

**State of Rhode Island and Providence Plantations
Department of Environmental Management
INTER-OFFICE MEMORANDUM**

TO: All Staff
Bureau of Environmental Protection

DATE: October 24, 2000

DEPT: Environmental Management

FROM: Terrence Gray, P.E., Assistant Director for Air, Waste & Compliance
Bureau of Environmental Protection

DEPT: Environmental Management

SUBJECT: Explanations of DEM's Options for Enforcement Response

In response to requests raised at the Director's All-Staff meetings, I have put together the following brief explanation of the administrative enforcement options typically used in our response to various inspections, investigations, and reports. If you have any comments or questions on the guidelines, please feel free to e-mail me at tgray@dem.state.ri.us. The various options and circumstances for their use are outlined below (Administrative Inspections Guidelines link):

Letters of Responsibility

There are some cases, particularly involving the investigation and remediation of contaminated properties, where the property owner or otherwise responsible party submits information to the Department to determine if their property is jurisdictional. An example of this type of case is the situation where a property owner conducts a site assessment on a piece of property for financing purposes. The results of that site assessment may show some contamination but it is unclear as to whether DEM will require further investigation. After reviewing the initial site assessment, DEM may issue a Letter of Responsibility to the party outlining the requirements they have to meet under the regulations. This Letter of Responsibility, or LOR, is not an enforcement action but a specific form of notice that the site is jurisdictional under the regulations and a timeline for fulfilling the next step in the site investigation and remediation process. If the responsible party fails to comply with the requirements or timelines outlined in the LOR, DEM will initiate an informal enforcement action unless an evaluation of the circumstances shows that elevation to a formal enforcement action is warranted.

Immediate Compliance Orders

Whenever a violation of any law, rule, or regulation is identified that requires immediate action to protect the environment, DEM may issue an Immediate Compliance Order ("ICO") stating the existence of the violation and the action deemed necessary to eliminate the immediate threat. ICOs are authorized pursuant to R.I.G.L. §42-17.1-2(u)(2) and may be issued without prior notice of violation or hearing and becomes effective immediately upon service or, in the alternative, within the timelines specified in the order. Persons receiving ICOs are not eligible for an administrative hearing.

ICOs remain in effect for up to forty-five (45) days, and with good cause, may be extended for one additional forty-five (45) day period.

If an ICO is necessary, the appropriate Office will consult with the Office of Legal Services and Assistant/Associate Director. Due to the urgency of the situation, the target date for issuing an Immediate Compliance Order is no later than three days from uncovering the violation. Verbal contact with the violator should be made immediately. As necessary, contact with other DEM, local, state or federal agencies will be made and information shared.

In the event that the responsible party does not comply with an ICO, the director may institute civil proceedings for injunctive relief in the Superior Court to enforce the order and may seek appropriate temporary relief. It is critical that any and all instances of non-compliance with an Immediate Compliance Order be brought to the Division Chief's attention so that the Chief can initiate discussions with the DEM senior staff and attorneys on the appropriate next course of action. Since the entire action is based on the immediacy of the problem, it is critical that the Department be prepared to respond immediately to instances of non-compliance.

When an Immediate Compliance Order is brought to Superior Court for enforcement, the Department bears the burden of proving the correctness of the order.

In terms of format, an Immediate Compliance Order is an emergency order issued in accordance with R.I.G.L. § 42-17.1-2(u)(2), which:

- cites the law, rule, regulation, license, permit and/or order violated;
- states the facts which form the basis for the Department's belief that an emergency exists;
- states the remedial action deemed necessary by the Director;
- takes effect immediately upon service or within such time as specified by the Director in said order;
- shall remain in effect for no more than forty-five (45) days which may be extended for good cause for one additional forty five (45) day period; and
- does not entitle the person so served to an administrative adjudication concerning the substance of the alleged violation or concerning any remedial action ordered.

Cease and Desist Orders

A special type of immediate compliance order is the Cease and Desist Order. The Cease and Desist Order is issued pursuant to R.I.G.L. § 2-1-24 either upon discovery of a suspected violation of the Fresh Water Wetlands Act or in combination with a notice of violation, which:

- cites the law, rule, regulation, license, permit and/or order allegedly violated;
- describes the act or course of conduct which is prohibited by the cease and desist order;
- orders the person allegedly in violation of the Fresh Water Wetlands Act to immediately cease the prohibited act or prohibited course of conduct;
- takes effect immediately upon service or within such time as specified by the Director in said order; and
- states the remedies and penalties which the Director may lawfully impose for any violation of the order.

