

V. Enforcement

A. Public Access to Enforcement Files	V-
1. File Contents.....	V-
2. Complainant Confidentiality....	V-
B. Enforcement Document Elements.....	V-1
1. Parties to the Action.....	V-1
2. Subject of the Action.....	V-2
3. Factual Basis for the Violations.	V-2
4. Applicable Legal Requirements.	V-2
5. Violations.....	V-2
6. Desired Outcome.....	V-3
C. Enforcement and Enforcement-Related Mechanisms.....	V-3
1. Notice of Past Violation.....	V-3
2. Letter of Deficiency.....	V-4
3. Notice of Findings; Alleged Violation Letter.....	V-6
4. License Action.....	V-7
a. Effect of a License Action.....	V-7
b. Grounds for a License Action.....	V-7
c. Initiation of a License Action.....	V-9
d. Resolution of a License Action.....	V-9
5. Administrative Order by Consent.....	V-10
a. Effect of an Administrative Order by Consent.....	V-10
b. Issuance of an Administrative Order by Consent....	V-10
c. Modifications to Administrative Order by Consent	V-10
d. Follow-up.....	V-11
6. Administrative Order.....	V-11
a. Effect of an Administrative Order.....	V-11
b. Issuance of an Administrative Order.....	V-11
c. Modifications to Administrative Order.....	V-12
d. Follow-up.....	V-12
e. Appeals (Process, Hearings, Settlements).....	V-13
7. Administrative Fine.....	V-14
a. Initiation of an Administrative Fine Action.....	V-15
b. Resolution of an Administrative Fine Action.....	V-16
c. Motion for Reconsideration.....	V-19
d. Follow-up.....	V-20
8. Referral to the Attorney General's Office.....	V-20
a. Effect of a Referral for Enforcement.....	V-20
b. Process.....	V-21
9. Cost Recovery Action.....	V-22

V. ENFORCEMENT

A. Public Access to Enforcement Files

File Contents

As noted in Chapter I, most documents contained in state agency files are considered to be public records and are subject to inspection by members of the public under RSA 91-A. Also as noted in Chapter I, some materials in state agency files are not considered to be public documents and so will not be made available to the public. Non-public materials likely to be found in an enforcement file include attorney-client communications, material which would reveal law enforcement investigative techniques or disclose a confidential informant, and certain document drafts or intra-office communications that reflect agency deliberations preliminary to a final decision.

2 Complainant Confidentiality

An investigation often will be prompted by a complainant who does not want to be identified to the Respondent. While many DES programs will not accept fully anonymous complaints, a complainant sometimes requests, as a condition of providing information, that his/her name not be released to the public. In such cases, DES usually will agree to try to protect the source's identity unless it becomes necessary to reveal the source (either because DES will not be able to fully pursue the case unless the name is released or because a court has ordered DES to reveal the source of the complaint). If possible, DES will try to find out at the time the complaint is filed whether the complainant expects his/her name to be kept confidential.

B. Enforcement Document Elements

Every enforcement document issued by DES will clearly identify the following elements

- The parties to the action;
- The subject of the action;
- The factual basis for the violations;
- The applicable legal requirements;
- The violations; and
- The desired outcome.

These elements are discussed below.

Parties to the Action

For DES enforcement actions, the "parties to the action" consist of DES and the target(s) of the action (the Respondent(s)). Other individuals or entities, such as municipal officials, abutters, the state representative or senator for the area, an environmental group, or a trade organization, may be interested in the action -- but individuals or entities who are not legally responsible for any of the violations identified in the action are *not* parties to the action. Such persons may, however, be on the "cc." list to receive a copy of the document.

Some cases may have more than one responsible party. Usually, every person who is responsible for causing or correcting a violation will be subject to the enforcement action. In this context, “responsible” is usually taken to mean both legally liable (*i.e.*, the statute confers liability on the person based on the person’s status as an actor or a property owner) and responsible as a practical matter (*i.e.*, the person knew or should have known about the action that constituted the violation and either actively participated or at least did not act to prevent the violation).

For compliance actions and civil judicial penalty actions, multiple responsible parties are typically named in (*i.e.*, issued) the same enforcement document. For administrative penalty actions, separate actions may be initiated.

2. Subject of the Action

The “subject of the action” is the land, facility, device, or vehicle that is the underlying target or cause of the enforcement action. For example, if an action is being taken for illegally disposing of solid waste on a person’s property or for installing or using a septic system without prior approval, the “subject of the action” is the land itself, and will be identified clearly enough so as to leave no doubt of its location. If the action is being taken for improper storage of hazardous wastes, the “subject of the action” is the “facility”, *i.e.*, the building in which hazardous wastes are stored.

Sometimes the “subject of the action” is unconnected to a particular property. For example, in a case where there is unpermitted transportation of hazardous waste, the “subject of the action” is the vehicle used for the transportation; in a case where someone is operating a diesel generator without a permit, the “subject of the action” is the “device” or generator itself. In such cases, the enforcement document still will include information about the location of the violation, but strict identification of the location is less significant than accurate identification of the vehicle or device.

3. Factual Basis for the Violations

The “factual basis for the violations” is the totality of the facts that supports or proves DES’s determination that a violation occurred. Various sources of facts are available, including observations made during an inspection, information supplied (or not supplied) by the responsible party, statements made by abutters or facility personnel, and the like.

4. Applicable Legal Requirements

The “applicable legal requirements” are the environmental laws (statutes, rules, or permit conditions) that apply to the activity that forms the basis of the violation. In most cases, this will include at a minimum the statutory requirement or the statutory authority to adopt rules or issue permits and one or more specific rules or permit conditions.

5. Violations

After identifying what happened (the facts) and what legal requirements apply, the enforcement document will recite the legal conclusion that the targeted party has committed specific violations. For instance, based on the facts that (1) John Doe spread septage on his

neighbor's land, (2) the land was not a permitted septage disposal site, (3) the statute authorizes DES to regulate the activity through a permit system, (4) DES has adopted rules to implement the permit system, and (5) the rules require that a site be permitted prior to using it as a septage disposal site, we can conclude that "John Doe has violated Env-Ws 1604.01(b) by disposing of septage at an unpermitted site." Usually, each violation will be stated separately.

6. Desired Outcome

The "desired outcome" is, in every compliance action, compliance with applicable environmental laws. If there is more than one way of achieving compliance and any of the various ways is acceptable, then the enforcement document typically will request or order that the Respondent "comply with" the applicable environmental laws. If the specific compliance action is not clear from the violation itself (*e.g.*, the specific compliance action for undertaking an activity without a required permit usually is to apply for the permit) and/or additional actions, such as submission of progress reports, are required, then **all** of the action(s) that the Respondent is being required to undertake will be specifically identified.

In an administrative fine case, the "desired outcome" is payment of the fine. However, since the fine can only be imposed after notice and opportunity for a hearing, the notice of proposed fine can't order or require the Respondent to pay. Instead, it states that the Division is seeking a fine of \$X and informs the Respondent of (among other things) the date and time of the scheduled hearing and the consequences of not responding to the notice.

