



DEPARTMENT OF
ENVIRONMENTAL
CONSERVATION
COMPLIANCE PROCEDURE

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Compliance Procedure

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2 INTRODUCTION AND SCOPE

2.1 INTRODUCTION

The Department of Environmental Conservation's ("DEC" or "Department") Compliance Procedure (Procedure) is the foundation of DEC's compliance efforts. This document communicates the Department's philosophy on compliance to the Department's divisions and media programs, identifies requirements and best practices, and provides guidance to programs for their compliance efforts.

Nothing in this Procedure binds or precludes any action by the Department.

2.2 SCOPE AND APPLICABILITY

The scope of this document is DEC compliance which includes assistance, monitoring, reporting, permitting, inspection and enforcement, with guidance and information for DEC staff relating to divisional and program compliance efforts. The requirements within apply to all DEC staff. The scope of this document includes:

- Ensuring that the regulated community receives proactive, clear and accessible information to meet or exceed regulatory requirements.
- Divisional requirements.
- Compliance tools.
- Identification of a violation through inspection or other means.
- Compliance monitoring and tracking.
- Inspections.
- Receipt of and response to complaints.
- Citations.
- Coordination between divisions.
- Referral to and through the Enforcement Referral Review Committee.

This Procedure does not address activities taken after an enforcement referral to the Enforcement Referral Review Committee (ERRC).

3 PURPOSE AND GOALS

3.1 PURPOSE

The purpose of this Procedure is to provide guidance to DEC staff related to compliance efforts in order to protect human health and the environment by maintaining and increasing compliance with the environmental laws administered by DEC.

3.2 GOALS

The goals of this compliance procedure are:

- To prevent adverse impact on human and environmental health.
- To ensure that the law is applied equitably, predictably, consistently and in a timely manner.
- To ensure that compliance with environmental permits, rules, regulations and statute is obtained and maintained.
- To promote assistance to increase compliance and promote exceeding minimum requirements.
- To compel a prompt return to compliance and remediation of the adverse effects of non-compliance.
- To provide consistent and equitable compliance decisions and directives.
- To ensure consistent and equitable initiation of enforcement actions.
- To ensure that the costs of non-compliance exceed the costs of compliance.
- To provide clear direction to staff concerning DEC compliance efforts.
- To promote information sharing between divisions and departments to increase communication and collaboration between staff.
- To provide for uniform reporting and tracking of compliance efforts.
- To ensure all compliance efforts are clearly, consistently and accurately documented and recorded.

4 DEPARTMENT PHILOSOPHY AND PRINCIPLES

The Department views assistance and enforcement as two essential components of achieving compliance. Assistance is used to prevent violations, remedy minor (i.e. not Tier One or Tier Two in any strategic overlay) violations, and to help persons go above and beyond minimum requirements. For those who are meeting the minimum compliance standards, using the “softer” tools of providing technical assistance, support, training and information is supported.

Enforcement, including financial penalties, is used to remedy harm, gain compliance, deter future violations, and ensure that violators do not accrue an economic advantage over those who are in compliance. Enforcement actions are used when a respondent demonstrates a lack of willingness to comply, or if there is imminent potential or actual harm to the environmental or human health.

The DEC requires that regulated communities maintain compliance and correct non-compliance. A return to compliance is a non-negotiable facet of the Department’s goals.

DEC uses a continuum of tools to obtain, maintain and restore compliance. Use of the appropriate tool in the right context greatly influences the effectiveness and the speed with which compliance can be restored. In the graphic below, the lower tiers of the compliance

triangle represent assistance tools, often used broadly for a sector, while the higher levels represent enforcement tools, often used for individual entities.

Assistance is provided across DEC's regulatory programs to help the regulated community easily predict, understand and comply with requirements. Each program strives to ensure clear and consistent communications, to raise awareness of and engage regulated communities in the revision and issuance of new and existing rules, and to identify and avoid conflict between regulatory programs. Across DEC programs provide individual and sector-based (e.g. regulated drinking water systems, wetland applicants, breweries, waste generators) compliance support. DEC's Environmental Assistance Office (EAO) within ECD provides individual and sector level assistance and is available to support and complement division assistance programs.

Assistance efforts shall not be used once a Tier One violation on any strategic overlay are identified by a program. Assistance may be provided on Tier Two violations under the direction of the applicable regulatory program. Exceptions include if the subject is engaged in an ECD-led Integrated Compliance Project; see ECD for a current list of these projects. In those instances, the respondent will be notified of the violation in writing, instructed how to return to compliance and provided with a timeline for return to compliance.

