved for appropriate reasons by the program director or enforcement supervisor. For enforcement actions taking significantly greater than these time lines, documentation of the reasons why should be provided in the file.

In other cases, immediate action may be appropriate. For example, regardless of the above time lines, immediately upon discovery of a potential or actual Definitive HPV, the Department will assess the violation and take appropriate action to remediate and/or abate the environmental harm. DEP will take action more quickly than provided in the ERP if:

-- A violation poses an immediate threat to public health, safety or the environment;
or

-- The violations are of a type, such as improper construction or installation, improper waste disposal, or the improper application or misuse of pesticides, which must be stopped or altered immediately.

1. The Department will evaluate and classify a violation within 90 days of discovery.⁷

The Department will determine as early as possible within the 90 days after discovery of a violation whether it is a High Priority Violation or a Secondary Priority Violation and decide whether a Formal Enforcement Response or an Informal Enforcement

⁷A violation is discovered as of the date when the investigating staff (typically field staff) responsible for administering and enforcing the statute or regulation at issue determines, through an inspection, record review, and/or data (e.g., laboratory reports), that a violation has occurred.

Response is appropriate.

2. Issue a Notice of Violation (if appropriate) within no more than 90 days of discovery and require that the violator achieve compliance or submit a compliance schedule within 30 days of issuance;

The 30 day time frame for achieving compliance (or obtaining a compliance schedule if full compliance is not technically feasible within 30 days) is the maximum the Department will allow. The Department may set shorter compliance deadlines as appropriate. The Department also does not need to wait until the end of the compliance deadline before taking further action if it appears that the violator is unable or unwilling to achieve compliance.

It is important to note that a Notice of Violation is often issued promptly upon discovery of the violation and before the violation has been classified as an HPV or an SPV, in order to put the violator on notice. See discussion on page 9. Issuance of an NOV does not in any way preclude a Formal Enforcement Response by the Department, and the Department may also issue a Notice of Violation while at the same time pursuing a Formal Enforcement Response or evaluating whether to take a Formal Enforcement Response.

3. If a Formal Enforcement Response is appropriate, the Department will do one of the following:⁸

- (A) Issue a unilateral order (and refer to the Attorney General's Office for collection of penalties if appropriate) within 180 days of discovery;
- (B) Issue a draft consent order within 180 days of discovery and obtain a consent order signed by all parties within 300 days of discovery; or
- (C) Complete a referral to the Attorney General's Office within 210 days of discovery.

If consent order negotiations break down, the Department will complete other appropriate action (usually a unilateral order or a referral to the Attorney General) within that same 300 day period. Staff should therefore monitor consent order negotiations to ensure that negotiations are progressing within that period, and if not, should re-assess what the appropriate enforcement response should be.

⁸Certain types of cases may require more time for taking formal enforcement action, including those involving site abandonment, potential criminal conduct, or the need for outside technical experts.

4. If an Informal Enforcement Response is appropriate, the Department will do the following:

(A) Issue a Notice of Violation or Warning Notice within no more than 90 days of discovery and require that the violator achieve compliance or submit a compliance schedule within 30 days of issuance;

See discussion on page 14.

(B) If compliance is not achieved within 30 days (or such other period as determined by the Department) or if otherwise appropriate, the Department will assess whether a Formal Enforcement Response is warranted. If warranted, the Department will commence a Formal Enforcement Response.

The first day that the violator exceeds the compliance deadline shall be considered the "discovery date" (see footnote 7) for the purpose of escalating the Department's actions to a Formal Enforcement Response. Staff thus must assess whether or not to pursue a Formal Enforcement Response at this point. Nothing herein shall preclude the Department from assessing penalties and imposing liability for the entire period of noncompliance.

IV. ESTABLISHING PRIORITIES

DEP will generally prioritize High Priority Violations ahead of Secondary Priority Violations in its enforcement efforts. However, enforcement actions need not be taken in all HPV cases before any actions are initiated in SPV cases. For example, it may be appropriate to take a formal enforcement action against someone whose illegal conduct is highly visible in order to assure that the conduct does not set an example that others may follow.

The emphasis will generally be on the cases that pose the most significant threat to human health and the environment. The following factors may also raise the priority of certain HPV cases over others, or may raise the priority of one SPV case over another:

- (1) Ongoing or imminent activity which is causing or can reasonably be expected to cause substantial damage to the environment or public health.
- (2) Pollution or potential pollution of an actual or potential source of drinking water -- areas classified as AA, A, GAA or GA in Connecticut's Water Quality Standards or designated as an aquifer protection area.
- (3) The location of the violation or pollution in a residential neighborhood or other area used by the general public.
- (4) Site is not secured to prevent public access, if necessary, including fencing, danger

signs or other security measures.

