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1- DEPARTMENT APPROACH TO COMPLIANCE ASSURANCE; DETERMINING THE APPROPRIATE RESPONSE TO VIOLATIONS

A. Introduction

The New Hampshire Department of Environmental Services (NHDES) is committed to a consistent, predictable, and appropriate compliance assurance program, which is protective of public health and the environment while creating a credible deterrent against future violations. NHDES believes that compliance with environmental laws is best ensured by using a multi-tiered, multi-media approach that includes education and outreach, compliance assistance, compliance monitoring, and where appropriate, formal enforcement. Compliance and going beyond compliance are our fundamental goals. NHDES will endeavor to create incentives for compliance and will encourage the regulated community to surpass the minimum requirements of compliance through pollution prevention and innovative technologies.

NHDES seeks to prevent violations of environmental laws and the associated impacts on the environment and public health through education and outreach. When violations occur, NHDES encourages early identification and correction of environmental violations to minimize impacts to public health and the environment. NHDES encourages regulated entities to self-report violations to NHDES, especially if compliance will take time to achieve. If violations are observed or reported by other than the regulated entity, NHDES will notify the responsible party as soon as possible after NHDES becomes aware of the violations. NHDES will offer or recommend assistance to correct violations even while formal enforcement action may be in development to address them. Where NHDES identifies trends or patterns of non-compliance, NHDES will investigate root causes and take appropriate action.

Violators will be held responsible for repairing any environmental damage that they have caused. If remediation is not feasible, NHDES will require the violator to provide or undertake other compensatory measures. If NHDES undertakes remediation when authorized by law due to the violator's unwillingness to do so, NHDES will seek cost recovery. NHDES will focus its enforcement efforts to ensure the most positive impact.

Through its outreach and assistance activities, NHDES will encourage greater awareness of the requirements of environmental laws and promote environmental stewardship. Through its compliance actions, NHDES will encourage the regulated community to implement innovative alternatives that provide additional environmental benefits. Through its penalty actions, NHDES will strive to eliminate unfair competitive advantage or other economic benefit gained from the avoidance of environmental requirements. Penalties also will reflect the seriousness of the violation and its impact on the environment and public health.

Because environmental compliance has a direct impact on everyone, NHDES seeks to expand public involvement in compliance assurance efforts, and strongly supports the public's right to know about the compliance status of New Hampshire facilities and the state of New Hampshire's environment. NHDES will maintain an open dialogue with the regulated community and other stakeholders to seek ways to continuously improve environmental performance and results.

B. General Approach to Compliance Assurance

To provide as much information as possible to as many people as possible, NHDES conducts education and outreach activities. These activities include preparing and distributing printed materials, conducting and participating in conferences and trade fairs, providing information through radio and television interviews and public service announcements, and maintaining an active and up-to-date website. A fuller description of these activities can be found in Chapter II.

NHDES also offers site-, activity-, and facility-specific technical assistance through a variety of mechanisms and offers or coordinates financial assistance for certain types of activities. Assistance is available on an on-going basis before NHDES discovers any violations, while NHDES is addressing violations that have been discovered, and even after the violations have been corrected. The range of available technical and financial assistance is described in Chapter III.

Once NHDES learns of a violation, it must decide what response is most appropriate. The action taken in response to a violation will be the action that NHDES believes is most likely to achieve the desired outcome. In all cases, the desired outcome includes current and future compliance with applicable requirements and remediation of any harm to the environment. These objectives often are achieved through assistance or a compliance action.

A penalty action may be appropriate in lieu of or in addition to a compliance action in cases where prior compliance actions against the same Respondent have been ineffective or there has been a pattern of non-compliance, the Respondent fails to promptly remediate a violation, a significant economic benefit has been realized, or the violation was committed knowingly or recklessly or resulted from gross negligence. In cases where the Respondent holds a license to engage in the activity from which the violation(s) arose, a license action may be appropriate in lieu of or in addition to a compliance action and/or penalty action. In cases where NHDES has expended resources to remediate a site due to unwillingness or inability of the site owner to do so, cost recovery will be pursued.