In addition to obtaining compliance, penalties are assessed where impact to human health and the environment have occurred or had the potential to occur or for other priority areas as directed by DEC's and the individual program's compliance policies or strategic overlays. Just as enforcement is an incentive for violators to come back into compliance, recognition is used as a positive reinforcement for persons to stay in, or go beyond, required compliance. This recognition can range from a formal awards program to providing simple acknowledgement for a job well done in a letter. To empower proactive compliance, DEC, through its various recognition programs, such as the Vermont Green Business Program and Governor's Awards for Environmental Excellence, recognizes those who go beyond minimum compliance with our environmental regulations and permits.

Each division is expected to formalize a strategic overlay that defines at least Tier One (most significant) and Tier Two violations and is consistent with the DEC Strategic Overlay (see Appendix C). Divisions and programs should strive for more specific requirements related to their areas of jurisdiction.

These are examples of situations that the Department, a division or a program may consider as lower priority for formal enforcement action (inclusion on this list does not in any way preclude the Department from taking enforcement action):

- Violations identified during assistance efforts consistent with Appendix D or an inspection that are minor in actual or potential impact and are remedied within the written timeframe conveyed to the entity;

- The specifics of any violation identified do not constitute a trigger for a citation or referral to the Enforcement Referral Review Committee per the program, division or Department's compliance procedures or strategic overlays.

5 DEFINITIONS

For the purposes of this Procedure:

Assistance: providing proactive support, training, education or technical assistance to gain, meet or exceed compliance thresholds used before a violation occurs or when a minor violation has been identified.

BEAR: DEC's incident tracking database administered by the Environmental Compliance Division.

Case: an incident that has been approved by the Enforcement Referral Review Committee (ERRC) to which an attorney has been assigned for formal enforcement. Cases may result in penalties or remedial compliance directives.

Citation: a civil complaint pursuant to 10 V.S.A. § 8019.

Complaint: an unconfirmed allegation of a violation received from the public, staff member, another agency, etc. which is recorded in BEAR.

Compliance: a) the act of using a combination of tools, such as assistance and enforcement, to help regulated entities meet or exceed requirements of rules, statutes, and permits. b) to meet or exceed all applicable rules, statutes and permits.

Compliance Directive: a notice to a respondent that a violation has been identified and that certain actions are required by a certain date in order to return to compliance.

Compliance Monitoring: an inquiry into the state of compliance of a regulated entity. The act of routine monitoring via desktop review, monitoring data analysis, or site visit that is performed with the purpose of providing on-site assistance or an independent verification of the operational compliance status of an entity.

Enforcement: a set of actions used at a point in time to achieve compliance, excluding assistance activities.

Enforcement Referral Review Committee (ERRC): a standing ANR committee that meets weekly to provide timely, consistent, and transparent evidentiary review of incidents that have been referred for formal enforcement within DEC, Department of Forest, Parks and Recreation or Department of Fish and Wildlife. See Appendix A for more information on the ERRC.

Environmental Enforcement Officer (EEO): an investigator of the Environmental Compliance Division.

Formal Enforcement Action: taking legal action to assess penalties and/or compel compliance. Does not include Notices of Alleged Violations, verbal warnings or warning letters.

Incident: an entry in BEAR. An incident may be a complaint, observation, alleged violation, confirmed violation, or an instance where no violation is found.

Inspection: an on-site inquiry by DEC staff into the state of compliance of a regulated entity. Inspections are performed with the explicit purpose of verifying an entity's compliance status.

Investigation: a formal inquiry into the facts related to an actual or alleged violation. Investigations may include interviews, collecting evidence, obtaining and executing an Access Order, document research, or coordinating across multiple DEC programs or ANR departments and documentation of all actions taken or facts ascertained.

Notice of Alleged Violations (NOAV): a document used to communicate that an alleged violation has occurred and the compliance directives that are required. For more information, see the DEC Guidance for the Issuance of Notice of Alleged Violation in Appendix B.

Penalties: A monetary amount assessed pursuant to 10 V.S.A. § 8010 and the Environmental Administrative Penalty Rule.

Person: for purposes of this Procedure, person means any individual, partnership, company, corporation, association, unincorporated association, joint venture, trust, municipality, the State of Vermont or any agency, department or subdivision of the state, federal agency or any other legal or commercial entity subject to state environmental laws, rules and permits.

Program: a divisional unit and its staff.

Strategic Overlay: a program, division, or DEC document that identifies at least two tiers of violations: Tier One violations which are those that are the highest priority for formal enforcement and thus usually formally enforced upon and Tier Two violations which are those that are less significant but likely to be formally enforced upon. See Appendix C for DEC's Strategic Overlay.

