

**I. DES Approach to Compliance Assurance; Determining the Appropriate Response to Violations**

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## **I. DES Approach to Compliance Assurance; Determining the Appropriate Response to Violations**

### **A. Introduction**

The Department of Environmental Services (DES) 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. DES 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. DES 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.

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

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

Through its outreach and assistance activities, DES will encourage greater awareness of the requirements of environmental laws and promote environmental stewardship. Through its compliance actions, DES will encourage the regulated community to implement innovative alternatives that provide additional environmental benefits. Through its penalty actions, DES 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, DES 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. Accordingly, DES 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**

In order to provide as much information as possible to as many people as possible, DES conducts extensive 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 Web site. A fuller description of these activities can be found in Chapter II.

DES also offers extensive 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 DES discovers any violations, while DES 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 DES 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 DES 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 otherwise 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 DES has expended resources to remediate a site due to the unwillingness or inability of the site owner to do so, cost recovery will be pursued.

Assistance and enforcement may proceed concurrently.

## **C. Determining Compliance/Non-compliance**

### Environmental Laws

When DES reviews a site, facility, or activity to “determine compliance”, DES 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 all living organisms, by a variety of mechanisms. Some statutes allow certain activities to be conducted if a permit is obtained from DES; other statutes prohibit certain activities outright. A list of the statutes implemented by DES can be found in the glossary under the definition of “environmental laws”.

The statutes that confer authority on DES to implement them typically include the authority for DES to adopt administrative rules (“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 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 DES’s compliance assurance efforts.

Because rules are so important to DES’s efforts, DES 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 (state-wide) rule drafting requirements, rules often must be 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, and DES can issue a regulatory interpretation or initiate rulemaking to clarify the rule if necessary.

Some environmental statutes also confer authority on DES to issue permits for certain activities. The permit application, review, and issuance process is 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 provision in statute or rules. Most programs expressly incorporate plans and specifications submitted by the applicant into the 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

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

A permit from DES is required to engage in the activity, whether or not the person has obtained a permit;

The activity involves a material regulated by DES (*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.

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

### 3. Investigations

To achieve its goal of ensuring compliance, DES 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 DES 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<sup>1</sup>. 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 the 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 DES to accurately identify and document the conditions on which a compliance determination will be made, *i.e.*, the conditions which may give rise to enforcement.

At times, DES will undertake a compliance determination at a site or facility that is subject to the requirements of more than one DES program. For instance, through its Performance Partnership Agreement (“PPA”) with EPA, DES typically commits to doing multi-media inspections at a certain number of permitted facilities per year. To fulfill this commitment, the DES programs involved (typically RCRA Subtitle C - hazardous waste, NPDES - surface water discharge, and Air - stationary sources) 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, such as the Wetlands Program and Shoreland Protection Program and/or the Site Specific (erosion control) Program. Not all multi-media inspections require direct participation by staff from each program involved; many staff have been 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, DES then must decide how to respond. For cases that do not present unique circumstances, a recommendation as to the appropriate response typically is made by the program. For cases that present unique circumstances or which present more serious violations, the response is developed through appropriate consultations.

Each DES regulatory program has a regularly-scheduled meeting with the DES Enforcement Coordinator and attorneys from the NH Attorney General’s Office Environmental Protection Bureau (“AGO”). 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

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<sup>1</sup> As used herein, “investigation” includes file reviews, facility or site inspections, and other investigative research.

arise between meetings can be discussed with the DES Enforcement Coordinator (and, as appropriate, with the AGO) without waiting for the next meeting. If a situation needs to be addressed immediately through injunctive relief, the AGO is consulted immediately.

The AGO has a role separate from, but closely related to, that of DES. AGO 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 the 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

As noted above, regularly-scheduled inspections are increasingly being conducted as multi-media inspections. However, in the course of responding to a complaint or otherwise being in the field, DES staff sometimes 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 of another DES requirement or of a non-DES program. 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 the Department of Health and Human Services, Division of Public Health. In such situations, DES staff will collect as much information about the potential violations as is reasonable under the circumstances, and then will transmit the information to appropriate staff.