Assistance and enforcement may proceed concurrently.

C. Determining Compliance/Noncompliance

1. Environmental Laws

When NHDES reviews a site, facility, or activity to determine compliance, NHDES is checking to see whether the conditions or activities meet the requirements specified in the applicable statutes, rules, and permits.

Statutes have been enacted by the New Hampshire General Court to protect air, land, and water, as well as living organisms, by a variety of mechanisms. Some statutes allow certain activities to be conducted if a permit is obtained from NHDES; other statutes prohibit certain activities outright. A list of the statutes implemented by NHDES can be found in the glossary under the definition of *environmental laws*.

The statutes that confer authority on NHDES to implement them typically include the authority for NHDES to adopt administrative rules, either to implement the statute generally or to address specific topics identified in the statute. Rules supplement the statutory requirements by creating the details of a regulatory program that are not contained in the statute, such as what information is required on a

permit application or how certain statutory requirements will be implemented. Once rules have been adopted through the formal rulemaking process specified in RSA chapter 541-A, they have the full force and effect of law – creating legally-enforceable obligations on persons who engage in the types of activities covered by the rules. Rules thus play a pivotal role in NHDES compliance assurance efforts.

Because rules are so important to NHDES' efforts, NHDES attempts to partner with the public and the impacted regulated community whenever developing new rules or revising existing rules. Drafting the actual language of rules can be a challenge, though, even when agreement is reached on content. Due to the formal rule drafting requirements, rules are often written in a formal style that most people don't use when speaking or writing, which can cause difficulties for people who are not used to reading rules. Also, rules cannot always be written to reflect the same degree of flexibility that most people believe should be included. Because rules are legally enforceable, any questions about what a rule really requires should be asked as soon as the uncertainty is noticed. Other people may have the same question or concern, and NHDES may issue a regulatory interpretation or initiate rulemaking to clarify the rule if necessary.

Some environmental statutes also confer authority on NHDES to issue permits for certain activities. The permit application, review, and issuance processes are typically spelled out in rules. Once a permit is issued, any conditions in the permit are legally enforceable to the same extent and by the same mechanisms as any other provisions in statute or rules. Most programs expressly incorporate plans and specifications submitted by the applicant into a permit that is issued. In such a case, the plans and specifications also become legally enforceable to the same extent and by the same mechanisms as any other provision in statute or rules.

2. *Jurisdiction*

NHDES has jurisdiction over an activity and the person undertaking the activity when:

- A permit from NHDES is required to engage in the activity, whether or not the person has obtained a permit;
- The activity involves a material regulated by NHDES (e.g., septage, hazardous waste);
- The activity impacts an area or type of environment protected by an environmental law (e.g., wetlands, shoreland); or
- The activity violates an environmental law.

NHDES will always review the issue of jurisdiction prior to initiating an enforcement action.

3. *Investigations*

To achieve its goal of ensuring compliance, NHDES must collect sufficient information to determine whether persons who are subject to environmental laws are complying with those laws. File reviews, routine inspections, and complaint investigations are all essential to this process. Since NHDES does not know whether a facility or activity is in compliance prior to undertaking an investigative activity, all such activities will be conducted in such a way that an enforcement action can be supported if it is the most appropriate response.

The key to any compliance determination is the investigation.¹ The investigation can take a variety of forms, from reviewing a file to see whether a report has been received to undertaking surveillance, unannounced inspections of a facility and its records, interviews with employees, tenants, or abutters, and/or a search of a facility pursuant to an administrative inspection warrant or a criminal search warrant. Regardless of the form of the investigation, it is critical to the success of the undertaking for NHDES to accurately identify and document the conditions on which a compliance determination will be made, the conditions which may give rise to the enforcement.

At times, NHDES will undertake a compliance determination at a site or facility that is subject to the requirements of more than one NHDES program. For instance, through an agreement with the EPA, NHDES typically commits to doing multi-media inspections at a certain number of permitted facilities per year. To fulfill this commitment, the NHDES programs involved coordinate with each other on which facilities to inspect and when to do the inspections. Coordination also will occur when a complaint is received that alleges violations in more than one program. Not all multimedia inspections require direct participation by staff from each program involved; staff may be cross trained in other program requirements and the use of the multi-media checklist, and so can undertake an inspection on behalf of more than one program.