Unlike ICOs, which are enforceable through civil-injunctive relief in Superior Court, failure to comply with a Cease and Desist Order issued under the Freshwater Wetlands Act is a criminal misdemeanor and is administered through the Rhode Island District Court.

Warning Letters

The warning letter is a form of an informal enforcement action. Warning letters are typically very informal in nature and are written in varying formats depending on the program. Warning letters are generally issued by the Department to put a person on notice that if they continue what they are doing they are likely to violate one or more of the environmental statutes or regulations enforced by the Department. Warning letters are typically followed up by a Letter of Non-Compliance or Notice of Intent to Enforce if there is continued non-compliance.

The warning letter should cite the law, rule, regulation, license, permit and/or order likely to be violated, state the facts which form the basis for the Department's belief that a violation is likely to occur, provide an offer for compliance assistance and specify a reasonable deadline or deadlines by which the person should prevent non-compliance. A warning letter may allow a person to submit a written proposal setting forth how and when that person proposes to ensure compliance.

The warning letter must also identify the individual and division to whom correspondence and inquiries regarding potential violations should be directed and state the Department's authority to pursue further administrative or judicial enforcement actions if noncompliance occurs.

As with other informal enforcement actions, the warning letter does not have a formal appeal process.

Letters of Non-Compliance

The second form for an informal enforcement action is the Letter of Non-Compliance. Letter of Non-Compliance, which have historically also been called Letters of Deficiency, are typically very informal in nature and are written in varying formats depending on the program. Letters of Non-Compliance are the most common form for the first informal action issued by the Department under our regulatory programs. They are typically followed up by a Notice of Intent to Enforce if there is continued non-compliance, but may be followed up by a Notice of Violation.

The Letter of Non-Compliance should cite the law, rule, regulation, license, permit and/or order allegedly violated, state the facts which form the basis for the Department's belief that a violation has occurred, provide an offer for compliance assistance and specify a reasonable deadline or deadlines by which the person shall come into compliance. Letter of Non-Compliance may allow a person to submit a written proposal setting forth how and when that person proposes to achieve compliance.

The Letter of Non-Compliance must also identify the individual and division to whom correspondence and inquiries regarding the violations should be directed and state the

Department's authority to pursue further administrative or judicial enforcement actions if compliance is not achieved in the timelines specified.

As with other informal enforcement actions, the Letter of Non-Compliance does not have a formal appeal process.

Notices of Intent to Enforce

The more serious form for an informal enforcement action is the Notice of Intent to Enforce, or NOI. Unless significant noncompliance has already occurred, an NOI must be issued before the elevation of a case for formal enforcement action. NOIs can be used as either the first informal action issued by the Department, or as a secondary follow-up to earlier LNCs, or other warning letters.

The NOI should closely follow the format of a Notice of Violation as it is intended to smooth the transition from informal to formal enforcement, if necessary. The NOI should cite the law, rule, regulation, license, permit and/or order allegedly violated, state the facts which form the basis for the Department's belief that a violation has occurred, provide the final offer for compliance assistance and specify a reasonable deadline or deadlines by which the person shall come into compliance. An NOI may allow a person to submit a written proposal setting forth how and when that person proposes to achieve compliance.

As with other informal enforcement actions, the NOI does not have a formal appeal process. Although more structured in format, the NOI is still a warning letter.

The NOI must also identify the individual and division to whom correspondence and inquiries regarding the violations should be directed and state the Department's authority to pursue further administrative or judicial enforcement actions if compliance is not achieved in the timelines specified.

Notices of Violation

The most common form of formal enforcement action issued by DEM is the Notice of Violation, or NOV. The NOV is a formal notice of a suspected violation issued in accordance with R.I.G.L. §§ 42-17.1-2(u)(1) and 42-17.6-3. The NOV must cite the law, rule, regulation, license, permit and/or order allegedly violated, state the facts which form the basis for the Department's belief that a violation has occurred, and state the administrative penalty and other relief deemed appropriate by the Director. Furthermore, the NOV should specify a reasonable deadline or deadlines by which the person shall come into compliance with the requirements described in the NOV. An NOV may allow a person to submit a written proposal setting forth how and when that person proposes to achieve compliance.