6 DIVISION PRACTICES AND PRINCIPLES

6.1 GENERAL FRAMEWORK OF DEC, DIVISION AND PROGRAM DOCUMENTS

Each division will develop a compliance procedure and a divisional strategic overlay that reflects how it will conduct compliance activities. Divisions and programs may also find it helpful to develop guidance documents and policies that document practices. These documents must align with this Procedure but may be more specific to that division. The increasing level of detail moving from the Department to division to program level is:

DEC Procedure, Strategic Overlay

Division Procedure, Strategic Overlay

Program Procedure, Strategic Overlay

Each division is responsible for drafting its compliance procedure and strategic overlay. ECD is available to assist each division and program with drafting these documents in order to assure consistency with this procedure and across divisions and programs to the greatest extent possible.

6.2 DIVISIONAL COMPLIANCE TOOLS

Divisions are expected to review program authority and delegation requirements. Based on these authorities, when enabled (i.e. funding is not restricted to enforcement only), divisions will identify and implement strategies and efforts to proactively assist regulated sectors to meet or exceed compliance obligations.

6.2.1 Assistance

Assistance is proactive and generally provided early, before a violation occurs, in order to prevent potential violations, during sector compliance initiatives, or when minor violations have been identified. Compliance directives are generally not considered assistance. They are required to be implemented and if not implemented within the identified timeline the violation progresses towards enforcement. Each Division will annually assess assistance needs based on the history of compliance rates over the last year. This assessment will identify areas where assistance would help to improve compliance rates, identify priority areas for assistance, consider how to provide targeted assistance and evaluate resources needed for implementation.

Assistance seeks to provide proactive information on what permits may be needed and how to comply with permits and rules. Examples include: Project Review Sheets, providing a training on how to fill out an application form; a factsheet on how to avoid common violations; a video that demonstrates how to comply with a rule; one-on-one meetings between staff and the regulated community about specific requirements; or notifications that deadlines are approaching.

Once an incident is referred to the ERRC for enforcement action, any assistance provided by DEC must be approved by the regulatory program and ECD. See Environmental Assistance Office Protocol for Engaging with Regulated Entities in Appendix D.

6.2.2 Compliance: Reminders/Outreach

The use of reminders such as notification of impending submittal dates, deadlines or warning of potential future violations sent via letters, post cards, phone messages, letters or email notifications by DEC programs is recommended.

6.2.3 Enforcement: Notices of Alleged Violation (NOAVs)

DEC regulatory programs will adhere to the DEC Guidance for the Issuance of Notice of Alleged Violation (see Appendix B).

Divisional and program compliance documents will identify triggers for NOAV issuance. At a minimum, DEC programs shall issue NOAVs for these violations:

1. Those that are Tier One violations that represent significant noncompliance status;
2. Violations resulting in, or threatening to cause, a potential or actual impact on the environment or human health except where those violations are actively being remedied already (such as when a permit application is received for a failed wastewater system);
3. Minor violations which have continued uncorrected after compliance directives have been issued; and
4. Violations observed during inspections.

Programs are required to have a method for tracking and storing NOAVs, and the method noted in each division compliance procedure.

6.2.4 Training

DEC recognizes that staff's professional judgement plays an important role when determining the appropriate response to non-compliant situations and to assuring compliance is achieved. ECD will provide program staff with compliance training and program staff must be familiar with and consistently apply program, division or department strategic overlays to identify what to enforce, when and how. Applying the standards described in this document and in divisional and program compliance documents is essential to achieve the goal of consistent, fair, robust and transparent enforcement. This is particularly important as DEC staff may be involved in either assistance or enforcement efforts; while the approach chosen by staff and management will be dictated by the situation as well as the standards contained in the division and program's guidance documents, consistency of approach between staff members and incidents is essential to ensure program integrity.

6.3 DIVISIONAL STRATEGIC OVERLAY

Each Division is required to create and adhere to a divisional compliance procedure and a develop a strategic overlay that is consistent with DEC's Strategic Overlay, found in Appendix C. **Divisional compliance procedures and divisional strategic overlays will be adopted within one year of the date of adoption of this Procedure, will be approved by the Commissioner and attached in an appendix to this procedure.** Division programs may develop program-specific procedures and strategic overlays. Program compliance procedures must be consistent with divisional and DEC procedures. A template for program documents is available from ECD, and an example strategic overlay can be found in Appendix E.