4. Consultation

If the information that is gathered through the investigation leads to a conclusion that a violation has occurred, NHDES will then decide how to respond. In cases that do not present unique circumstances, a recommendation as to the appropriate response is typically made by the program. In cases that present unique circumstances, or which present more serious violations, the response is developed through appropriate consultations.

Each NHDES regulatory program has a regularly scheduled meeting with NHDES staff attorneys and attorneys from the New Hampshire Department of Justice (NHDOJ) Environmental Protection Bureau. Active cases and cases in development are discussed at these meetings so that decisions can be made early in the process regarding the most appropriate response. Cases that arise between meetings can be discussed with NHDES and/or NHDOJ attorneys without waiting for the next meeting. If a situation needs to be addressed immediately through injunctive relief, the AGO is consulted immediately.

The Environmental Protection Bureau (EPB) at NHDOJ has a role separate from, but closely related to, that of NHDES. EPB duties include bringing civil and criminal judicial actions to enforce environmental laws, serving as legal counsel to state agencies that have responsibility for environmental concerns, exercising common law powers of the Attorney General to protect the environment, and bringing public nuisance actions and other actions with state-wide significance upon complaint of private citizens.

5. Cross-Program and Inter-Agency Referrals

Regularly scheduled inspections may be conducted as multimedia inspections. However, while responding to a complaint or conducting a field visit, NHDES staff may observe conditions that appear to constitute violations of a program other than the one for which the field work is being done. The violation could be

¹ As used herein, *investigation* includes file reviews, facility or site inspections, and other investigative research.

of another NHDES requirement or fall under the jurisdiction of another state agency or municipality. For instance, staff doing a routine inspection of a proposed subdivision may observe that someone has clear cut and stumped a lot which is down the road from the subdivision being inspected, causing severe erosion into a river. Or an investigation into a complaint of illegal asbestos removal may show that in addition to violations of Env-A 1800, the person doing the work is not licensed by NHDES. In such situations, NHDES staff will collect as much information about the potential violations as is reasonable under the circumstances and will then transmit the information to appropriate staff.

D. Determination of Appropriate Compliance Assurance Response

1. Primary Factors Considered

In determining the most appropriate response to a violation, NHDES will consider many factors. The primary factors considered are listed below (in alphabetical order).

- a. Adequacy of Assistance in Achieving Goals: Whether assistance is likely to bring the Respondent into full compliance **and** prevent repeat violations or violations of other requirements.
- b. Degree of Cooperation: Whether the Respondent works cooperatively with NHDES to identify and remediate the violation that became known to NHDES, as well as other violations under the Respondent's control.
- c. Economic Benefit: Whether the Respondent(s) realized an economic benefit as a result of or in connection with the violation.
- d. Environmental Management System (EMS): Whether the violation was detected due to the implementation of an EMS; whether an EMS would help to prevent future violations.
- e. Extent of Deviation from Requirement: The extent to which the applicable requirements were met.
- f. Harm, or Threat of Harm: Whether the violation caused any actual long-term harm or posed a significant threat or harm to public health or the environment.
- g. History: Whether the Respondent has a history of noncompliance with environmental laws or rules (or analogs thereof in other states or at the federal level).
- h. Intent: The degree to which the activity constituting the violation was intentional.
- i. Knowledge of Requirement: Whether the Respondent knew or should have known about the requirement that was violated. (Includes assessments of the Respondent's regulatory sophistication and the complexity of the facility.)
- j. Ongoing Business Activity: Whether the violation was committed during a legitimate business activity in which the Respondent is likely to continue to engage.
- k. Policy Considerations: Whether the overall case has important policy implications.
- l. Prompt Remediation: Whether the Respondent acts promptly to remediate the violation after it was discovered.

- m. Proof: Whether NHDES has sufficient proof that the violation occurred, and the Respondent is legally liable.
- n. Unique Circumstances: Whether the case offers unique circumstances that must be accounted for in developing a fair and just response.
- o. Voluntary Self-Report: Whether the Respondent(s) voluntarily reported the violation to NHDES.