#### **D. Determination of Appropriate Compliance Assurance Response**

##### Primary Factors Considered

In determining the most appropriate response to a violation, DES 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 DES to identify and remediate the violation that became known to DES, as well as other violations under the Respondent's control.

c. Economic Benefit - Whether the Respondent 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 applicable requirements were met.

f. Harm, Threat of Harm - Whether the violation caused any actual long-term harm or posed a significant threat of harm to public health or the environment.

g. History - Whether the Respondent has a history of non-compliance with environmental laws (or analogs thereof in other states or at the federal level).

h. Knowledge of Requirement, Intent - Whether the Respondent knew or should have known about the requirement that was violated and the degree to which the activity constituting the violation was intentional. (Includes assessments of the Respondent's regulatory sophistication and the complexity of the facility.)

i. On-going Business Activity - Whether the violation was committed during the course of a legitimate business activity in which the Respondent is likely to continue to engage.

Policy Considerations - Whether the overall case has important policy implications.

k. Prompt Remediation - Whether the Respondent acts promptly to remediate the violation after it was discovered.

l. Proof - Whether DES has sufficient proof that the violation occurred and the Respondent is legally liable.

m. Unique Circumstances - Whether the case offers unique circumstances that must be accounted for in developing a fair and just response.

n. Voluntary Self-Report - Whether the Respondent voluntarily reported the violation to DES.

## 2. Enforcement Forbearance

DES will be more likely to not initiate an enforcement action in the following circumstances, provided that none of the violations in the case falls within any of the categories listed in D.3, below. Depending on the situation, DES may offer or recommend site- or facility-specific assistance. Regardless of whether assistance is provided, DES 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 violation. The violation must not have arisen in the course of a legitimate business activity that is likely to continue. The person must have fully remediated the violation, or DES 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 (*i.e.*, no contractors involved).

b. First Violation

The violation is a 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 in the course of a legitimate business activity that is likely to continue. The person must have fully remediated the violation, or DES must have adequate reassurances that the violation will be fully remediated within a reasonable time without need for a compliance action. DES usually will offer or recommend assistance if it determines that assistance will help to remediate the violation and is likely to prevent a recurrence of the same violation and similar violations.

c. Federal Overlay

The violation is one for which EPA has affirmatively declined to take enforcement action based on a federal policy such as the Small Business Policy or the Self-Audit Policy, provided that refraining from taking an enforcement action is consistent with environmental laws and this policy.

3 Enforcement

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

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 DES 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 DES is delegated, authorized, or otherwise approved to implement on behalf of EPA.

d. Harm, Threat of Harm

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

e. History of Non-Compliance

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

Committed the same or a 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 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.

Other Violations

Any violation which is not appropriate for enforcement forbearance

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**

Considerations

If a violation is of a type that will result in an enforcement action being taken, the case must 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, DES will identify the most desirable end result that is consistent with applicable enforcement authority. Most of the statutes implemented by DES 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 of the statutes also provide for the imposition of civil and/or criminal penalties for such violations. Most programs now also have administrative fine authority, but the authorizing language is more variable from program to program. Programs that issue licenses have 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 non-binding documents, all programs may issue a Letter of Deficiency (“LOD”), Notice of Findings (“NOF”), or Notice of Past Violation (“NPV”).

After identifying the available options, DES determines what kind of outcome is most appropriate in light of the agency’s overall objectives of compliance, deterrence, remediation, cost recovery, and recovery of significant economic benefit. The desired outcome is often (but not always) determinative of the route that should be taken. Also, in any given 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 DES considers in determining the overall goal of the action is the status of the violation being addressed. For instance, if a violation has ended and already has been remediated, issuing an LOD to request compliance would be unnecessary and inappropriate. Conversely, 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. Time-frame

Certain routes 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 usually 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 the AGO, 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.) In order to obtain a PI or TRO, the State 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 also can 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 time frame in which action should be taken, available personnel resources are considered. At times, DES will prioritize which violations to address through enforcement actions based on several factors, including available resources. DES also coordinates with the AGO regarding the priority of referred cases.