An NOV informs the person of his or her right to file a timely written request for an adjudicatory hearing on either the alleged violation or the penalty or remedy imposed or both, that said written request for a hearing must be filed with and received by the Administrative Adjudication Division of the Department within ten (10) days (twenty (20) days after January 1, 2001) after

service of the NOV, that the written request for an adjudicatory hearing shall strictly comply with Section 7.00(b) of the Administrative Rules for Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters, that said notice shall become a final order of the Director upon the person's election to waive or failure to request an adjudicatory hearing in a timely manner, and, that the penalty continues to accrue from the time the Notice of Violation is issued until compliance is achieved pursuant to R.I.G.L. § 42-17.6-3 if reasonable efforts to promptly come into compliance have not been made.

The NOV must also identify the individual and division to whom correspondence and inquiries regarding the NOV should be directed, state to whom (which entity) and the date by which the administrative penalty must be paid if the person against whom an administrative penalty is assessed elects to waive or fails to request an adjudicatory hearing in a timely manner and elects to pay the penalty, and state the Department's authority to pursue further administrative or judicial enforcement action.

Consent Agreements

The settlement of formal enforcement actions is documented in Consent Agreements. Once settlement has been reached, a Consent Agreement should be prepared that cites the law that authorizes the department and the respondent to enter an agreement, refers to the specific enforcement action issued that is the subject of the agreement, states the stipulated facts that give rise to the agreement, sets forth the terms/conditions of the agreement to be carried out by the Respondent and /or the DEM and ensures future compliance by the Respondent. The Consent Agreement should state the amount of the final administrative penalty and any payment schedule or allowances agreed to. If the penalty is different from the amount originally assessed, the rationale need not be included in the consent agreement directly but should be referenced and maintained in the file.

The consent agreement should specify a reasonable deadline or deadlines by which the person shall come into compliance with the requirements described in the NOV. A consent agreement may allow a person to submit a written proposal under an enforceable schedule setting forth how and when that person proposes to achieve compliance.

The consent agreement should settle an appeal of the NOV and, if an administrative hearing was properly requested, will be filed with AAD to negate the need for an adjudicatory hearing.

The consent agreement must also identify the individual and division to whom correspondence and inquiries regarding the obligations set forth in the agreement should be directed, state to whom (which entity) and the date by which the administrative penalty must be paid, and state the Department's authority to pursue further enforcement action in the event of non-compliance with the obligations in the consent agreement.

Consent Agreements may also include stipulated penalties for future non-compliance. Stipulated penalties may be included, at the discretion of the Director, as a condition of settlement in any case particularly when the consequences of future non-compliance are severe and the majority of

the performance under the settlement is deferred into the future (including, but not limited to, payment of penalties).

Superior Court Actions

In the event of noncompliance with any Compliance Order (i.e., ICO, Decision and Order, or NOV with no request for a hearing), the department may petition the Superior Court for an order to enforce the Compliance Order. In addition, the Department may also go directly to Superior Court to seek enforcement of any statutory or common law cause of action if the court is the most expedient or appropriate forum for resolution of a dispute.

The Office of Legal Services in coordination with the regulatory enforcement office will prepare the complaint for filing in Superior Court. Where advantageous or required by law, the Department may request that the Attorney General's Office join with the Department in the action.

The complaint will note the jurisdiction maintained by the court, cite the statutes violated along with a history of noncompliance, indicate what performance actions are being sought by the Department and, where appropriate, request monetary penalties to be imposed. Typically, the complaint will be “verified” (signed by authorized personnel as an affidavit) and will be filed along with other supporting affidavits and exhibits. Where appropriate, the complaint may be filed along with a motion for emergency injunctive relief pending trial. Regulatory staff will provide testimony in the case if necessary.

If settlement can be reached prior to trial, the parties may enter a Consent Judgment with the Court. Noncompliance with the Consent Judgment or an order of the Court is likely to result in the Department requesting the Court to find the defendant in contempt and to impose appropriate sanctions.

Letters of Compliance/No Further Action Letters

If complaint inspection or compliance monitoring uncovers no violations, the complaint report will be filed or letter of compliance issued. Owners and complainant will be notified.

The Letter of Compliance is a brief letter, written in varying formats depending on the program, citing the action that has been complied with (immediate compliance order, informal or formal enforcement action, consent agreement) and state the activities performed that form the basis for the Department's belief that compliance has been achieved.

cc: Jan Reitsma, Robert Ballou, Gerald McAvoy, Kathleen Lamphear