2. Enforcement Forbearance

NHDES will be more likely to **refrain from** initiating an enforcement action in the following circumstances, if none of the violations in the case falls within any of the categories listed in the following section titled *Enforcement*. Depending on the situation, NHDES may offer to recommend site-or facility-specific assistance. Regardless of whether the assistance is provided, NHDES will suitably document the violation so that any subsequent violation can be dealt with appropriately.

a. Isolated Incident

The violation is a first-time violation that is not likely to recur. The person who caused or committed the violation acted in good faith and did not know or have reason to know about the requirement that was violated at the time of the incident. The violation must not have arisen during a legitimate business activity that is likely to continue. The person must have fully remediated the violation, or NHDES must have adequate reassurances that the violation will be fully remediated within a reasonable time without need for a compliance action.

Such cases often involve violations arising from home maintenance and repair or other property improvements undertaken directly by the homeowner.

b. First Violation

The violation is the first violation but has some reasonable potential to recur. The person who caused or committed the violation may have known or had reason to know about the requirements but must not have previously violated the requirement (or a similar requirement). The violation may have arisen during a legitimate business activity that is likely to continue. The person must have fully remediated the violation, or NHDES must have adequate reassurances that the violation will be fully remediated within a reasonable time without a need for a compliance action. NHDES may offer or recommend assistance if the department determines that assistance will help remediate the violation **and** is likely to prevent a recurrence of the same or similar violations.

c. Federal Overlay

The violation is one for which the EPA has affirmatively declined to take enforcement action based on a federal policy, provided that refraining from taking an enforcement action is consistent with environmental laws and this policy.

3. Enforcement

NHDES will usually initiate an enforcement action for the following types of violations:

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Chapter I

a. Economic Benefit

Any violation that allowed the Respondent or any person under the direction or control of, or otherwise acting on behalf of, the Respondent to realize a significant economic benefit.

b. Failure to Correct

Any violation identified by NHDES through a compliance inspection or other investigatory activity that is not corrected by the Respondent within a reasonable time or in a reasonable manner.

c. Federal Violations

Any violation that meets any federal definition of *significant* or which is otherwise required to be addressed with an enforcement action under a federal law or policy in a program that NHDES is delegated, authorized, or otherwise approved to implement on behalf of the EPA.

d. Harm, or Threat of Harm

Any violation that causes actual harm or a substantial threat of harm to public health or the environment.

e. History of Noncompliance

Any violation committed by a person who, within the five years prior to the violation:

- i. Committed the same or similar violation; or
- ii. Was the subject of an enforcement action for a violation of the same environmental law or an analog thereof in another state or at the federal level; or
- iii. Was the subject of multiple enforcement actions for violations of any environmental laws or analogs thereof in another state or at the federal level; or
- iv. Was convicted on or pleaded guilty or no contest to any criminal charge for violation of any environmental law or analogs thereof in another state or at the federal level.

f. Importance to Regulatory Scheme

Any violation of a requirement that is central to achieving the goals of the environmental law or rule to which it relates (e.g., failure to apply for a permit or failure to conduct monitoring, even if no environmental harm can be proven).

g. License Action

Any violation that constitutes a basis for suspending, revoking, or refusing to renew a license, as identified in Env-C 209 or any program-specific rules applicable to the license.

h. Precedence Value

Any violation which, if addressed by an enforcement action, would allow an important legal or policy issue to be established or settled.

i. Other Violations

Any violation which is not appropriate for enforcement forbearance.

j. Willful, Reckless Conduct

Any violation that was committed willfully or recklessly or that resulted from gross negligence on the part of the Respondent or any person under the direction or control of, or otherwise acting on behalf of, the Respondent.