C. Enforcement and Enforcement-Related Mechanisms

As noted in Chapter I, DES has many types of enforcement and enforcement-related documents available for use in any given case. The format and effect of these documents, as well as appropriate action for the Respondent to take, are described more fully in this part.

Notice of Past Violation

DES occasionally runs across the following situation: a program discovers a violation; the responsible party returns to compliance prior to the program taking any action; seeking an administrative fine for the violation is not appropriate; but the program wants to have a record that the violation occurred in the event of a future action against the same responsible party. In such a case, a Notice of Past Violation ("NPV") may be issued. The NPV serves to create a record that DES believes that the violation occurred and that it has been addressed. The NPV in and of itself is not proof that a violation occurred, so if DES uses the past violation in a subsequent proceeding, DES will offer proof of the past violation as appropriate along with proof of the current violation.

The NPV is a letter with a listing of the violations alleged to have occurred. The letter acknowledges that the violations have been corrected and states that no further action related to the listed violations is required. If inspections have occurred since the one that originally revealed the violations and no further violations were observed, a brief statement to that effect usually will be included.

If the violation(s) cited in the NPV have not already been discussed with the Respondent, the NPV should invite the Respondent to provide any information that may be available to disprove the conclusions reached in the NPV. Because the NPV is not a legal determination that the violation occurred, there is no right to appeal an NPV. If a Respondent receives an NPV without prior contact from DES and believes the NPV to be in error, the Respondent should submit information to DES that supports the Respondent's position.

2. Letter of Deficiency

A Letter of Deficiency ("LOD") is a letter to the Respondent which identifies violations that DES believes to have occurred and the applicable environmental laws, and which requests the Respondent to come into compliance with the applicable requirements. An LOD constitutes a compliance action, and so is only issued if violations have occurred or are on-going. If DES has reason to believe that a violation *might* occur in the future but no violation *has yet* occurred, often a letter will be sent that provides information about the statute and/or rules and offers assistance if appropriate (including a referral to the P2 program). Sometimes, DES will send a letter requesting additional information (as discussed in Chapter IV, Part C).

Although an LOD is issued when deficiencies (violations) actually exist, it is not an order but a notice of known deficiencies and a *request* for voluntary compliance. Mandatory language is used in LOD only when identifying a legal requirement, such as "RSA 149-M:9, II prohibits the disposal of solid waste at a non-permitted facility" or "RSA 485-A:17 requires any person who proposes to significantly alter the characteristics of the terrain to first obtain a permit from DES". While the Respondent ultimately may not have any choice about addressing the cited deficiencies and will ultimately have to comply with the applicable environmental laws, the LOD is still just a notice of the problems and a *request for voluntary compliance*. An LOD is like a "warning shot over the bow": the boat being shot at doesn't have to stop (since it doesn't have a hole in it yet), but if it doesn't, more serious consequences are likely to follow.

The LOD cannot be "enforced" or appealed, since it is merely a notice of a problem. (A Respondent who receives an LOD with a notice of proposed fine has a right to a hearing on the proposed fine, at which the factual basis of the violations and the conclusions that the violations occurred can be challenged.) However, the LOD does serve to put the Respondent on notice of the violation. If the violation continues or recurs, the Respondent subsequently may be charged with committing the violation "willfully" or "knowingly", usually resulting in stiffer penalties. Thus, if a Respondent believes the LOD to be in error, the Respondent should submit information to DES that supports the Respondent's position.

An LOD is written on DES letterhead in the form of a letter. The words "Letter of Deficiency" will be written to the right of the name and address of the Respondent, and will be followed by a unique docket number (assigned by DES to facilitate tracking). The LOD will contain the elements discussed in Part B, above. However, because an LOD is less formal than an administrative order ("AO"), the Respondent is identified in the name/address portion of the letter, and DES, applicable law, and the subject property are usually described in the opening paragraph. The opening paragraph can also identify how the deficiencies were discovered. Some programs include a brief statement in the opening paragraph that explains the purpose of the program, for example: "DES inspects public bathing facilities to help protect public health and

safety.” This is designed to help the Respondent to better understand why the LOD is being issued, and has had the effect of increasing compliance with LODs in some programs.

The LOD next lists the specific deficiencies and identifies the specific sections of environmental laws that apply to the activities. The LOD then requests the Respondent to come into compliance and specifies a time period within which DES believes compliance can be achieved. The LOD may request the Respondent to take specific action or may just generally request compliance. The LOD may also include a request that the Respondent schedule a meeting with DES or submit a report that contains a proposed compliance schedule or that describes the corrective measures that were or are proposed to be taken.

Finally, the LOD will indicate what can happen if the deficiencies are not corrected. For most programs, this includes issuing an AO and/or seeking judicial (civil or criminal) enforcement. If an administrative fine is being sought concurrently, the LOD will either state this or will specifically reserve DES’s right to seek a fine. If a fine is not contemplated when the LOD is issued, the LOD will include “seeking an administrative fine” in the list of possible consequences for not coming into compliance.

LODs are sent certified mail, return receipt requested, to establish receipt. If the Respondent refuses to sign for an LOD, DES may hand deliver the LOD or may proceed directly to delivering an AO, since it seems unlikely that a Respondent would voluntarily comply with the request in the LOD if s/he refuses to sign for a certified letter.

Copies of the LOD are sent to municipal officials and may be sent to other interested parties such as the complainant or abutters. Everyone who receives the LOD will be put on the list to receive any follow-up (*e.g.*, Letter of Compliance or AO). In order to balance the Respondent’s interest in hearing about the LOD directly from DES (and not from the newspaper) against the public’s right to know (since LODs are public documents as soon as they are issued), a copy will be faxed to the Respondent if possible. If the Respondent does not have a fax or DES cannot get a fax number, then the copies will be mailed to outside parties no sooner than three days after the original is mailed. This is to give the Respondent a reasonable opportunity to receive the LOD before the LOD is mailed to local officials. If the LOD is faxed to the Respondent the day the original is mailed, the copies can be mailed with the original.

If the Respondent corrects all of the deficiencies noted in the LOD, DES will send a Letter of Compliance (“LOC”). Typically, the LOC indicates how DES learned that compliance was achieved (*e.g.*, received report, reinspected property), and then states that based on that, the deficiencies noted in the LOD have been corrected. If the activity from which the violations arose is a legitimate business activity that is likely to continue, the LOC usually will remind the Respondent of the on-going responsibility to comply with applicable environmental laws.

If none or only some of the deficiencies are corrected, DES will consider what further action to take, such as issuing an AO to compel compliance. An administrative fine may be sought whether or not compliance is achieved (the fine would be for the underlying violation, not for not complying with the LOD).

3 Notice of Findings; Alleged Violation Letter

A Notice of Findings (“NOF”) is a letter to the Respondent that identifies all of the violations that a program, after an investigation (including record reviews and/or inspections as appropriate), believes exists at a facility. The NOF also requests a response, and so actually serves two purposes: it informs the Respondent of the violations that DES believes exist to allow the Respondent to get an early start on correcting them, and it allows the Respondent to inform DES if the information on which the conclusions are based is incomplete or erroneous.