The division and/or program strategic overlay must identify areas of Tier One violations, Tier Two violations, provide criteria for staff to determine whether a violation is Tier One, Tier Two or other violation, and provide guidance for the handling of Tier One and Tier Two violations. The strategic overlay acts as a screening tool to consistently escalate violations to the ERRC that the division or program has identified as Tier One. This escalation allows the division and programs to identify, respond to and track the most severe and/or chronic violations. Highest priority violations should include:

- Actual or potential impacts to human health or the environment.
- Violations of permit limits or conditions.
- Reporting requirements that have occurred at certain unacceptable frequencies and magnitudes.
- Failure to monitor or to submit required monitoring reports.
- Failure to meet a compliance directive contained in an NOAV or otherwise conveyed (. e.g. verbally or in an e-mail).
- Permit limit exceedances (taking into consideration the magnitude and frequency of the exceedances).
- Violation of a compliance schedule.
- Failure to submit a required compliance schedule report.
- Failing to obtain a permit prior to undertaking activity that requires a permit.
- Operating without a permit.

See DEC's Strategic Overlay in Appendix C.

7 PROGRAM PROCESS, PRACTICES AND PRINCIPLES

7.1 GENERAL PROGRAM PROCESS

Staff should establish and follow a clear and predictable process for compliance work from discovery of non-compliance, entry into a compliance tracking system or BEAR and closure of the incident:

1. Analyze and document annual program compliance expectations and strategies.
2. Identify specific violations via complaint, monitoring or inspection.
 - a. If identified via complaint, enter violations into BEAR; request to be assigned or request that ECD assign an EEO.
 - b. If identified via inspection, enter violations into program database or BEAR.
3. Notify the respondent in writing of the violations observed, usually in an NOAV (see Appendix B). Provide a timeframe to return to compliance (e.g. 10, 30, or 60 days). Note that the date contained in the compliance directive in no way supersedes compliance deadlines established in the permit, rule, etc.

4. After compliance has been achieved and documented, confirm or require that the entity demonstrates a return to compliance via documentation, follow-up site visit, photographic or other evidence. A follow-up site visit may be utilized but is not required if sufficient evidence is provided to confirm a return to compliance.
5. If compliance is obtained, determine where the violation fits within the Division's and/or program's strategic overlay. If compliance is not obtained during the specified timeframe, prepare referral for the ERRC, and submit to ERRC by closing BEAR incident with the appropriate code indicating violation found, referred by program, to proceed with formal enforcement.
6. If not a Tier One or Tier Two violation, close the incident and update BEAR and program databases. If Tier One or Tier Two violation, prepare a referral for ERRC and submit to ERRC by closing BEAR incident with the appropriate code indicating violation found, referred by program.
7. Attend ERRC meeting or be represented by authorized divisional delegate for the incident to answer questions and receive guidance. While not required, it is recommended that personnel with direct knowledge of the violation attend the ERRC meeting for complex referrals.
8. Modify referral package per ERRC guidance, if necessary.
9. Once case is assigned to an attorney, assist the attorney as needed to completion of case.

7.2 COMPLAINTS/USE OF BEAR

All complaints, regardless of whether they appear to be Tier One, Tier Two or minor or whether a violation is present or not, are required to be entered into BEAR. It is recommended that all incidents be entered into BEAR. Confidential information should not be recorded in BEAR. For assistance identifying confidential documents, staff should consult DEC or ANR legal counsel.

Using a consistent, uniform tracking method for compliance activities is a priority for DEC for many reasons. There is a statutory requirement to report on these activities and a uniform system ensures that repeat violations and recurring "warnings" are captured. Information sharing, through BEAR, increases interaction and communication between staff and programs, increases transparency and supports consistent application of compliant tools to each incident, person and case. It is recognized that integrating information sharing processes with BEAR may involve new work protocols and significant organizational change.

All complaints will be entered immediately into BEAR by the staff who received them but no later than 24 hours after receipt of complaint.

Complaints received by ECD are assigned to staff or EEOs at the time of entry, depending on the nature of information provided. ECD emails any person who is assigned as a lead of an incident at the time of entry into BEAR. Each staff person also has a "dashboard" feature in BEAR so that they can quickly identify which incidents are their responsibility.

Entry of the incident by program staff into BEAR does not constitute assignment of an EEO. A person may assign themselves as lead/investigator or request that the Chief Environmental Enforcement Officer assign an EEO as lead/investigator. The lead investigator is assigned upon receipt of a complaint by ECD.

Absent a request from DEC staff to be assigned as the investigator, it will be assigned to an EEO. If the matter involves a permit violation or technical expertise and there is little to no actual investigation required (i.e. the violation is obvious or confirmed), program staff should assign themselves as lead. If there is on-site investigation that is required, or if there are multiple programs potentially or actually involved, the EEO will be assigned as lead investigator. Program staff should work with the EEO where technical expertise and/or knowledge of permit requirements are involved.