E. Selecting the Appropriate Enforcement Response

1. Considerations

If a violation is of a type that will result in an enforcement action being taken, the case will be reviewed to determine what type of action will be most appropriate. Several factors must be considered when making this determination, as discussed below.

a. Goal of the Action

Before initiating any enforcement action, NHDES will identify the most desirable result that is consistent with applicable enforcement authority. Most of the statutes implemented by NHDES authorize the issuance of an Administrative Order (AO) for violations of the statute, rules adopted pursuant to the statute, and licenses (including permits and other forms of approval) issued pursuant to the statute. Most statutes provide for the imposition of civil and/or criminal penalties for such violations. Most programs have administrative fine authority, but the authorizing language varies from program to program. Programs that issue licenses have the authority to suspend, revoke, or refuse to renew the licenses. Programs that have authority to remediate sites have the authority to seek cost recovery. Since specific statutory authority is not required for nonbinding documents, all programs may issue a Letter of Deficiency (LOD), Notice of Findings (NOF), or Notice of Past Violation (NPV). Some programs may be authorized to issue a Notice of Violation (NOV).

After identifying the available options, NHDES determines what kind of outcome is most appropriate considering the agency's overall objectives of compliance, deterrence, remediation, cost recovery, and recovery of significant economic benefit. The desired outcome is often determinative of the route that should be taken. In any case there may be both a compliance/remediation goal and a punitive/deterrent/recovery of economic benefit goal. Thus, more than one type of action may be needed.

Another factor NHDES considers in determining the overall goal of the action is the status of the violation being addressed. If a violation has ended and has already been remediated, issuing an LOD to request compliance would be unnecessary and inappropriate. If the case involves an on-going violation or a series of violations, a monetary penalty alone is probably inadequate since the underlying problem must still be resolved (although compliance might be achieved through settlement of the penalty action).

b. Timeframe

Certain enforcement actions typically take longer to conclude than others. The imminence of the threat involved can, therefore, have a direct bearing on which enforcement route is selected. Each case is unique, and the Respondent's degree of cooperation will greatly affect the length of time any type of case will take to complete.

If there is an immediate and substantial threat of harm to public health, safety or the environment, the most appropriate action for most programs is to obtain a preliminary injunction (PI) or temporary restraining order (TRO) to stop the harm from occurring. A PI or TRO is obtained in the context of a civil action and so must be handled through NHDOJ but can be obtained relatively quickly and without waiting for the entire civil action to be heard by the court. A permanent injunction can only be obtained after the case is heard in full. To obtain a PI or TRO, NHDES must be able to show that it is likely to prevail on the merits of the underlying case **and** that any harm that the defendant might suffer from the PI/TRO is outweighed by the harm that is likely to occur if the PI/TRO is not issued. Some programs are authorized to issue an imminent hazard order, which is an AO with which the statute requires immediate compliance.

c. Available Resources

In addition to examining the scope of the program's authority, the ultimate outcome desired, and the timeframe in which action should be taken, available staff resources are considered. NHDES will prioritize which violations to address through enforcement actions based on several factors, including available resources. NHDES also coordinates with the EPB regarding the priority of referred cases.

Priorities change, and a case that had top priority at one point may become less important than another case later, while a case that was initially a low priority may, due to subsequent events, become a top priority.

2. Selecting a Response

Several enforcement and enforcement-related mechanisms are available to NHDES. The various mechanisms **do not** have to be implemented in any order. NHDES does not have to issue an LOD before issuing an AO or issue an AO before seeking an administrative fine. The various mechanisms and the situations in which they are typically used (subject to other state, federal, and/or program-specific policies, and absent extenuating circumstances) are described in this section. Additional information about each type of action is included in Chapter V.

a. Notice of Past Violation

An NPV is a notice to the Respondent(s) of known deficiencies and an acknowledgment by NHDES that they have been corrected. An NPV is appropriate in cases where no substantial harm or substantial threat of harm has occurred, is on-going, or is likely to occur; the Respondent(s) did not realize a significant economic benefit and a monetary penalty is not otherwise appropriate; criminal prosecution is not warranted; and no remedial action is necessary; **but** the program wants to document that the violation occurred.