As with an NPV or LOD, the NOF in and of itself is not proof that a violation occurred. Unlike the NPV or LOD, though, an NOF usually is a precursor to a further action. That is, if compliance is achieved in response to an LOD, no further compliance action will be taken (although a penalty action may still be pursued). In contrast, an NOF informs the Respondent that a response will be considered by DES in determining which type of action to take -- suggesting that something else is going to happen, it’s just a matter of what, and when, unless the information provided by the Respondent shows that no violations occurred.

The NOF is typically formatted as a letter with an attached chart or listing of violations, although the violations can be listed in the text of the document if they are not extensive. The NOF is signed by the Bureau Administrator, although a staff person may be identified as the contact. The original NOF is sent to the Respondent certified mail, return receipt requested. In most cases, copies of the NOF will be sent only to other DES staff (including the DES Enforcement Coordinator). The NOF is a public document, though, so if anyone (*e.g.*, the complainant or a municipal official) specifically requests a copy, one will be sent.

As indicated above, the NOF presumes that a formal enforcement action will follow unless the Respondent provides information which shows that no violations have occurred. At present, the most common NOF follow-up is to enter into an administrative order by consent (AOC) with the Respondent, with or without administrative fines or civil penalties.

Any person who receives an NOF should promptly contact the DES staff identified in the letter to discuss the allegations.

An “Alleged Violation Letter” (“AV Letter”) is a letter to a responsible party that DES has received a complaint that the person is violating (or has violated) a specified statute or set of rules, and that an inspection is being scheduled. An AV Letter is most likely to be useful in a program where a violation cannot easily be concealed and where the volume of incoming complaints makes it difficult to undertake site inspections promptly in all cases. The letter usually will identify a general time frame for the anticipated inspection. An AV Letter may be useful in a subsequent enforcement action to show when the Respondent was first informed that the activities being undertaken may violate the law (especially when the activities continued after the AV Letter was received). An AV Letter’s usefulness is limited, however, since it is not sent certified mail and it cannot definitively assert that a violation actually has occurred, only that DES has received a complaint.

Any person who receives an AV Letter should stop doing whatever activity prompted the letter. Anyone who has questions about the activity to which the letter relates should call the identified DES staff to discuss the situation.

4 License Action

When violations are committed by someone who holds a license from DES, DES may take an action directly against the license in addition to or in lieu of a penalty action or compliance action. (Remember that “license” is very broadly defined to include the whole or part of any agency permit, certificate (including operator certification), approval, registration, charter or similar form of permission required by law.)

a Effect of a License Action

Suspending, revoking, or refusing to renew a license usually has the effect of imposing a monetary penalty on the license holder. In the case of an occupational license (such as a septic system designer license or a wastewater treatment facility operator certification), the license holder usually derives most or all of his/her income from that occupation and may not be able to work (at least at the same salary level) without the license. In the case of a facility or on-going activity license (such as a permit to operate or a hazardous waste transporter registration), the underlying activity must cease if the license is not in effect -- and if it doesn't, the responsible party faces penalties for operating without a license. In the case of an activity-specific license (such as an approval for a septic system or a wetlands permit), a new application may have to be prepared and filed, and work previously done may have to be undone.

A license suspension is temporary, operating for a period of time that is specified in the decision which suspends the license. The time period can be either fixed or contingent. A fixed time period is simply a set period of time (*e.g.*, 60 days), after which the license will once again be effective or after which the license holder can request reinstatement of the license. A contingent time period is however long it takes for the license holder to undertake certain specified activities. For example, an occupational license might be suspended until the license holder attends certain classes and/or passes a test; a facility or on-going activity license might be suspended until certain violations are corrected; an activity-specific license might be suspended until the license holder submits additional information to support the application originally filed.

Typically, a license revocation is permanent. That is, if a license is revoked after a hearing, the license holder usually cannot simply reapply for another license. A license may also be revoked for a period of time, usually measured in years rather than months, after which the (prior) license holder will be allowed to apply for a new license.

A refusal to renew also is usually a permanent refusal to issue a new license to the (prior) license holder. However, if the basis for a refusal to renew is that the license holder has not met certain conditions for renewal, such as paying a fee or taking continuing education courses, then the decision to not renew the license usually will indicate that the license holder can reapply for a license once the conditions for obtaining the license are met.

b Grounds for a License Action

Programs that issue licenses usually have rules that specify both the procedures for initiating a license action and the grounds on which the program can suspend, revoke, or refuse to renew a license. The grounds specified in program-specific rules typically involve the competence and

integrity of the license holder (for occupational licenses) or the accuracy of the information submitted on the application for the license (for facility or activity licenses).

Env-C 209.02, which is applicable to all DES programs, specifies additional grounds for license suspension, revocation, or refusal to renew. These include that (1) the license holder owes any money (fees or fines) to DES or owes any civil or criminal penalties as a result of a judicial action taken to enforce any environmental laws, unless the money owed is being paid in accordance with a payment schedule and the license holder is current with all payments; (2) the license holder has failed to comply with any administrative order issued by DES or any civil or criminal restoration or restitution order imposed as a result of a judicial action taken to enforce any environmental laws, unless the license holder is complying in accordance with a compliance schedule and is current with all items; and (3) within three years of the violation for which a license action has been initiated, the license holder has been the subject of two or more administrative or civil enforcement actions or one criminal enforcement action, that have not been overturned on appeal, for violation(s) of any environmental laws (including the license at issue).

An action to suspend an occupational license may be appropriate in cases where the violations committed by the license holder indicate that the license holder does not take the obligations of the occupation seriously, but are not so egregious that the license holder should be totally barred from the occupation.

An action to revoke an occupational license is appropriate where the violations committed by the license holder indicate that the license holder should not be allowed to continue in that occupation. Revocation will be considered when the license holder has engaged in criminal conduct or conduct that either alone or in conjunction with other actions demonstrates gross incompetence, gross negligence, or an unwillingness or inability to comply with applicable requirements. Revocations of occupational licenses by DES in the past few years typically have been based on falsification of information required to be reported to DES by the license holder.

An action to refuse to renew an occupational license is appropriate where a license is up for renewal and grounds to revoke the license exist, or where conditions necessary to renewal have not been met.

An action to suspend or revoke a facility or activity license may be appropriate where:

The activities authorized by the license should not continue until violations associated with the activities have been corrected;

Questions have arisen regarding the accuracy and completeness of the information on which the decision to issue the license was based; or

The violations associated with the authorized activities are so egregious that the facility should be closed or the activity should not be allowed to continue at all.

If a license action is initiated based on questions about the accuracy or completeness of the application, the license typically is suspended to give the license holder an opportunity to submit accurate and complete information. If the information submitted shows that the license would

have been issued if the accurate/complete information had been received originally, the license will be reinstated. If the submitted information shows that the license would not have been issued if the accurate/complete information had been received originally, the license will be revoked.

c. Initiation of a License Action

To initiate a license action, DES will inform the license holder of the proposed action (suspension, revocation, or refusal to renew) and offer the license holder the opportunity to have a hearing to show cause why the proposed action should not be taken. The notice will identify the grounds for the proposed action with enough specificity for the license holder to know exactly what issues will be raised at the hearing. No issues should be raised at the hearing that are not specified in the notice. If additional grounds arise after the initial notice is sent, a supplemental notice will be sent to alert the license holder to the additional issues. If a supplemental notice is sent, the hearing will be postponed if necessary to allow the license holder adequate time to prepare based on the new information.