All staff should regularly review (via the BEAR Dashboard) the incidents that are assigned to them and their direct reports, manage these incidents and close them with a closure code as soon as possible but no later than 45 days from the resolution of the violation or the date the investigation is completed.

The lead investigator is responsible for:

- Driving the incident to resolution.
- Ensuring that enforcement decisions are consistent with applicable strategic overlays.
- Submitting documentation to support their decision.
- Closing incidents in BEAR a timely fashion (i.e. ensuring that only active incidents are open in BEAR).

7.3 COMPLAINT RESPONSE AND TRACKING

Any member of the public filing a complaint with DEC should be treated with respect and the complaint must be investigated as required by 10 V.S.A. § 8020, “the secretary shall investigate all citizen complaints of a violation of a federally authorized or delegated program and shall respond to known complainants in writing”. It is DEC’s practice that all complaints, regardless of whether the program is federally authorized or delegated, are investigated.

All complaints must be tracked and closed in a timely manner by the lead/investigator assigned.

Program Managers/Section Chiefs should run a monthly report for their program and all program staff of all open incidents and any incidents closed in the last month to review. Discrepancies, problems or concerns should follow the Procedure to Define Management Relationship between Commissioner’s Office & Division Directors (see Appendix F).

ECD will provide division directors with monthly reminders of the need to evaluate and consider all active incidents with the goal of closing inactive incidents as soon as possible. ECD holds monthly meetings with each division to discuss incidents of concern. This forum also provides an opportunity to get updates from ECD or from the programs on incidents of concern.

At least one week prior to these monthly meetings, each program will identify which incidents it would like updates on from EEOs and provide that list to ECD. At least one-week notice is required to obtain an update from the assigned EEO. ECD will provide each program with an update on the requested incidents.

8 PROGRAM COMPLIANCE MONITORING

8.1 COMPLIANCE MONITORING AND DOCUMENTATION

Compliance with regulations, permits (including permits by rule), and enforcement documents are central to DEC's efforts to protect the environment and human health. It is expected that regulatory programs will use compliance monitoring to be aware of the compliance status of the persons regulated by the program's requirements.

DEC staff should never communicate to a violator that a violation is allowable or that it is acceptable for a violation to continue. Enforcement discretion may be exercised if it is decided that enforcement will not be taken against a violator once compliance has been achieved, but a return to compliance is always required and the continuation of a violation can never be approved, even if the violator is returning to compliance.

Warning letters should only be issued for their explicit statutory purpose: when a violation is likely to occur and not if a violation has been observed. Warning letters should not be used as an alternative to an NOAV for observed violations, nor should they contain compliance directives.

Compliance oversight will be accomplished through both office-based compliance monitoring and tracking, and on-site compliance monitoring as described in Sections 9.2 and 9.3 below.

Each division will have criteria in its divisional and/or program documents which determine whether the regulated entity will be given prior notice of a scheduled inspection (i.e. an announced inspection) or whether the inspection will occur unannounced.

At a minimum, accurate, understandable and complete field notes will be prepared and maintained for all inspections. Field notes will also be created for any on-site visit if a potential violation was observed. The field notes will document the date of the site visit, the participants, and any relevant statements and observations made at the site, including photographs and any violations identified.

The DEC regulatory program will notify the person in writing of the results of an inspection, including any compliance determinations which have been made and any compliance directives, ideally within 30- 45 days of the on-site visit. When a closure conference is held with the person at the end of an inspection and is documented in the field notes, the timing of this written notification should still be completed within the designated timeline.

Thorough and accurate documentation ensures potential enforcement actions will be neither impeded nor compromised by a lack of information or evidence. This documentation also

provides a valuable historical perspective which allows consistent enforcement decisions to be made within programs and across DEC.

8.2 OFFICE-BASED COMPLIANCE MONITORING/TRACKING

Whenever feasible, information submitted by a regulated entity should be reviewed within one month of receipt or, when present in division or program compliance documents, within the time frame established in those documents. Divisional or program documents will establish divisional expectations regarding these review timeframes.

Timely and appropriate follow-up by the division or program will occur in response to noncompliance found during the office-based reviews as set out in the division or program strategic overlay. All follow-up activities will be documented in program databases and/or BEAR.

8.3 SITE COMPLIANCE MONITORING/INSPECTIONS

Inspections are performed with the explicit purpose of making an on-site, independent verification of an entity's compliance status. Inspections should be documented according to program document retention standards; documentation should include field notes, photos, trip reports, facility records, etc. All violations and follow-up activities will be documented in program databases and/or BEAR.