- (5) High likelihood of human exposure to hazardous or dangerous materials.
- (6) High value of the natural resource that is threatened (e.g., a high value wetland may be determined by the plant and animal species present, their diversity and apparent health; the size of the wetland and whether it is part of a network of wetlands; and the flood storage capacity and water quality renovation potential of the wetland.
- (7) Enforcement action is likely to result in substantial "pollution prevention" or environmentally beneficial research and development initiatives.
- (8) Enforcement action is likely to result in substantial economic benefit to the state as a whole.
- (9) Enforcement action is likely to result in fast and complete cleanup or compliance by Respondent with comparatively little time and effort of DEP staff.
- (10) Enforcement action is likely to result in final order or judgment in DEP's favor because of strength of case, and is not likely to take an inordinate amount of DEP staff time and effort given the value of the environmental resources involved or the seriousness of the violation.
- (11) Respondent in this case is a more severe chronic or recalcitrant violator than in other cases in which enforcement action has not yet been taken.
- (12) Enforcement action is necessary to implement important state plan or policy (e.g. no net increase of nitrogen in Long Island Sound).
- (13) The violation or the violator involved has gained notoriety, and is likely to encourage similar violations by others.
- (14) The violator has gained substantial economic benefit from noncompliance.

V. CRIMINAL PROSECUTION

Referral to the Chief State's Attorney or the Environmental Protection Agency for criminal prosecution is encouraged where criminal conduct may have occurred. The time delay involved in instituting criminal prosecution is generally longer than that for civil actions, and the staff should assure that violations which pose a threat to human health or the environment are not allowed to continue while the criminal action is pursued. A civil action to compel a return to compliance should also be taken when criminal referrals are made. Parallel civil and criminal enforcement actions must be coordinated with both the

Attorney General's Office (or EPA) and the Chief State's Attorney's Office whenever both are involved.

VI. REFERRALS TO EPA

Referrals to and coordination with EPA on enforcement actions will be consistent with any procedures which a particular program may have established with EPA. The State has the primary lead for enforcement in Connecticut. However, if the Department decides to refer a High Priority Violation case to EPA, the referral will be made within 120 days of violation discovery. Regular communication, including conference calls, will assure and facilitate coordination with EPA on enforcement cases. (For further discussion of joint actions with EPA, see "Enforcement Coordination Plan.")

APPENDICES

Classification of Certain Violations in the Air Pollution Control Program

Examples of Definitive High Priority Violations

1. Violation of RCSA Section 22a-174-29, Table 1 (hazardous air pollutants) at any source.
2. Violation of RCSA Section 22a-174-29, Tables 2 and 3 (hazardous air pollutants) at a permitted source or a source which should have obtained a permit.
3. Any knowing violation of a National Ambient Air Quality Standard.
4. Constructing and operating a stationary source without required permits or permit modifications where actual emissions from the source or modification exceed major source thresholds.
5. General Permit to Limit Potential to Emit (GPLPE) violation - actual emissions above major stationary source threshold.
6. Gasoline dispensing facility with monthly throughput of one hundred thousand gallons or more which transfers or allows the transfer of gasoline into a motor vehicle fuel tank without a Stage II vapor recovery system (Stage II vapor recovery system has not been installed).
7. Violation where the violator gains a significant economic benefit due to non-compliance.

Examples of Possible High Priority Violations

1. Violation of order or permit. Factors to be considered include, but are not limited to, the condition(s) of the order or permit that were violated and the length of time and degree to which the condition(s) have been violated. Some conditions may warrant stronger enforcement action than others.
2. Violation of RCSA Section 22a-174-7(b) - shutdown of control equipment. Factors to be considered include, but are not limited to, frequency and/or length of time that the control equipment was not or has not been operated, magnitude and type of pollutants emitted, and source's efforts to repair the control equipment.
3. Violation of RCSA Section 22a-174-18(a) (visible emissions) at a major stationary source. Factors to be considered include, but are not limited to, magnitude of the violation and whether or not the source is a recalcitrant and/or repeat offender with respect to this violation.