The notice will include the date and time of a hearing and will identify a staff member to call with questions. Pursuant to 1999 amendments to RSA 541-A:30, the notice will also inform the license holder that s/he is entitled to be represented by an attorney (at the license holder's expense) and to have the hearing transcribed by a certified shorthand court reporter (for which DES will make arrangements, but for which the license holder must pay).

If DES makes a finding that public health, safety, or welfare requires emergency action and the notice incorporates a finding to that effect, a license suspension can be effective immediately. If this is done, an adjudicative proceeding will be commenced within ten days of the date of the notice. (DES interprets this to mean that an opportunity for a hearing must be provided within 10 days, which time limit may be waived by the license holder). Also, for emergency actions the agency is required to provide and pay for a certified shorthand court reporter.

d. Resolution of a License Action

As with any enforcement action, DES usually is willing to discuss settlement of a license action. Since a license action typically has a financial impact on the license holder, DES may consider whether it is desirable to settle a proposed license action by accepting payment of a fine in lieu of all or some portion of the proposed suspension period. This will be considered especially in cases where the license holder needs the license in order to generate revenue to be able to come into compliance.

If the action is not settled, a hearing will be held. The hearing is an adjudicative hearing that will be run in much the same way as an administrative fine hearing and at which the presiding officer typically will be the DES Hearings and Rules Attorney. For licenses that are overseen by a board or committee (e.g., the Water Well Board for well contractor licenses or the Wastewater Operator Certification Committee for wastewater treatment facility operators), the relevant Board or Committee will conduct the hearing. At the hearing, the program will bear the burden of proving the grounds for and appropriateness of the proposed action.

5 Administrative Order by Consent

a. Effect of an Administrative Order by Consent

An Administrative Order by Consent (“AOC”) is a *legally enforceable* document that DES issues with the consent of the Respondent. An AOC requires the Respondent to undertake specified corrective actions in response to specifically identified violations of environmental laws. Because the Respondent is agreeing to the AOC, administrative fines, civil penalties, and/or stipulated penalties can be included in the AOC; a separate proceeding is not needed.

b. Issuance of an Administrative Order by Consent

An AOC contains the same parts as an AO. The caption of the document is “Administrative Order by Consent” (rather than just “Administrative Order”), but the document is numbered in sequence with the AOs issued by the Division from which the AOC originates. There is a slight difference in the introductory language and the language leading into the order provisions to indicate the Respondent’s consent to the AOC, and provisions regarding the Respondent’s waiver of hearings and appeals is included.

Because the Respondent is agreeing to the AOC, the Respondent must sign the AOC. The signature line for the Respondent follows the body of the AOC, after which come the signature line for the Division Director and the signature line for the Commissioner. If civil penalties have been included in the AOC, there also will be a signature line for the AGO. Each signature line should have a line next to it for the signatory to enter the date of signing.

The AOC is sent (unsigned) to the Respondent for signature. The cover letter sent with the AOC will include a deadline for the Respondent to sign and return the AOC and should explain the consequences of failing to meet the deadline (*e.g.*, DES will unilaterally issue an AO, seek administrative fines, refer the case to the AGO for civil prosecution, *etc.*).

Once the Respondent signs and returns the AOC, it is signed by DES and, if the AOC includes civil penalties, by the AGO. Copies should be made and distributed only after all signatures are obtained. A copy of the AOC will be sent to the DES Enforcement Coordinator, the DES PIP Office, the AGO, and appropriate municipal officials. For programs that have federal analogs, a copy will be sent to EPA. As appropriate, copies may also be sent to others such as a complainant or a consultant who has been working on the project, or may be placed in a licensee’s file. If the Respondent wants a copy of the AOC with original signatures, two copies will be prepared and routed for signature. An “original copy” is then sent to the Respondent once the AOC is fully executed.

c. Modifications to an Administrative Order by Consent

Because the Respondent has already agreed to the terms of an AOC, it is not likely that the AOC will need to be modified. However, if a modification becomes necessary or desirable, it is effected by the execution of an Amendment by Consent to the AOC. The amendment would be prepared the same way that an AO amendment is prepared, but would reflect the Respondent’s consent by incorporating the same language from the AOC in the introduction and order sections

of the amendment and by including signature lines for all of the parties. The Amendment is reviewed and approved the same way as the original AOC and is signed by the same parties that executed the original AOC.

d. Follow-up

DES program staff will be responsible for monitoring any compliance activities that must be undertaken pursuant to the AOC. Payment of any administrative fines will be tracked by the DES Legal Unit, while payment of any civil penalties will be tracked by the AGO.

If the Respondent fully complies with all of the items in the Order, DES will issue a Notice of Compliance (“NOC”) to the Respondent. If the AOC was recorded, DES will issue a Notice of Compliance and Release of Recordation (“NOC/Release”) to allow the Respondent to clear the title to the property by recording the NOC/Release. The NOC/Release usually is sent with a cover letter that explains the purpose of the NOC/Release and recommends that the Respondent record the NOC/Release. (DES does not record the NOC/Release.)

If the Respondent does not comply with the terms of an AOC, DES will consider whether to invoke any stipulated penalty provisions that may have been included or to seek to enforce the AOC in court (*i.e.*, by referring the case to the AGO).

6. Administrative Order

a. Effect of an Administrative Order

An Administrative Order (“AO”) is a *legally enforceable* document issued unilaterally by DES that *requires* the Respondent to act (*e.g.*, to undertake specified corrective actions) or refrain from acting in response to specifically identified violations of environmental laws. An AO usually includes a compliance schedule. If an AO is not appealed, it can be used in a subsequent proceeding, including a proceeding to compel compliance with its terms, as proof that the violations alleged in the AO occurred. As such, the AO must comply with basic concepts of fairness and due process, which require that the Respondent be able to tell exactly (*i.e.*, without guessing) what the “charges” (violations) are and what DES expects to happen to fix them.

Some programs have statutory authority to issue an Imminent Hazard Order (“IHO”).¹ An IHO must specifically include a finding that the violation(s) identified in the IHO present(s) an imminent and substantial hazard to human health or the environment. If this finding is made, the IHO becomes effective immediately upon issuance regardless of whether the Respondent files an appeal. Since IHOs are formatted and processed the same as AOs (only more quickly), the following discussion of AOs includes IHOs unless otherwise indicated.

b. Issuance of an Administrative Order

AOs are more formal than LODs, having a caption, a number, and separate sections

See, *e.g.*, RSA 146-A:16, III; RSA 147-A:13; RSA 485-A:54, II

containing numbered paragraphs that identify the parties, the factual and legal bases upon which the AO is issued, the conclusions that violations have occurred, and the specific remedial action being required. The AO will also inform the Respondent of the right to appeal the AO and of the time in which any appeal must be filed. For appeals of an AO issued under two or more different statutes that are appealable to different Councils, the AO will specifically identify the correct appeal route for each determination of violation.