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

2. Selecting a Response

As noted above, a number of enforcement and enforcement-related mechanisms are available to DES. The various mechanisms **do not** have to be implemented in any particular order. That is, a program does not have to issue an Letter of Deficiency ("LOD") before issuing an Administrative Order ("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

A Notice of Past Violation ("NPV") is a notice to the Respondent of known deficiencies and an acknowledgment by DES 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 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

A Letter of Deficiency ("LOD") is a notice of deficiencies that have been identified by DES and a request for voluntary compliance within a specified time frame. 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

A Notice of Findings ("NOF") is a notice of violations that DES has identified through an investigation and an invitation to respond or to otherwise provide additional information so that the most appropriate response can be selected. The NOF itself is not an enforcement action and does not preclude DES from taking any type of enforcement action. An NOF is appropriate in the following situations:

DES discovers one or more apparent violations but needs or desires additional information from the Respondent before deciding on an appropriate response;

- ii. DES discovers one or more violations, and wants to notify the Respondent of the findings promptly to allow the Respondent to initiate corrective or remedial action while an enforcement action is being prepared; or
- iii. During negotiations concerning an on-going enforcement action, DES discovers new or recurring violations which DES wishes to address in the pending action.

d License Action

A license action is initiated by the issuance of a Notice of Proposed License Suspension/Revocation/Refusal to Renew, which informs the license holder of the grounds on which DES is proposing to take action against the licensee and is also the notice of hearing. 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 DES issues with the consent of the Respondent, which usually requires the Respondent to undertake specified corrective actions on an agreed-to schedule and which may also require the Respondent to pay an administrative fine or civil penalty. Once fully executed the AOC is legally binding on the Respondent. 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 the AGO.

f Administrative Order

An Administrative Order (“AO”) is a legally-enforceable document that identifies the factual and legal basis for DES’s determination that a violation has occurred and requires the Respondent to undertake specified corrective actions within a particular time frame. An AO is appropriate, with or without a concurrent administrative fine action, if a referral to the AGO is not otherwise appropriate and:

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 (fast track AO quick issuance, tight compliance deadlines); or

- iii. The property on which the violation occurred is for sale, and recording the AO will inform 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.

g. Imminent Hazard Order

An Imminent Hazard Order (“IHO”), available to certain DES 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 DES 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 to occur within a relatively short period of time if nothing is done, and there is reason to believe that the Respondent will cooperate (such that a preliminary injunction or a temporary restraining order is not necessary).

h. Administrative Fine

An administrative fine is a monetary penalty imposed by the Commissioner of DES after opportunity for a hearing or by agreement between DES and the Respondent. A Respondent usually is informed that a DES Division is seeking an administrative fine via a Notice of Proposed Administrative Fine and Hearing (“NPF/H”), which specifies the basis for and amount of the proposed fine as well as the hearing date. In some programs, the Respondent may be informed of the proposed fine by a Field Citation (“FC”). In some cases, the Division will initiate an administrative fine action by offering a proposed settlement. 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:

The total administrative fine that can be imposed for the violation is large enough to recover any significant economic benefit realized by the Respondent 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.

#### AGO Referral

Most environmental laws allow the AGO to seek judicial relief in the form of civil penalties, injunctive relief, and criminal penalties. If DES believes judicial enforcement is appropriate in a case it has investigated, DES usually will refer the case to the AGO. A referral from DES to the AGO to initiate a civil or criminal judicial action is appropriate in cases where:

There is substantial, on-going harm;

- ii. The violation rose to the level of a criminal offense or otherwise 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 administrative order by consent; or
- vii. The Respondent has failed to comply despite administrative efforts by DES.

If DES refers a case to the AGO, DES almost always will ask the AGO to seek monetary penalties in addition to whatever other relief is appropriate.