4. Storing, offering for sale, or delivering fuel with greater than 1% sulfur by weight (dry basis) unless allowed under RCSA Section 22a-174-19(a)(4).
5. Violation of RCSA Section 22a-174-29, Tables 2 and 3 (hazardous air pollutants) at an unpermitted source. Factors to be considered include, but are not limited to, risk of human or environmental exposure and magnitude and type of pollutants emitted.
6. Violation of RCSA Section 22a-174-23 (control of odors). Factors to be considered include, but are not limited to, risk of human or environmental exposure, magnitude and type of pollutants emitted, land use in the neighborhood and frequency and/or number of complaints received from the public.
7. Violation of RCSA Section 22a-174-20, 22a-174-22 or 22a-174-32 (ozone precursor regulations). Factors to be considered include, but are not limited to, magnitude of pollutants emitted and the time of year that the violation occurred.
8. Violation of RCSA Section 22a-174-30 (dispensing of gasoline/Stage II vapor recovery). Factors to be considered include, but are not limited to, risk of human or environmental exposure and whether or not the source is a repeat offender with respect to RCSA Section 22a-174-30 violations.
9. Construction and/or operation of a stationary source or modification (other than a stationary source where the actual emissions from the source exceed major source thresholds) without a permit. Factors to be considered include, but are not limited to, type of stationary source, whether or not the source is subject to a federal new source performance standard, magnitude and type of pollutants emitted and whether or not the source is a repeat offender with respect to this violation.
10. Failure to apply for and/or obtain a Title V permit or General Permit to Limit Potential to Emit (GPLPE). Factors to be considered include, but are not limited to, whether or not the source reports the fact that they did not apply for and/or obtain the Title V permit or GPLPE, type of source, actions taken by source to remedy violation, and magnitude and type of emissions.

Note: The Bureau of Air Management may take into consideration the Environmental Protection Agency's enforcement priority when evaluating possible high priority violations.

Classification of Certain Violations in the Inland Water Resources Division

Examples of Definitive High Priority Violations

The following activities or conditions that are subject to statutes and regulations administered by the Inland Water Resources Division are examples of Definitive High Priority Violations when they are conducted or created by a violation of law:

- C A dam, dike or similar structure that shows signs of imminent failure and would by breaking away cause a loss of life or property damage.
- C Fill in a FEMA regulatory floodway that creates a potential threat to public health or safety and a flood event is predicted.
- C Blockage of a stream channel that threatens public health or safety.
- C Pumping of water at volumes that result in aquatic habitat destruction.
- C On-going destruction of endangered species habitat.

Examples of Possible High Priority Violations

The following activities or conditions that are subject to statutes and regulations administered by the Inland Water Resources Division are examples of Possible High Priority Violations when they are conducted or created by a violation of law:

- C A dam, dike or similar structure that would by breaking away cause a loss of life or property damage is found to be in an unsafe condition.
- C Fill placed in a FEMA regulatory floodway.
- C On-going alterations to floodplains, watercourses or wetlands that:
 - * degrades aquatic habitat (e.g. severe siltation)
 - * creates blockages to fish passage (e.g. culvert replacements),
 - * creates or aggravates a flood hazard (e.g. fill in a floodplain with known flooding problems),
 - * degrades or destroys wetlands habitat (e.g. sand and gravel mining operations, filling, grading, draining)
- C Modification or construction of a dam that is under DEP jurisdiction.
- C Conducting “emergency repairs” that result in the degradation of wetland or

watercourse habitats but where the “emergency” cannot be reasonably verified.

- C Violation(s) of order, consent order or permit condition(s) that result in environmental damage.
- C Conducting regulated activities after the expiration of a permit.
- C Installation and withdrawal of water from new wells by persons that have been past applicants or permittees of water diversion permits.
- C Dewatering or pumping of water that adversely affects stream flows, particularly during the annual low flow period.
- C Pond drawdowns made without proper notifications or authorizations

Classification of Certain Violations in the Office of Long Island Sound Programs

Definitive High Priority Violations in the Office of Long Island Sound Programs will be those unauthorized activities or construction which result in significant or irreversible disruption, disturbance, loss or destruction of coastal resources, or impairment of navigation or the public trust, and which require prompt action to prevent or minimize such impacts. The following are examples of specific violations which will be categorized as Definitive High Priority Violations if the threshold criteria described above is met:

Examples of Definitive High Priority Violations

- < unauthorized activities or construction conducted during periods of seasonal restrictions to protect certain shellfish, fish and avian species
- < unauthorized activities or construction resulting in the discharge of dewatering or storm water effluent into tidal wetlands, or to tidal, coastal or navigable waters of the state
- < unauthorized activities or construction resulting in the sedimentation, dredging or filling of tidal coastal or navigable waters, or of a tidal wetland
- < unauthorized activities or construction which blocks a navigation channel, interferes with shellfishing, or limits public access such as the installation of a groin or fence
- < unauthorized construction of solid fill structures such as docks, solid groins, jetties and retaining walls which result in the interruption of natural sediment transport, sedimentation and erosion processes
- < unauthorized placement of structures in tidal wetlands
- < violation where the violator gains a significant economic benefit due to non-compliance

Classification of Certain Violations in the PCB Management Program

Examples of Definitive High Priority Violations

1. Improper disposal of PCB's such that a significant threat to public health is created, a significant or irreversible destruction or degradation of habitat has resulted, or which involves fraudulent or criminal conduct.
2. Release of PCB's into the environment which results in a significant threat to the public health, significant or irreversible destruction or degradation of habitat, or which requires prompt action to prevent such significant threat or damage.

Examples of Possible High Priority Violations

1. Improper disposal of PCB's
2. PCB release to soil, surface water, or groundwater.
3. Manufacture of PCB's without obtaining an exemption.
4. Use of PCB's in other than an enclosed system.
5. Unauthorized sale of PCB's.
6. Incineration of PCB's by Public Service companies without making the required notifications.

Classification of Certain Violations in the Pesticide Management Program

Examples of Definitive High Priority Violations

1. The misuse of pesticides such that a significant threat to public health, safety, or the environment has occurred or is likely to occur, or which involves fraudulent or criminal conduct.
2. The misuse of pesticides such that substantial environmental contamination or human exposure has occurred requiring prompt action to minimize further contamination or exposure.
3. The production, sale, or use of prohibited or banned pesticides to a degree that poses a substantial threat to public health, safety or the environment or is knowingly conducted in a fraudulent or criminal manner.

Examples of Possible High Priority Violations

1. Commercial application of pesticides without proper business registration.
2. Commercial application of pesticides without proper certification.
3. Application of restricted use pesticides without proper certification.
4. Producing, distributing, offering for sale, or using prohibited, banned, or unregistered pesticides.
5. Distributing or offering for sale restricted use pesticides to an uncertified or improperly certified individual.
6. The misuse of pesticides.

Classification of Certain Violations in the RCRA Program

Examples of Definitive High Priority Violations

1. Receipt at a facility of hazardous waste from off-site for financial gain without the receiving facility first obtaining a TSDF permit.
2. Gross deviation from the storage time requirements for a generator of hazardous waste.
3. Systematic failure to comply with manifest requirements which prevents hazardous waste from being properly managed, transported and/or delivered to a permitted facility.
4. Failure to properly handle ignitable, reactive or incompatible wastes when there is a serious threat to public health and/or the environment.
5. Systematic failure to comply with land ban requirements which causes hazardous waste to be disposed of improperly.
6. Systematic failure to comply with general inspection requirements which results in potential hazards being undetected and uncorrected.
7. Failure to maintain and implement a personnel training program which is designed to help employees properly manage hazardous wastes and appropriately respond to potentially hazardous conditions or releases.
8. Systematic failure to comply with container management requirements (i.e., containers in poor condition, contents not identified, lack of secondary containment) to such a degree that there is a potential risk to public health and/or the environment.
9. Systematic failure to comply with tank requirements.
10. Gross deficiencies in contingency planning requirements.
11. Failure to clean up spills that may cause a substantial likelihood of exposure to hazardous waste or hazardous constituents.
12. Violation where the violator gains a significant economic benefit due to non-compliance.

Examples of Possible High Priority Violations⁹

1. Significant permit violations such as failure to conduct waste analysis on incoming waste streams for a commercial facility.
2. Failure to obtain a permit for activities that require a permit.
3. Failure to comply with hazardous waste determination requirements for wastes such that wastes are not identified and there appears to be no knowledge of the waste and its hazardous constituents.
4. Failure to comply with the 90 day storage time limit for a large quantity generator, or the 180 day storage time or 1000 kg. accumulation limit for a small quantity generator.
5. Failure to significantly comply with manifest requirements, but the hazardous waste is properly handled and ultimately managed at a permitted facility.
6. General failure to comply with container and tank management requirements including labeling, dating, keeping containers closed, using containers in good condition and performing tank assessments.
7. Failure to have a closure plan addressing all hazardous waste management units at the facility.
8. Failure to establish or maintain continuous financial assurance or update financial assurance for closure and/or post closure care.
9. Failure to implement or complete closure activities under an approved closure plan.
10. Substantial deviation from export rule requirements.
11. Failure to provide adequate site security when there is a potential for exposure to hazardous wastes.