The AO will include a statement of other remedies available to DES for the underlying violation(s) and for not complying with the AO itself. If the activity noted in the Statements of Fact and Law also violates (or may violate) a statute which is outside DES's jurisdiction, a sentence usually will be included in the AO that alerts the Respondent that the matter is being referred.

All AOs are sent certified mail, return receipt requested. If the Respondent refuses to sign for the certified mail, the AO will be hand delivered either by DES staff or by law enforcement officials (*e.g.*, local police officer or county sheriff).

DES usually will record an AO whenever a specific parcel of land is affected by the violation(s). Orders issued pursuant to certain statutes implemented by DES can be recorded without charge to DES. A copy of the AO will be sent to the DES Enforcement Coordinator, the DES PIP Office, the AGO, and appropriate municipal officials. For programs that have federal analogs, a copy will be sent to EPA. As appropriate, copies may also be sent to others such as a complainant or consultant who has been working on the project, and may be placed in a licensee's file.

c. Modifications of an Administrative Order

Any modification to an AO, including any extension to the time limits specified for compliance, can only be legally effected through an amendment to the AO. The format and procedures for amending an AO are designed to ensure that the requirements of the AO as amended are clear (unambiguous) and that the amendment is legal and reasonable under the circumstances.

The amendment should identify what is being modified in a way that allows someone who was not privy to the discussion(s) which resulted in the amendment to know how the AO should read as a result of the change. The Amendment thus either must clearly identify the provision(s) being revised and the revision(s) being made, or entirely replace the original provisions with new provisions. The Amendment must be signed by the Commissioner and Division Director. A copy of the Amendment must be sent to each person who got a copy of the original AO. If an AO is being amended as part of a settlement of an appeal, the amendment can be an "Amendment by Consent", as described in section C.5.c.

d. Follow-Up

If the Respondent fully complies with all of the requirements of the AO, DES will issue a Notice of Compliance ("NOC") to the Respondent. If the AO was recorded, DES will issue a Notice of Compliance and Release of Recordation ("NOC/Release") to allow the Respondent to clear the title to the property by recording the NOC/Release. The NOC/Release usually is sent with a cover letter that explains the purpose of the NOC/Release and recommends that the Respondent record the NOC/Release. (DES does not record the NOC/Release.)

If DES receives information subsequent to issuing an AO that conclusively shows either that there was no violation or the person to whom the AO was sent was not the person legally responsible for committing or fixing the violation, DES will issue a "Rescission". If the violation(s) did occur and the named Respondent was the legally-responsible person, an AO will **not** be rescinded even once compliance is achieved (but it will be released).

e. Appeals (Process, Hearings, Settlements)

All appeals must be filed within **30 calendar days** of the date the AO was **issued**. The presumptive date of issuance is the date that appears on the first page of the AO. The 30-day period is counted by starting on the day following the date of issuance and includes the last (30th) day unless that day falls on a weekend or State holiday, in which case the deadline extends to the first business day following the weekend/state holiday. The appeal notice must contain certain information such as the specific name of the party appealing the AO, the specific portions of the AO that the party disagrees with, the specific reason(s) why those portions are unlawful or unreasonable, and the specific relief that the party is asking the Council or Board to provide. Rules addressing content and format of appeals have now been adopted by all DES Councils (Waste Management Council, Water Council, Wetlands Council, and Air Resources Council) and by the Water Well Board. If an appeal is not filed in time or does not contain the required information, the appeal might not be accepted. The DES fact sheet "Appealing an Order of the N.H. Department of Environmental Services" (#NHDES-CO-7) usually is sent with each AO.

Appeals of AOs usually will be received by the paralegal in the DES Legal Unit who is the appeals clerk to the Councils. The Council Appeals Clerk will send a copy of the appeal to appropriate DES staff if the appeal document does not indicate that copies were sent directly. Once an appeal is filed, no party to the appeal (DES or the Respondent or any intervenors) can discuss the appeal with the Council unless all parties have received notice that the discussion will occur and have been given an opportunity to participate. (Discussions where all parties are not given notice and opportunity to participate are considered *ex parte* and are prohibited by RSA 541-A:36.)

When an appeal is received, the program that initiated the AO will be assisted either by the DES Enforcement Coordinator or by an attorney from the AGO. DES's initial focus in an appeal usually will be to see if the appeal can be settled without the need for a hearing. The attorney representing the Division will contact the Respondent (or Respondent's attorney) to talk about settling the case. More than one meeting may be necessary, especially if the issues are complicated. Settlement discussions are confidential; if a settlement is not reached, nothing that anyone says (or writes) during the negotiations can be introduced as evidence by another party at the subsequent hearing.

If settlement discussions are not successful or do not seem to be moving very fast, any party can request a prehearing conference. A prehearing conference is a more formal proceeding than a settlement discussion, and is conducted by a member of the Council that will be hearing the appeal. The stated purpose of a prehearing conference usually is to agree on the specific issues that will be presented to the Council and/or to identify witnesses and exhibits and how much time each side will need. Sometimes, the presiding Council member will give some indication of the likely reaction of the full Council to the issues, *etc.*, which can provide enough motivation for

DES and the Respondent to reach a settlement. An appeal can be settled at any time prior to the Council actually making a decision on the case (even after the hearing, provided the Council has not yet deliberated and voted).

If an appeal is settled, a settlement agreement that contains the terms of the settlement must be prepared. DES usually will do this, although if the Respondent is represented by legal counsel and DES agrees, the Respondent's attorney often prepares at least the first draft. A settlement agreement may include a compliance schedule that differs from the deadlines specified in the AO. However, while DES may compromise on when compliance will be achieved (*i.e.*, the compliance schedule dates), DES **does not (cannot)** compromise on whether compliance will be achieved.

The settlement agreement also must resolve the appeal that is pending before the Council. This is usually done by the Respondent agreeing to withdraw the appeal upon execution of the settlement agreement.

Also, even though DES does not combine administrative fine notices and administrative orders into one document (because the hearing and appeal processes are different), fines and/or stipulated penalties **can** be included in an AO settlement (because the Respondent is agreeing to pay and waives the hearing and appeal).

If an appeal hearing is held, it will be a full evidentiary hearing before at least a quorum of the Council. At the hearing, DES will testify and present evidence about the investigation that led to the AO being issued for the violation(s) alleged. The hearing may last less than an hour or may continue over several days, depending on the number and complexity of the violations alleged and the number of witnesses and exhibits to be presented. The hearing is recorded and all testimony is given under oath or affirmation.

After the hearing, the Council must review the evidence and come to a decision. This is usually done at the Council meeting following the meeting at which the hearing was held. After the Council reaches a decision (by majority vote), a written decision is prepared and issued. RSA 541 provides that any party (the Respondent(s) or DES) who is dissatisfied with the Council's decision may appeal the decision to the NH Supreme Court. Appeals to the Supreme Court are rare, as they are on issues of law only. That is, except in extremely limited circumstances, an appeal can not be taken from a finding of fact even if the finding appears to be erroneous, if the correct law is properly applied to that finding.