The AGO has authority to initiate a case without a referral from DES. For example, the AGO may receive information from another source (such as EPA) which causes the AGO to initiate a case.

### 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 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 DES proposes to take. Regulated entities reasonably want “closure” after an inspection, and some may have reporting requirements that may be impacted by an enforcement action (*e.g.*, annual reports to shareholders or regulatory agencies may have to list actual and contingent liabilities). DES also needs to close out cases as quickly as reasonably possible, so that other matters can be worked on. It is thus very important to establish guidelines for when a response should be made.

DES programs that are federally delegated, authorized, or approved typically are subject to federal “timely and appropriate” requirements. “Appropriate” means that the enforcement response adequately addresses all compliance issues and imposes an appropriate penalty. “Timely” means that the enforcement action is initiated within the period of time specified in the federal policy. For programs where a federal timely and appropriate policy applies, actions should be initiated within the specified times. **Appendix 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 time lines, 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 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 of 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 an LOD, the LOD should be issued within 15 working days of reaching the decision.

If the decision is to issue an AO, the AO should be drafted within 10 working days of reaching the decision and should be issued (*i.e.*, should be completely through all review processes and in final format and mailed) within 30 working days of reaching the decision.

If the decision is to seek an administrative fine (other than by a Field Citation), the NPF/H or proposed settlement should be drafted within 10 working days of reaching the decision and should be issued (*i.e.*, should be completely through all review processes

and in final format and mailed) within 30 working days of reaching the decision.

If the decision is to attempt an AOC, the AOC should be drafted 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 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 substance of the terms of the AOC, DES will expect the AOC to be returned within 15 working days of receipt. If the Respondent has not previously been made aware of the specifics of the AOC, DES will expect the Respondent to contact DES to discuss the terms within 10 working days of receipt, and will expect negotiations to proceed expeditiously.

If the decision is to refer the case to the AGO, the referral should be drafted within 15 working days of reaching the decision and should be sent to the AGO (*i.e.*, should be completely through all review processes and in final format and mailed) within 30 working days of reaching the decision.

## **G. Public Access to Files**

### **1 The New Hampshire Right to Know Law**

Most documents contained in state agency files are considered to be public records and are subject to inspection by members of the public. New Hampshire RSA 91-A, Access to Public Records and Meetings, requires public records which are immediately available for release to be made available upon request. If the records are not 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.

DES is undertaking an effort to make more of its public records available electronically, either through dedicated computer terminals in the lobby of 6 Hazen Drive or via the Internet. It is important to note, though, that RSA 91-A does not require an agency to create documents or reports that don't otherwise exist in response to a request, and that the statute does not require an agency to copy any records at its own expense in response to a request.

Some materials in state agency files are not considered to be public documents, and so will not be made available to the public. Non-public materials can include information submitted by an outside party under a claim of confidentiality (*e.g.*, confidential business information or a proposed settlement in a pending enforcement action) as well as documents generated by the 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 or disclose a confidential informant). Due to the importance of openness in government, the exceptions to RSA 91-A are interpreted narrowly, and the person or agency asserting that the information is non-public is responsible for showing that a particular document should not be made public. The AGO has issued a "Memorandum on New Hampshire's Right-To-Know Law, RSA Chapter 91-A", dated May 10, 1999. This guidance

document, applicable to all state agencies and available through the AGO's web site at [www.state.nh.us/nhdoj](http://www.state.nh.us/nhdoj), explains RSA 91-A and the New Hampshire legal rulings distinguishing public and non-public documents.

## 2. Access to DES Files

DES has many files, such as reports of site investigations, that many people 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 DES staff. DES is committed to providing access to all public files and is improving its facilities for providing file review space; however, for some files an appointment still must be made well in advance.

It is easier for DES 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 DES staff member who received the letter to contact all DES programs that might have a file on the company and to gather all of the files. In this case, if all the person really wanted was a report of the most recent Air inspection, making the request more specific would save time both for DES and for the person who otherwise might be presented with a 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 yet be in the file when the file is made available. In such a case, the person should ask specifically about the report.