Classification of Certain Violations

⁹Factors to be considered in determining if the violation is significant and should be upgraded from possible to definitive or downgraded from possible to secondary include amount of waste, nature of waste, condition of containers, overall waste management practices, duration of the violation and potential for harm to public health and the environment.

in the Solid Waste Management Program

Examples of Definitive High Priority Violations

1. Disposal of hazardous, radioactive, or liquid wastes at a solid waste facility, or the disposal of any amount of biomedical waste or friable asbestos anywhere without approval, in violation of statutes, regulations, or the solid waste facility permit.
2. Failure to install or maintain landfill liner and leachate or gas collection and treatment system in compliance with regulations and facility solid waste permit.
3. Methane gas emission from a landfill exceeding 25% of the lower explosive limit in on-site or off-site structures.

Examples of Possible High Priority Violations¹⁰

1. Constructing or operating a solid waste facility without a permit. Specific factors to be considered include the type, quantity and location of the waste.
2. Significant deviation from permit condition or regulations at a solid waste facility, such as:
 - C exceeding permitted fill limits;
 - C failure to conduct required ground water and surface water monitoring;
 - C violation of ash residue storage requirements with potential for release of contamination to the environment;
 - C improper storage of solid waste that exceed permit limits or regulations
 - C failure to maintain waste compaction and grading, or appropriate daily, intermediate or final landfill cover or disruption of landfill without approval;
 - C failure to maintain ground water, surface water, and water supply separation requirements; and
 - C failure to comply with permit conditions or regulations for solid waste facility closure and/or post-closure activities.
 - C receipt of solid waste not authorized by the solid waste facility permit
3. Methane gas emission exceeding the lower explosive limit in the soil at the landfill

¹ General factors to be considered when determining a high priority violation include the quantity of waste involved, toxicity, environmental persistence, or other hazard posed by the waste, waste management practices, proximity to human (including employees) and environmental receptors, exposure pathways, duration of violation, etc.

property boundary.

4. Burning any unauthorized solid wastes at a solid waste facility or elsewhere.
5. Failure to establish or update financial assurance for closure and/or post-closure care.

Classification of Certain Violations in the Water Pollution Control Program

Examples of Definitive High Priority Violations

- 1) Discharge to soil or groundwater which creates actual contamination or imminent likelihood of contamination of a public or private water supply well, above Ground Water Protection Criteria.
- 2) Discharge to soil or ground water of toxic or hazardous substances in GA or GAA areas which creates a significant and imminent risk to public health, safety or the environment.

NOTE: While Nos. 1 and 2 above should in most cases be considered HPVs and require quick, formal responses, penalties may not be appropriate in those cases where the releases are more historic in nature. Degree of wilfulness or negligence, lack of adequate maintenance, timeliness of notification and other factors as discussed in the body of this document should be considered in determining whether a penalty is appropriate.

- 3) Failure to file a Form 3 pursuant to section 22a-134a of the Connecticut General Statutes (“CGS”) upon transfer of an establishment at which pollution exists that poses a significant and imminent risk to public health, safety or the environment.
- 4) Any discharge deemed avoidable that causes actual harm or poses a significant and imminent risk of harm to public health, safety or the environment (examples of harm include fish kills, habitat destruction, upset of a sewage treatment plant, exposure of human beings to dangerous levels of air- or water-borne pollutants, significant aesthetic impacts such as discoloration, solids deposition or floating oil in a surface water body, etc.).
- 5) Any bypass of approved wastewater collection, storage, treatment or disposal facilities deemed avoidable, generally excluding wet weather related combined sewer overflows, that causes or has the potential to cause significant harm to public health, safety or the environment.
- 6) Generally, multiple or recurring violations of effluent limitations greater than five times permitted limits or pH values greater than 2.0 standard units outside the permitted range or flow values greater than twice permitted limits. Consideration should be given to the type of treatment system (for example, biological, physical/chemical, etc.), the receiving waters (for example, water quality limited, POTW equipped with advanced treatment, etc.), the parameters of concern (for example, toxic or conventional pollutants), and the potential impact of the

violations.