7. Administrative Fine

An administrative fine is an action that seeks to impose a monetary penalty against the Respondent. Administrative fine actions are often initiated with the intent of seeking a settlement of the case that will also resolve any outstanding compliance issues. The Commissioner of DES is authorized to impose administrative fines for violations under most of the statutes implemented by DES. The current statutory authorities for administrative fines are included as **Appendix V-1**. Rules implementing the Commissioner's authority have been in place since 1989, and have been modified as necessary to add or revise schedules of fines and to modify the procedures for seeking administrative fines. The most recent comprehensive re-adoption of Env-C 601, relating to procedures, was in December 1998. The most recent comprehensive re-adoption of Env-C 602 -

616, the fine schedules, was in February 2000. In developing administrative fine procedures, the desire to have a streamlined program has been balanced against the need to afford due process to those against whom a fine is sought to be imposed.

a. Initiation of an Administrative Fine Action

In most cases, an administrative fine action is initiated by the issuance of a Notice of Proposed Administrative Fine and Hearing (“NPF/H”) or a Field Citation (“FC”). The NPF/H or FC is a notice that an administrative fine (also referred to as an “AF” or just a “fine”) is being proposed; it is **not** a notice that a fine has been imposed. Pursuant to the statutory authorities for imposing fines, the Respondent has an opportunity for a hearing before a fine is imposed. In some cases, a program may initially send a proposed administrative fine settlement to the Respondent. That is, instead of sending a NPF/H and then initiating settlement discussions, the program may offer the terms under which the program is willing to settle the case.

The NPF/H, FC, or proposed settlement informs the Respondent that a fine is being proposed, and specifies the factual and legal bases for the violation(s) that are alleged and the amount of the fine(s) being proposed. This is the only enforcement document in which the state party to the action agency is identified as “the Division” instead of “DES”. This is because at the NPF/H, FC, or proposed settlement stage, “DES” (*i.e.*, the Commissioner) has not made a decision on the fine; the NPF/H, FC, or proposed settlement only indicates that the Division is seeking a fine.

The NPF/H or FC also informs the Respondent that the Respondent has an opportunity for a hearing on the proposed fine and that the Respondent is obligated by rule to respond to the NPF/H or FC, and specifies the date by which the Respondent must respond. Beyond this, the two forms of notice differ slightly, as discussed below.

The NPF/H will specify the date on which a hearing has been scheduled, and informs the Respondent of how a change in the scheduled hearing date can be requested. The NPF/H also explains how the determination is made to impose a fine (or not) after a hearing, and how the Respondent can attempt to mitigate the amount of a fine imposed after a hearing.

The NPF/H is sent to the Respondent by certified mail, return receipt requested. Copies of the NPF/H will be sent to the DES Enforcement Coordinator, the DES Hearings and Rules Attorney, the DES PIP Office, municipal officials, and others who are known to be interested in the matter. If the Respondent doesn’t sign for the certified mail, the NPF/H will be delivered by hand to the Respondent.

An FC is issued in the field at the end of the inspection which results in the field citation being issued. The field inspector fills in a pre-printed FC form with the case-specific information, such as how many of which violations were observed and how much the total fine is, and signs the FC. The FC is also signed (to acknowledge receipt) by the Respondent or Respondent’s agent who is present at the inspection. The Respondent (or agent) then gets one of the copies of the FC; the inspector brings the other copies back to the office for filing and distribution. Copies of the FC are given to the Division Director, the DES Enforcement Coordinator, and the Commissioner.

The cover letter sent with a proposed settlement specifies a date by which the Respondent must return the settlement. If the Respondent doesn't accept the proposed settlement and alternate terms can't be worked out, the Division will initiate a formal proceeding by issuing a NPF/H. Since the Division usually is willing to reduce the fine if the case is settled, the Division usually informs the Respondent that the full potential (higher) amount will be sought if the case goes to a hearing.

b. Resolution of an Administrative Fine Action

Proposed Settlement

If the Division initiates a fine case by sending a proposed settlement, the Respondent can accept the terms of the settlement or can discuss alternative terms. If terms are agreed to, the settlement agreement is signed and routed for acceptance by the Commissioner. If terms agreeable to the Respondent and DES can't be reached, the Division will withdraw the proposed settlement and will proceed to issue a NPF/H.

ii. Field Citations

Under Env-C 608.03, an FC cannot be used to propose an individual fine of more than \$100 per violation or a total fine of more than \$1,000. If the total fine proposed in the FC exceeds \$500, the amount over \$500 will be suspended. If the Respondent corrects the violations and pays the \$500 fine within 30 days of the date of the FC, payment of the suspended portion will be waived and the file will be closed.

A Respondent who received an FC occasionally will ask to discuss a settlement, although this is rare because the fine amounts are so low and compliance has to be achieved anyway. If the program settles the case, *e.g.*, by accepting a payment schedule or a schedule for compliance that extends beyond the time allowed by the FC, the standard procedures for settlements must be followed.

If a Respondent who received an FC requests a hearing, program staff will coordinate with the DES Legal Unit to schedule the hearing. The DES Legal Unit will send the hearing notice, which will contain the same hearing-related information as a NPF/H (hearing date, how to request a different date, how the determination is made to impose a fine (or not) after a hearing, and how the Respondent can attempt to mitigate the amount of a fine imposed after a hearing). A hearing conducted for a field citation fine is the same as any other fine hearing.

iii. Standard NPF/H

If a Respondent who has received an NPF/H elects to waive the hearing and pay the proposed fine, the administrative fine file is closed upon receipt of payment.

If DES receives the return receipt from the NPF/H but the Respondent does not respond by returning the Appearance/Waiver form, a hearing can be held anyway pursuant to Env-C 204.09, subject to the Respondent's right to request the hearing to be reopened.

iv. Standard NPF/H - Settlement

All DES programs are encouraged to discuss a possible settlement of any administrative fine case initiated using an NPF/H. If the Respondent does not contact the program to initiate the discussion, program staff usually will contact the Respondent. Contact should be made well in advance of the scheduled hearing to allow time to come to an agreement and prepare and execute the settlement document. If the parties are discussing a possible settlement but have not concluded the negotiations and agreement by the date of the hearing, either program staff or the Respondent must request that the hearing be continued or postponed. The request must be in writing and sent to the DES Hearings and Rules Attorney, with a copy to everyone identified on the "cc:" list of the original NPF/H.

Administrative fine settlements range from being a payment schedule for the amount originally sought to including complex compliance schedules with suspensions or waivers of portions of fines based on various contingencies and/or stipulated penalties for failing to meet agreed-to deadlines for remedial actions. The complexity of the settlement depends primarily on whether there are any violations that remain unresolved.

If there are no outstanding compliance issues, the settlement is a payment schedule or an agreement to suspend a portion of the fine contingent on the Respondent undertaking certain beneficial activities (a Supplemental Environmental Project, or SEP) or committing no further violations of applicable requirements for a specified period of time, or a combination thereof. Payment schedules should be reasonable in view of the Respondent's financial resources, but may not extend for more than six months except under unusual circumstances or unless the Respondent agrees to pay interest on the unpaid balance. As the payment schedule gets longer, the amount of resources DES spends to receive and process the payments increases, which reduces the net value of the fine. Also, if the Respondent does not pay interest on the outstanding balance of the fine, a longer payment schedule reduces the current value of the fine.