b. Letter of Deficiency

An LOD is a notice of deficiencies that have been identified by NHDES and a **request** for voluntary compliance within a specified timeframe. An LOD is appropriate, with or without a concurrent administrative fine action, in cases where no actual harm or substantial threat of harm has occurred, is on-going, or is likely to occur and criminal prosecution is not warranted, but there is an on-going violation that needs to be corrected or remedial action that needs to be taken.

c. Notice of Findings

An NOF is a notice of deficiencies that NHDES has identified through an investigation and an invitation to respond or to otherwise provide additional information so that the most appropriate enforcement response may be selected, if any. The NOF itself is not an enforcement action and does not preclude NHDES from taking any type of enforcement action. An NOF is appropriate in the following situations:

- i. NHDES discovers one or more apparent violations but needs or desires additional information from the Respondent(s) before deciding on an appropriate response;
- ii. NHDES discovers one or more violations, and wants to notify the Respondent(s) of the findings promptly to allow the Respondent to initiate corrective or remedial action while an enforcement action is being considered; or
- iii. During negotiations concerning an on-going enforcement action, NHDES discovers new or recurring violations which NHDES wishes to address in the pending action.

d. License Action

A license action is initiated by the issuance of a Notice of Proposed License Action (NPLA) to Suspend, Revoke, or refuse to renew, which informs the license holder of the grounds on which NHDES is proposing to take action against the licensee. A license action is appropriate, with or without a concurrent compliance or penalty action, if the Respondent holds a license that applies to the type of activity from which the violation arose; the violation constitutes a basis, under Env-C 209 or program-specific rules applicable to the license, to suspend, revoke, or refuse to renew the license; and a compliance and/or penalty action standing alone is deemed likely to be insufficient to deter future violations.

e. Administrative Order by Consent

An Administrative Order by Consent (AOC) is an AO that NHDES issues with the consent of the Respondent(s), which usually requires the Respondent(s) to undertake specified corrective actions on an agreed schedule and which may also require the Respondent to pay stipulated penalties for non-compliance with the AOC, and administrative fine, or a civil penalty. Once fully executed the AOC is legally binding on the Respondent(s). An AOC is appropriate in situations where an AO would be appropriate, and the Respondent is willing to agree to its terms. An AOC with penalties is especially useful where both a compliance action and a penalty action would otherwise be initiated. An AOC with civil penalties requires consultation with NHDOJ.

g. Administrative Order

An AO is a legally enforceable document that identifies the factual and legal basis for NHDES' determination that a violation has occurred and requires the Respondent(s) to undertake specified corrective actions within a particular timeframe. An AO is appropriate, with or without a concurrent administrative fine action, if an immediate referral to the AGO is not otherwise appropriate **and**:

- i. The violation is on-going or recurring or remedial action is necessary, but the violation is not causing substantial harm or posing a substantial threat of harm to public health or the environment;

ii. Additional harm might occur within a relatively short period of time if nothing is done, **but** criminal prosecution is not warranted, **and** the Respondent is being cooperative in addressing the violations in a timely manner; or

iii. The property on which the violation occurred is for sale, and recording the AO will inform the potential purchasers of the need to resolve the violation.

An AO may be appropriate with a subsequent referral to the AGO for civil penalties if it is likely that compliance will be achieved quickly but the total administrative fine that could be imposed for the violations is not adequate to recoup significant economic benefit and provide an adequate deterrent.

h. Imminent Hazard Order

An Imminent Hazard Order (IHO), available to certain NHDES programs, is a legally enforceable order which includes a finding that the violation being addressed presents an imminent and substantial hazard to human health or the environment and so requires immediate compliance. An IHO is appropriate if NHDES can make a finding that the violation to be addressed by the IHO poses an imminent threat to public health or the environment harm, and the violation is likely to continue or occur within a relatively short period of time if nothing is done, **and** there is reason to believe that the Respondent(s) will cooperate (such that a preliminary injunction or a temporary restraining order is not necessary).