Divisions will develop a system for scheduling inspections, including listing the expected number of on-site compliance inspections for the next year. Sites to be given high inspection priority include those that:

- Have the highest probability of having violations which might cause an adverse impact to the environment and/or human health.
- Have the highest probability of having unreported violations.
- Are part of an inspection initiative (such as a certain industry sector or watershed).
- Have a history of being in noncompliance or have shown a lack of regard for environmental compliance.
- Must be inspected to meet EPA or statutory requirements or commitments.

9 REPORTING AND PUBLIC RECORDS

9.1 REPORTING

Pursuant to 10 VSA § 8017, ECD creates and submits an annual report to the Legislature containing information on enforcement actions taken and the status of citizen complaints about environmental problems. The report includes, at a minimum, the number of violations, the

actions taken, disposition of cases, the amount of penalties collected, and the cost of administering the enforcement program. Division data that is not contained in BEAR (e.g. inspections) will be solicited annually by ECD for inclusion in this report.

9.2 COMMUNICATIONS RELATING TO INCIDENTS AND PUBLIC RECORDS REQUESTS

Staff should assume that all information contained in BEAR is part of the public record.

Confidentiality related to DEC's work is most commonly linked to incidents and investigations of a criminal nature. Confidentiality must be determined on a case-by-case basis by the Chief Environmental Enforcement Officer in consultation with the ECD Director and DEC legal counsel.

The Department strictly adheres to its public records policy and process. As such, all requests for information from BEAR or of any kind should be forwarded to ECD to ensure that proper process is followed. Ultimately, all information in BEAR is likely part of the public record and may be subject to public scrutiny. Staff should not deposit confidential or privileged information in BEAR.

No information of any kind shall be released (i.e. shared externally) from BEAR at any time without consultation with ECD. This includes a prohibition on the sharing of screen shots, summaries, outcomes or any other information in BEAR. Similarly, ECD will consult with programs before any information is released from BEAR.

9.3 MEDIA REQUESTS AND PUBLIC ACCESS TO DOCUMENTS

Media inquiries and requests for open incidents should be referred to the Program Manager or Division Director. Media inquiries and requests may be transferred to ECD's Director at any time, for any reason.

When DEC staff responds to a media inquiry or request, the following guidelines will be followed:

- No information from BEAR shall be released without prior authorization from ECD and/or DEC legal counsel.
- Staff shall not comment on the potential outcome of investigations or penalties.
- If the public or press submits a records request related to an incident prior to a referral to the ERRC, involved staff should consult with DEC legal counsel and ECD prior to responding or providing any information.
- Program Managers may confirm, if asked, that the Agency is investigating or considering a matter, but should not discuss or comment on the specific stage of the investigation, information gathered at that point, or what the next steps in the investigation may be.
- Staff shall not comment on the severity of a potential violation.
- If staff are unable to answer a question, it may be referred to another staff member, ECD, or to the ANR Office of General Counsel (OGC). If referred, a heads up to the receiving staff person should be provided as soon as possible.
- A media contact form must be completed and routed.

Once a case has been approved by the ERRC and an attorney assigned, all information requests from the public or press for information related to the case will be referred to the assigned attorney. No documents related to the case are to be released without the prior approval of the ECD and ANR Office of General Counsel (OGC).

All staff must adhere to DEC's Procedures to Access on Public Records in Appendix G for all records requests.

9.4 PUBLICIZING ENFORCEMENT ACTION RESULTS

Publicizing completed enforcement actions educates the public on environmental laws and serves as an important deterrent for future violations by the violator as well as other persons and the regulated community. Doing so ensures that the public is accurately and fully informed of our work.

All final environmental enforcement orders and press releases related to enforcement actions will be put on ECD's public web page.

10 ENVIRONMENTAL COMPLIANCE DIVISION COORDINATION

10.1 ENVIRONMENTAL COMPLIANCE DIVISION SCOPE

To help DEC programs to be proactive in their efforts, ECD's Environmental Assistance Office is available to help with proactive individual or sector-wide assistance to regulated persons. Staff can submit written requests for assistance at any time to EAO. EAO uses a prioritization process at least twice a year, which ranks short, discreet project requests to proactively engage with the regulated community. Examples include outreach to municipalities about a new rule, designing training for emergency responders on hazardous releases, or designing a brochure for business on the proper storage and disposal of florescent bulbs.