The conditions of a suspension can be limited to complying for a specified period of time with the requirements of one program, or can include complying with the requirements of any program implemented by DES. The time period specified is typically two years, which usually is long enough to give some level of assurance that the Respondent really is trying to comply and is short enough to not be onerous to monitor.

If a fine has been sought in a case where the violation has not yet been corrected, the settlement agreement can and should be used to establish a compliance schedule. If a portion of the fine is conditionally suspended (*e.g.*, contingent on the deadlines set in the schedule being met), the amount of money that will be paid if all of the deadlines are met must be sufficient to recoup any economic benefit that accrued to the Respondent as a result of the violation. (See Chapter VI for a discussion of recouping economic benefit.)

If it is not appropriate to waive any of the fine originally sought, either because the violations and/or past compliance record of the Respondent are so egregious and/or the amount sought is just adequate to recoup the economic benefit, and the Respondent still is willing to establish a compliance schedule in a settlement agreement, stipulated penalties usually will be considered to motivate compliance with the schedule. (See Chapter VI for a discussion of stipulated penalties.)

v. Hearings

If settlement discussions are not successful or don't occur, a hearing will be held. The purpose of an administrative fine hearing is to create a formal record which will form the basis for determining whether there has been a violation for which the imposition of an administrative fine is authorized, and, if so, what the appropriate amount of the fine is. The fine will be conducted in accordance with Env-C 200, in particular Env-C 204 relative to adjudicatory hearings. These rules incorporate the statutory hearing procedures of RSA 541-A, the NH Administrative Procedures Act. This hearing is **not** an appeal, since no decision to impose the fine has yet been made. (Remember, the "P" in NPF/H is for Proposed, and the Field Citation is simply an alternate form of proposing that a fine be imposed.)

In most cases, the hearing is a formal oral hearing at which witnesses testify under oath and the record is created by tape recording. If there are unusual circumstances involved and all parties agree, the "hearing" can consist of submission of each party's case in writing, with accompanying affidavits and exhibits. For hearings done on a written record, testimony can be submitted only in the form of a sworn affidavit.

At the hearing, Division staff will present testimony and evidence to prove that the violation(s) occurred and that the fine sought is the appropriate amount. The Respondent will have an opportunity to rebut the Division's evidence and present evidence to support the Respondent's position. The Division bears the burden of proof at this hearing. This means that the Division must show that it is more likely than not that the violation(s) occurred, that this Respondent is the violator, and that the fine sought is the appropriate amount.

The person conducting the administrative fine hearing is referred to as the "presiding officer" or "hearing officer". The hearing officer is **neutral** insofar as the substance of the alleged violations is concerned, and so will have no prior independent knowledge of the circumstances which gave rise to the administrative fine action. The hearing officer is responsible for ensuring that the hearing is conducted in an orderly manner and that the rights of all parties (including the Division) are protected. In most cases, the hearing will be conducted by the DES Hearings and Rules Attorney ("HRA") as the designee of the Commissioner. If the HRA is unavailable, another person will be designated to preside over the hearing.

If the Respondent is an individual, the individual usually must attend the hearing in order to present evidence. If the Respondent is an entity, then an officer, director, or other duly-authorized individual must attend the hearing on behalf of the entity. The Respondent, whether an individual or an entity, may be represented by legal counsel.

The hearing is open to anyone who wishes to attend. However, this does **not** mean that anyone who attends has a right to be heard; only parties and any witness(es) the parties call can testify on the record. Note, though, that if a person who attends the hearing is asked by a party to testify, the testimony will be accepted into the record if it is material, relevant, and not duplicative.

Following the hearing, the hearing officer will evaluate the testimony and evidence presented and make findings of fact to support the hearing officer's recommendation to the Commissioner. In so doing, the hearing officer will be guided by which party has the burden of proof on each

issue and whether that party persuaded the hearing officer that the proposition is more likely than not to be true. (The Division must prove that the Respondent violated a statute, rule, permit, or contract and that the violation is one for which a fine can be imposed, and must prove any aggravating factors it believes warrant an increase in the fine. The Respondent has the burden of proving any mitigating factors, such as no history of non-compliance with DES programs, in order to obtain a reduction in the fine imposed.)

In this process, the hearing officer will evaluate the credibility of the witnesses and evidence. The hearing officer can choose to believe all of a witness's testimony, part of the testimony, or none of the testimony. The hearing officer will base the determination of credibility on the witness's demeanor when testifying, the witness's interest in the outcome, the witness's personal knowledge of the matters about which s/he testified, the consistency of the witness's testimony with that of other witnesses or other evidence, and any other factors which bear on the witness's believability. The strength of the testimony of a single, credible witness can exceed that of many witnesses whose credibility is tainted. Further, the hearing officer does not have to believe testimony *even if* no testimony is offered which is contrary to it.

The hearing officer then prepares a recommendation to the Commissioner as to whether to impose the fine sought by the Division, a lower amount, or no fine at all. The hearing officer can also recommend a payment schedule and/or suspension of all or a portion of the fine based on certain conditions being met. The hearing officer forwards the recommendation and the complete record to the Commissioner. The Commissioner may accept the recommendation or make specific findings to support a different fine amount. The hearing officer then converts the approved/modified recommendation to a Notice of Decision ("NOD"). The NOD is sent to the Respondent by certified mail, return receipt requested. Copies of the NOD are sent to everyone who received a copy of the original NPF/H or FC.

DES has developed a protocol for handling administrative fine cases that ensures that *ex parte* communications do not occur during the process of developing and issuing the NOD. A copy of this protocol is included in **Appendix V-2**.

c. Motion for Reconsideration

Administrative fine decisions are subject to the provisions of RSA 541 for purposes of appeal. Under RSA 541:3, "any party to the action or proceeding ... or any person directly affected thereby, may apply for a rehearing" The request for rehearing, or motion for reconsideration ("MFR"), must be filed within 30 days of the date the NOD is issued. The MFR must be in writing and must *specifically* identify all of the reason(s) why the party believes the Commissioner's decision was unlawful or unreasonable (ref. RSA 541:3 and 4).

Under RSA 541:5, the Commissioner must decide within 10 days whether to reconsider the decision. If a decision is reconsidered, the hearing officer sets a time limit for the other party to respond to the MFR if desired. After the response deadline, the hearing officer reviews the information submitted and makes a recommendation to the Commissioner as to whether another hearing should be held or, if not, whether the original decision should be affirmed, overturned, or modified. In most cases, a second hearing is not held; rather, the Commissioner makes a decision based on the written record. Once a decision on the MFR is issued, any party that is still

dissatisfied with the decision has 30 days in which to appeal to the NH Supreme Court

d. Follow-up

If a fine is imposed, the decision that is issued will specify the time by which the payment(s) must be made. If a fine is appealed, payment will be suspended pending the outcome of the appeal. If the fine is upheld on appeal, the decision usually will specify a (new) time by which the payment(s) must be made, since the original date(s) usually will have passed.