i. Administrative Fine

An administrative fine is a monetary penalty imposed by the Commissioner of NHDES after opportunity for a hearing or by agreement between NHDES and the Respondent(s). A Respondent is informed that an NHDES Division is seeking an administrative fine via a Notice of Proposed Administrative Fine (NPF), which specifies the basis for and amount of the proposed fine. A form is included with the NPF with which a Respondent can make appearance and request a hearing. In some cases, the Division will initiate an administrative fine action by offering a proposed settlement, using an Administrative Fine by Consent (AFC). An administrative fine action may be appropriate, with or without a concurrent AO or LOD, if a referral to the AGO for judicial action is not otherwise appropriate **and**:

i. The total administrative fine that can be imposed for the violation is large enough to recover any significant economic benefit realized by the Respondent(s) plus an amount that will appropriately reflect the gravity of the violation;

ii. The Respondent has been the subject of a prior enforcement action for the same violation and does not have a good explanation for why the violation recurred (e.g., act of nature; conditions that were not foreseeable when the prior corrective action was implemented);

iii. The Respondent has been the subject of multiple enforcement actions for violations of any environmental laws;

iv. The Respondent is a license holder who may have had previous warnings, but the violation does not rise to the level appropriate to suspend, revoke, or refuse to renew the license;
or

v. A penalty is otherwise appropriate for its deterrent effect.

j. NHDOJ Referral

Most environmental laws allow NHDOJ to seek judicial relief in the form of civil penalties, injunctive relief, and criminal penalties. If NHDES believes judicial enforcement is appropriate in a case it has investigated, NHDES may refer the case to NHDOJ. A referral from NHDES to the EPB at NHDOJ to initiate a civil judicial action is appropriate in cases where:

- i. There is substantial, on-going harm;
- ii. The violation was willful or deliberate;
- iii. The violation caused actual serious harm or posed a substantial threat of serious harm to public health or the environment;
- iv. Additional harm is likely to occur within a relatively short period of time if nothing is done, and there is reason to believe that the Respondent will not cooperate or has a history of non-compliance with environmental laws;
- v. The significant economic benefit realized by the Respondent from the violation is more than the total administrative fine that could be imposed;
- vi. A civil penalty is otherwise appropriate, and the Respondent is not willing to enter into an AOC; or
- vii. The Respondent has failed to comply despite administrative efforts by NHDES.

If NHDES refers a case to NHDOJ, NHDES will typically ask the EPB to seek monetary penalties in addition to whatever other relief is appropriate.

NHDOJ has authority to initiate a case without a referral from NHDES. For example, NHDOJ may receive information from another source which causes it to initiate a case. NHDOJ may bring criminal proceedings on behalf of the state at any time on its own discretion.

3. Appropriate Penalties

Generally, the penalty sought will reflect the severity and/or egregiousness of the violation and recover any significant economic benefit realized by the Respondent(s) as a result of the violation. More information on penalty calculations and recovery of economic benefit is provided in Chapter VI.

F. Response Time Targets

Often, a significant issue to a regulated entity that has been inspected is when it will find out what action NHDES proposes to take. Regulated entities reasonably want closure after an inspection and may have reporting requirements that could be impacted by an enforcement action. NHDES should close out cases as quickly as reasonably possible, so that other matters can be addressed. It is important to establish guidelines for when a response should be initiated.

NHDES programs that are federally delegated, authorized, or approved are typically subject to federal *timely and appropriate* requirements. *Appropriate* means that the enforcement response adequately addresses all compliance issues and imposes an adequate penalty. *Timely* means that the enforcement

action is initiated within the period specified in the federal policy. For programs where a federal timely and appropriate policy applies, actions should be initiated within the specific times. **Appendix I-1** identifies key EPA timely and appropriate guidance documents.

For programs that are not subject to federal timely and appropriate requirements, and which do not have program-specific timelines, the guidelines shown below will be applied. As with all other provisions of this CARP, 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.

Decisions on whether additional information is needed from the Respondent(s) 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 working days from the inspection date; for more complicated violations or situations, the target is 5 to 25 working days from the inspection.