ECD investigates complaints and assumes primary responsibility in instances where no assistance or enforcement efforts are assigned to the programs. Examples include proactive assistance to regulated sectors in conjunction with identified program priority areas, administration of recognition programs that incentivize and reward "above and beyond" compliance efforts, and resolution of violations for which no regulatory program has permitting overview such as unpermitted discharges to waters of the state.

10.2 ENVIRONMENTAL ENFORCEMENT OFFICER ENGAGEMENT

Environmental Enforcement Officers (EEOs) investigate complaints and specialize in investigations which are different and distinct from program inspections. Programs are ultimately responsible

for compliance with their rules, statutes and permits and program staff will be involved with and lead assistance, investigation and enforcement actions unless otherwise assigned to the EAO, an EEO or referred to the ERRC. EEOs provide supplemental investigatory resources for programs and investigate complaints. EEOs may initiate investigations of complaints either independently or through referral by DEC divisions or programs. While EEOs have extensive training in conflict resolution, they should be engaged only when there is a need for investigation:

- DEC receives information of active violations (e.g. a fire or discharge is currently occurring) and EEOs are physically closer to the location and in a position to minimize the threat immediately. In these cases, EEOs serve as environmental first-responders. Note that EEOs are not on-call 24 hours a day or seven days a week.
- DEC has information about suspected violations and additional evidence, such as extensive interviews, must be gathered.
- Complaints are received for which there is no permit, such as the illegal disposal of hazardous materials or illegal and unpermitted discharges into waters of the state.
- Extensive interviews will be required to investigate.
- Complaints allege violations of more than one DEC or State of Vermont law or regulation.

If program staff have safety concerns, ECD can coordinate with local or state law enforcement to provide a security detail. If a division or program seeks assistance from an EEO to investigate, the incident must be entered into BEAR. Next, the program lead should consult with the Chief EEO to identify the lead investigator (program or EEO). The lead investigator is then notified via e-mail from BEAR. The status of the incident can be checked in BEAR.

When a violation is known and documented either by program staff either from desk -based compliance efforts or on-site inspection, there is no need to engage an EEO. Programs should bring referrals directly to the ERRC – this is the fastest, most efficient way to move incidents to cases. Programs are ultimately responsible for compliance and are empowered to make decisions about violations and potential violations identified during compliance monitoring efforts.

10.3 INVESTIGATIONS

Investigations are distinct from inspections in that they are conducted in response to either a suspected or unreported violation for gathering evidence for a probable enforcement action.

Investigations usually involve focused, in-depth record searches and interviews of persons who may have knowledge of the violation. These persons may either have had direct involvement in the violation itself or may be able to provide information critical for substantiating facts surrounding a violation that they were not directly involved with.

At a minimum, investigations will be conducted when:

- There is convincing evidence that a person knowingly and willfully caused a substantial violation to occur.
- It is suspected that falsified material information has been submitted to the DEC.

- There is reason to believe that a person knew about a substantial violation but failed to take an action to correct it and/or failed to report it as required.

The DEC program manager or supervisor and his/her staff must use their best judgement when confronted with either a suspected or unreported violation in deciding whether the program will investigate on its own or whether an Environmental Enforcement Officer (EEO) should be assigned to the case. In the following instances, the program manager or supervisor should ask the Chief EEO to assign an EEO as the lead entity in the investigation:

- If it is suspected that ANR's response to the violation will be filing a criminal charge.
- If the person(s) responsible for the suspected or unreported violation are unlikely to be forthcoming during the investigation.
- If evidence pertinent to the case is going to be collected from outside of the facility.
- If multiple programs are potentially or actually involved.

When an EEO has been assigned to be the lead in a case, DEC program staff will make themselves available to assist as needed during the investigation.

10.4 CONSISTENCY AND COORDINATION BETWEEN EEOs AND PROGRAMS

Programs are responsible for permitting, inspections, and the ultimate success and compliance rates for their programs. To ensure that consistent approaches are taken in response to violations, and to ensure that division and program priorities are guiding compliance activities, programs will participate in the decisions related to ECD outcomes and ECD-initiated enforcement actions. The following protocols will be used in these instances:

- Except in situations where there is insufficient time due to the necessity of an immediate site visit, when it is known that a site is subject to an existing DEC operational permit, EEOs will consult with the involved program before investigating.
- At permitted sites or those sites permitted by rule or general permit, if an EEO-discovered violation is a priority per the division or program strategic overlay, is complex or the necessary corrective action is unclear, the EEO and program will consult and decide who will issue the NOAV.
- NOAVs issued by EEOs will copy the division director, program manager and program point person, if any.
- When an EEO believes that the investigation should be referred for formal enforcement action, the EEO's case referral will be evaluated by the Chief EEO. The EEO's referral is then sent to the ECD Director and appropriate division director for approval.