If the Respondent does not make payment by the deadline, the DES Legal Unit will send a letter to remind the Respondent of the decision and to request payment. If payment is not received, a second letter is sent, which is slightly less friendly than the first. If payment is still not received, a third (final) letter is sent, demanding payment and informing the Respondent that a collection action will be initiated unless payment is received by a specified date. Most fines are less than \$5,000 and so can be collected by the DES Legal Unit via a small claims action in the Concord District Court. Larger fines are referred to the AGO for collection in Superior Court.

If a Respondent does not comply with the terms of a settlement agreement, DES will consider whether to invoke any stipulated penalty provisions that may have been included or to seek compliance via a judicial proceeding (*i.e.*, refer the case to the AGO).

8. Referral to the Attorney General's Office

As noted in Chapter I, most environmental laws allow the AGO to seek judicial relief in the form of civil penalties, injunctive relief, and criminal penalties. If DES believes a judicial remedy is more appropriate than an administrative remedy, DES usually will refer the case to the AGO. Referrals are frequently made in cases where the violation is causing substantial, on-going harm or caused actual serious harm or posed a substantial threat of serious harm to public health or the environment; the violation rose to the level of a criminal offense or otherwise was willful or deliberate; 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; the significant economic benefit realized by the Respondent from the violation is more than the total administrative fine that could be imposed; a civil penalty is otherwise appropriate and the Respondent is not willing to enter into an administrative order by consent; or the Respondent has failed to comply despite administrative efforts by DES. If DES refers a case that falls into one of these categories to the AGO, DES almost always will ask the AGO to seek monetary penalties in addition to whatever other relief is appropriate. DES also refers clean-up cost recovery actions to the AGO (ref. C.9, below).

a. Effect of a Referral for Enforcement

When DES refers a case to the AGO for judicial action, one of the attorneys from that office will be assigned to work on the case. DES will continue to work with the attorney throughout the course of the case. Final decisions (including decisions on settlement terms) generally will result from discussions that lead to a consensus with the AGO and DES. In addition to referring a case for civil action, DES refers matters to AGO for criminal investigation and for review of AOCs that include civil penalties.

b. Process

The AGO may initially seek to settle a case referred by DES for civil judicial action. Usually, the AGO will send a letter outlining proposed settlement terms and setting a deadline for response. If the draft petition is available, a copy will often be sent with the letter. Offers of settlement are typically met with counter-offers, and so negotiations ensue. If the discussions are successful, a consent agreement will be prepared to file in court with the petition. In order to ensure that the negotiations do not stall out, the AGO will set a date for filing the petition with or without an accompanying consent agreement.

During this process (and throughout the ensuing process, if a case is not settled), all parties must remember that the case has been referred, *i.e.*, that DES is no longer handling the case. This means that DES staff (including program staff, supervisors, Bureau Administrators, and Division Directors) should refrain from discussing the case with the Respondent or the Respondent's consultant or attorney. Not talking to the Respondent or the consultant sometimes can be difficult, especially if there is a long-standing relationship between them and DES staff and/or there are on-going projects unrelated to the case that was referred. DES staff who are contacted by the Respondent or Respondent's consultant about matters not related to the pending action can proceed as normal. However, staff must **not** discuss the referred case (directly or indirectly) with the Respondent or the Respondent's consultant unless the assigned AGO attorney knows in advance that the discussion will occur and has agreed to the scope of the discussion (*e.g.*, technical details about restoration or other remedial measures).

While it may be difficult to avoid talking to the Respondent or Respondent's consultant, DES staff should never have a problem **not** talking to the Respondent's attorney. Attorneys operate under rules of professional conduct that prohibit direct contact with a party known to be represented by counsel without that counsel's knowledge and consent. Since DES is represented by counsel in any case that has been referred, this prohibition applies. DES staff who are contacted directly by the Respondent's attorney **must decline** to discuss the case unless staff has already heard from the AGO attorney that the call has been discussed and approved. The AGO attorney should also indicate what topics can be covered by the call, so if the Respondent's attorney starts to stray from the agreed-to topics, the discussion can be terminated.

If a petition is filed without a consent agreement, both parties will begin to prepare for trial by undertaking discovery, including depositions of the other party's witnesses and interrogatories. Settlement talks often continue or resume as discovery proceeds, as both sides reassess the strength of their respective cases in light of the information provided by the opposing party. If the case is settled through negotiation, the AGO will forward a copy of the draft settlement (usually in the form of a consent decree) to DES for review. Once everything is finalized, the AGO will send a copy of the final petition and signed consent decree to the DES. If the settlement includes a compliance schedule or other such deadlines, DES will be responsible for monitoring compliance with the schedule. The AGO will collect any payments that are due. If the settlement includes a Supplemental Environmental Project ("SEP") other than a straight cash payment, in most cases DES will be responsible for monitoring implementation of the SEP.

If the case goes to trial, DES staff will be called upon to testify. If the court rules in the State's favor and the Respondent doesn't appeal, the case is done and DES will be responsible for

monitoring the Respondent's compliance with the court order (if such is required). If the court only imposes monetary penalties, the AGO will collect the payments. If the court rules in favor of the Respondent, DES and the AGO will discuss whether to appeal the decision.

9. Cost Recovery Action

Certain statutes implemented by DES authorize DES to perform remedial actions, including associated site investigations, and to recover the costs for the actions from the responsible parties. A list of statutes conferring such authority is included as **Appendix V-3**. DES usually does not perform the remedial activities directly; instead, DES contracts with an environmental company to do the work.

Before undertaking remedial activities, DES notifies the responsible parties of their obligation to do the work and offers a reasonable time for the responsible parties to confirm their intent to do the work. Depending on the circumstances, DES may ask the responsible parties to enter into an AOC that establishes the schedule for the work. If the responsible parties do not respond to the notice or do not adhere to the agreed-to schedule, DES will send a notice informing the responsible parties that if work is not initiated by a date that is specified in the letter, DES will undertake the necessary actions and will bill the responsible parties for all recoverable costs.

If DES undertakes the activities (*i.e.*, hires the state contractor to do the work), DES will send a statement of the total recoverable costs to the responsible parties when the work is completed. If the project is expected to last for a longer period of time (*e.g.*, more than six months), DES will send periodic statements of the amounts due to date. The statements will request the responsible parties to remit payment.

If the responsible parties do not remit payment and the statute allows DES to claim a lien against the property to secure payment, DES will file a lien in the registry of deeds for the county in which the property is located. Depending on the statute under which the lien is filed, the lien may take precedence over previously-filed liens. If the responsible parties remit payment, DES will discharge the lien.

If the responsible parties do not remit payment, DES will refer the case to the AGO for judicial action. If a case is referred for cost recovery, DES may also request the AGO to seek civil penalties, either for the underlying violations or for the failure to pay as required. DES is more likely to seek penalties in addition to cost recovery if the responsible parties did not have a compelling reason for not undertaking the work originally and for not paying recoverable costs when originally requested by DES.