- Conclusions about what violations exist should be reached within 10 working days of having complete information.
- Decisions on what type of response is appropriate should be made within 10 working days of identifying all violations.
- If the decision is to issue a LOD, the LOD should be issued within 15 working days of reaching the decision.
- If the decision is to issue an AO, approval should be sought within 10 working days of reaching the decision and an AO should be issued (i.e., should be completely through all review processes and in final format and mailed) within 30 working days of reaching the decision.
- If the decision is to attempt an AOC, approval should be sought within 10 working days of reaching the decision and should be sent to the Respondent for review (i.e., should be completely through all review processes and in final draft format and mailed) within 30 to 45 working days of reaching the decision. If the Respondent has been fully engaged in negotiations and is aware of the specifics of the AOC, NHDES should expect the Respondent to contact NHDES to discuss the terms within 10 working days of receipt of the draft AOC and will expect negotiations to proceed expeditiously.
- If the decision is to refer the case to NHDOJ, the referral should be drafted within 15 working days of reaching the decision and should be sent to the EPB (i.e., should be completely through all review processes and in final format and emailed) within 30 working days of reaching the decision.
- If any of the above timelines cannot be met and the LOD, AO, AOC, or referral to NHDOJ will take more than 90 days from the point the decision is made, the department shall provide the regulated entity with notification that an enforcement action remains a possibility and that the case is under review. This notification shall occur quarterly until the case is referred to NHDOJ. This shall not apply to AOCs in instances where negotiations or correspondence is occurring regularly.
- In the case of a referral to NHDOJ, NHDES will send a letter to the Respondent(s) notifying them of the referral at the time the matter is referred for enforcement. NHDES staff will monitor the status of the case during regular meetings with the EPB. If there is no contact between

NHDES/EPB and the Respondent(s) during any 6-month period, a follow-up letter may be sent. NHDES will coordinate any communication with Respondent(s) subject to referral with NHDOJ.

G. Public Access to Files

1. *The New Hampshire Right-to-Know Law*

Most documents contained in state agency files are considered public records and are subject to inspection by members of the public. RSA chapter 91-A, *Access to Public Records and Meetings*, requires that for public records which are immediately available, the agency must, within five business days of receiving a request to review public records, either make the documents available for inspection and copying or respond to the requesting party in writing by denying the request or stating when a decision on the request will be made.

NHDES makes many public records available electronically, via the NHDES webpages. RSA chapter 91-A does not require an agency to create documents or reports that don't otherwise exist in response to a request, and the statute does not require an agency to copy any paper records at its own expense in response to a request.

Some materials in state agency files are not considered public documents and 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 agency 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. Due to the importance of openness in government, the exceptions to RSA chapter 91-A are interpreted narrowly, and the person or agency asserting that the public information is non-public is responsible for showing that a particular document should not be made public. NHDOJ issues guidance on New Hampshire's Right-To-Know Law on a regular basis. This guidance, applicable to all state agencies and available through NHDOJ website, explains RSA chapter 91-A and the New Hampshire legal rulings distinguishing public and non-public documents.

2. *Access to NHDES files*

NHDES has many files, such as reports of site investigations, that many people may want to review. This sometimes results in a file not being immediately available to a person who requests it, because other people are scheduled to review it. Also, some programs do not always have staff available to assist with a file review, and some files may be in active use by NHDES staff. NHDES is committed to providing access to all public files; however, for some paper files an appointment still must be made in advance. Many files may be made available electronically through the OneStop pages on the NHDES website, and/or through an electronic storage and distribution system, GovQA. The NHDES Public Records Center is online at: <https://nhdes.govqa.us/WEBAPP/rs/>.

It is easier for NHDES to respond promptly to requests that specifically identify the information that the requesting party is interested in seeing. For example, if a person asks for "all files on HIJK Company," it may take several days for the NHDES staff member who received the request to contact all NHDES programs that might have a file on the company and to gather all the files. In this case, if all the person

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really wanted was a report of the most recent Air Resources Division inspection, making the request more specific would save time for NHDES staff and for the person who otherwise might be presented with a file box or email box full of files from a variety of programs. It also is important for the requesting party to follow up if information that s/he expected to see in a file wasn't there. For example, if the person requested the file on a particular property because s/he wished to see a specific recent site investigation report, it is possible that the report won't be in the file when the file is made available. In such a case, the person should ask specifically about the report.