10.5 CONFLICT RESOLUTION

It is up to the managers and staff in the divisions and ECD to promptly identify and discuss conflicts/concerns of importance with each other so that resolutions may occur in a timely manner. The Procedure to Define Management Relationship between Commissioner's Office & Division Directors is

attached as Appendix F and should be utilized when divisions and ECD have trouble reaching agreement on specific enforcement case issues.

All staff involved in conflict resolution have the responsibility to inform their program manager and division director of the conflict and attempts at resolution.

11 ERRC AND REFERRALS FOR FORMAL ENFORCEMENT

11.1 REFERRAL PRIORITIES

The decision to refer a case to the ERRC for formal enforcement is a discretionary one that is most often compelled by the individual circumstances of each case, but is guided by a division's and program's priorities, compliance procedures and strategic overlays, DEC's Strategic Overlay, the respondent's history of compliance, and other factors. In general, an enforcement referral to the ERRC should occur in the following instances:

- When a violation causes actual or potential impact to human health or the environment.
- When the environmental or human health, safety and welfare impacts cannot be mitigated (e.g. a discharge or open burning).
- When a violation has caused economic benefit to accrue to the violator.
- For repeat or continuing violations. The more significant the violation(s), the fewer repeats and less continuing time is required to prompt a referral.
- When a person has or is committing a violation, is instructed to stop and fails to do so.
- When a violation is a Tier One violation per any strategic overlay.

Because of the strict liability nature of environmental violations, there will be many situations other than those described above which should be considered for an enforcement referral.

11.2 ENFORCEMENT REFERRAL PROCESS

A decision to refer a case for formal enforcement should be made within sixty days of the completion of an inspection, investigation or of determining through office-based compliance monitoring that a violation has occurred. This period may be extended if the program, exercising sound discretion, believes that the person is making a viable good faith effort to correct the violation or if staff resources are limited. Tier One violations are priorities.

Referrals for formal enforcement to the ERRC will be made via BEAR. Division director sign-off must be obtained before referring to the ERRC. All referrals to the ERRC must have complete documentation uploaded to BEAR. DEC Staff must provide the referral package to DEC Legal for review before division director signoff.

11.3 ENFORCEMENT REFERRAL PACKAGE

To prevent delays in initiating an enforcement action, the division's referral package to the ERRC must be thorough and complete. The referral package should include, at a minimum:

1. A Referral Memo that summarizes the facts, violation found, current state of compliance of the violation and a written rationale for the referral;
2. All photographs (not a subset) of the record;
3. All supporting documentation such as record of USPS "green card" receipt, inspection reports, and permits;
4. All internal and external correspondence with the respondent including all e-mails, letters, NOAVs etc.; and
5. Director approval (via SharePoint, email, form, etc.).

All the evidence which forms the basis for the referral should be placed in the appropriate BEAR folders for reference in the Referral Memo.

Once division director approval has been obtained and the incident is closed in BEAR with a closure code indicating referral to the ERRC, the Chair or Vice Chair of the committee will place the referral on the committee agenda within two weeks. Staff involved in the referral are strongly urged to attend the ERRC to answer questions about the referral. The ERRC will evaluate the referral package for evidentiary completeness. Per the Enforcement Referral Review Procedure (see Appendix A), it will make one of five responses to the program within one week of the ERRC's review:

- (1) The referral has been assigned to an attorney within the Agency Litigation and Enforcement Section or referred to the Attorney General's Office, EPA, or State's Attorney's Office. The response shall include a contact person for the referral.
- (2) The referral has been referred to the Chief EEO, an Environmental Enforcement Officer (EEO), or program delegated to issue civil citations for the alleged violation.
- (3) The matter is being returned to the program for additional investigation. The response shall include a summary of the issues identified with the referral.
- (4) The matter has been referred to an EEO for additional investigation.
- (5) Additional time is needed to process the referral. The response shall include an estimate of the time needed.

12 APPENDICES

- Appendix A: Enforcement Referral Review Committee Procedure
- Appendix B: DEC Guidance for the Issuance of Notice of Alleged Violation
- Appendix C: DEC's and ECD's Strategic Overlay
- Appendix D: EAO Protocol for Engaging with Regulated Entities
- Appendix E: Example Program Strategic Overlay
- Appendix F: Procedure to Define Management Relationship between Commissioner's Office & Division Directors
- Appendix G: Procedures to Access on Public Records

This procedure is effective upon signing and replaces the prior DEC Compliance Procedure dated February 8, 2001.



Commissioner, DEC

3/14/19

Date