- 7) Discharge to a POTW that adversely impacts or causes an upset or interference with the sewage collection, treatment or disposal operations, or that causes a pass-through of any substance into the receiving waters which subsequently causes or has the potential to cause significant harm to public health, safety or the environment.
- 8) Improper operation and maintenance of wastewater collection, storage, treatment or disposal facilities that causes or has the potential to cause significant harm to public health, safety or the environment, or is likely to cause significant continuing violations of a permit, order, consent order or stipulated judgment.
- 9) Violation where the violator gains a significant economic benefit due to non-compliance.

Examples of Possible High Priority Violations

- 1) Significant non-compliance with a compliance schedule for substantive requirements/injunctive provisions of a permit, order, consent order, stipulated judgment or remediation schedule under the Property Transfer Act. The length of time which is significant will depend upon the type of action which is past due and the importance of that action in the particular case. Examples include failure to provide short-term potable drinking water on time and any non-compliance which could result in a significant delay in the long-term provision of potable water; failure to investigate or remediate an existing or imminent pollution problem; failure to cease a discharge that has a significant potential to cause pollution; failure to upgrade wastewater treatment facilities; or failure to pay a penalty or fund a supplemental environmental project (“SEP”). However, missing a date in some permits, orders or stipulated judgments may not be a high priority violation until comparatively more time has passed, especially if the final compliance date is not jeopardized.
- 2) Frequent or regular failure to perform or comply with monitoring requirements of a permit, consent order or stipulated judgment, especially where the facility clearly realized an economic benefit that should be recovered through a penalty action. Examples include knowingly failing to sample or monitor at the location specified or representative of the activity; failure to submit complete reports; failure to collect, preserve, handle or analyze samples in accordance with approved or required procedures.
- 3) Discharge to soil or ground water which creates actual contamination or substantial likelihood of contamination of a public or private supply well, below

Ground Water Protection Criteria or for which there is no Ground Water Protection Criteria.

- 4) Failure to file appropriate forms pursuant to section 22a-134a of the CGS for an establishment at which a release of a hazardous substance has occurred.
- 5) Any unpermitted process wastewater discharge of a significant volume, for which permit requirements are known or should have been known and for which a permit application has not been submitted or completed in good faith. Examples include a facility having a permit in one location but maintaining unpermitted discharges at another location, moving a previously permitted operation to another address, or inordinately delaying the permit process while the unpermitted discharge exists.
- 6) Any bypass of approved wastewater collection, storage, treatment or disposal facilities that results in a violation of a permit, order, consent order or stipulated judgment.
- 7) Generally, multiple violations of permitted effluent limitations or other permit conditions, including general permits.
- 8) Multiple instances of improper operation or maintenance of approved wastewater collection, storage, treatment or disposal facilities, including but not limited to inadequate treatment controls, deteriorated equipment, inadequate operator staffing or training, failure to have sufficient alarms or to respond to available alarms, insufficient spare part or treatment chemical inventory, recurring equipment failure, lack of emergency treatment controls or back-up facilities, which causes noncompliance with a permit, order, consent order or stipulated judgment.
- 9) Failure to notify the Water Bureau in accordance with statutes or regulations of:
 - a) a substantial upset or failure of a wastewater treatment system or its monitoring or control equipment which causes or has the potential to cause significant harm to public health, safety or the environment; or
 - b) a bypass of any part of approved wastewater collection, storage, treatment or disposal facilities except as allowed by regulation.
- 10) Substantial facility, process, production, or treatment system changes made without the required notice to DEP and/or approval.
- 11) Lack of adequate spill control in instances where the location of a potential release and the nature or the pollutants/characteristics of a discharge pose a threat to public health, safety or the environment and the responsible party resists making

immediate improvements or the responsible party has a poor history of environmental compliance.

Classification of Certain Violations in the Underground Storage Tank Management Program

Examples of Definitive High Priority Violations

1. Continued operation of a leaking underground storage system or facility with knowledge or suspicion of a release.
2. Falsification of leak detection and/or activity records for an underground storage tank system or facility.
3. Use of underground storage tank system or facility components beyond deadlines for operation of said components in a system or facility from which a release is suspected or confirmed.

Examples of Possible High Priority Violations

1. Failure to report in a timely manner a known discharge from an underground storage tank system or facility.
2. Failure by the responsible party to take necessary and timely corrective actions following a known discharge from an underground storage tank system or facility.
3. Failure to conduct required leak detection and/or failure determination testing and/or tightness testing of an underground storage tank system or facility from which a release is suspected or confirmed.