

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
ADMINISTRATIVE POLICIES AND PROCEDURES

Subject: D-0401 – DNREC Penalty Mitigation Policy

Section: D-0400 - Enforcement

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I. PURPOSE

The Delaware Department of Natural Resources and Environmental Control (DNREC or Department) wishes to promote voluntary compliance with environmental requirements. DNREC believes that the protection of the environment and public health and safety rests, in part, on voluntary compliance with environmental laws. Voluntary compliance begins with an awareness of environmental problems and is often achieved through the implementation of compliance assessments. The Department will provide meaningful incentives to encourage large and small businesses to develop and implement an environmental management system and to conduct regular compliance assessments.

The business community reports that a major disincentive to undertaking environmental compliance assessments is the threat of administrative or civil sanctions. Responsible businesses examine their operations and take whatever steps are necessary to comply with the law. Ideally, businesses should not need penalty mitigation as an incentive to comply with the law. The Department does not condone conscious disregard by business of possible or probable environmental violations. Nonetheless, this policy is being undertaken in the hope that significant environmental benefits will accrue. Under this policy, the Department will grant penalty mitigation for self-reported violations under the circumstances and conditions set out below.

II. APPLICABILITY

This policy applies to the Department's administrative and civil penalty assessment activities under 7 Del. C. Chapters 60, 63, 74, 74A & 77. The policy applies to compliance assessments which occur after the effective date of this policy. It is the responsibility of the person seeking the benefit of this policy to establish to the Department's satisfaction that the elements of the policy have been met. This policy is intended to affect only the relationship between DNREC and disclosing persons.

This policy only applies to disclosing persons with a total of 100 or fewer full time employees at one or more discreet facilities. Furthermore, this policy does not apply in any instance where the violation commenced or occurred greater than five years prior to the disclosure required in V. A. 1.b. below.

This policy will automatically apply to any business whose discovery and disclosure of a violation comes as a direct result of a compliance assistance effort provided by the Clean Air Act, Section 507 Small Business Ombudsman or the DNREC, Office of the Secretary's Pollution Prevention and Compliance Assistance Program, providing all other provisions of this policy are met and the violation is not one of the exemptions listed in Section V. C. herein.

III. DISCLAIMER

This policy and its procedures are in no way intended to supplant existing legal requirements. Nothing in this policy shall affect such requirements, including statutory or regulatory requirements which mandate enforcement actions. This policy is limited in scope to actions for penalties, and shall not affect other actions, such as actions for injunctive relief or emergency administrative orders.

This policy is the procedure that DNREC will follow in the future to achieve compliance under the statutes listed in the above section on Applicability. This policy establishes the framework within which DNREC will exercise its discretion in assessing and pursuing administrative and civil penalties in matters involving self-reported environmental regulatory noncompliance.

IV. DEFINITIONS

Environmental Regulatory Requirements: All approvals, written authorizations, and legally enforceable obligations, including those contained in environmental laws and regulations and those incorporated into permits or licenses issued pursuant to those environmental laws and regulations.

Department: The Delaware Department of Natural Resources and Environmental Control.

Compliance Assessment: Any mechanism used to evaluate environmental regulatory compliance. This could include consultant reports, audits, self-diagnosed compliance problems or any assessment that leads the disclosing person to believe that they are in non-compliance with environmental requirements.

Disclosing Person: A natural person, partnership, association or corporation, firm, trust, joint stock company, or business entity requesting consideration under this policy.

Small Business: A business that is independently owned and operated and which employs 10 or fewer full-time employees.

V. POLICY

To encourage companies and individuals to perform compliance assessments, the Department will use the following when considering whether to pursue administrative or civil penalties applicable to environmental regulatory violations.

A. GENERAL POLICY

1. The Department will not assess an administrative or civil penalty for violations of environmental regulatory requirements which are voluntarily disclosed following a compliance assessment provided:
 - a. the date and time of discovery of the violation is contemporaneously documented by written memorandum signed by an owner, officer, director or plant or facility manager of the subject facility, and;
 - b. within 21 consecutive days after the date of discovery, the disclosing person shall send to the Department, by certified mail, notification of the violations and a request for consideration under this policy, and;
 - c. the disclosing person provides: 1) a full and complete written description to the Department of the condition causing the violation, including planned measures to return to compliance or a compliance schedule to address the violation; and 2) fully cooperates with the Department regarding its investigation of the disclosed condition, and;
 - d. the disclosing person shall within 30 days after the Department receives the notification as provided in section b. above: 1) correct the violation; or 2) have a compliance schedule approved by the Department and incorporated into an enforceable agreement. Upon a showing by the disclosing person within the 30 day deadline above, of good cause and that compliance with the 30 day deadline is not possible, the Department may in its sole discretion extend the 30 day deadline. Nothing in this section or Policy shall be construed to require the Department to approve a compliance schedule or otherwise grant any approval or permit.
2. For voluntary disclosures concerning unpermitted or unauthorized operations, the Department may incorporate the compliance schedule as a condition to the permit or required authorization. For purposes of this policy, any and all monetary charges that would have been applicable and payable to DNREC or its designees by the person during the period of time in which

unauthorized or unpermitted activity occurred are not considered penalties and will be due and payable in full. Small businesses will be assessed a charge based on the actual time operating without a permit or authorization with a maximum retroactive assessment period not to exceed five years. Partial year assessments will be calculated on a monthly schedule based on 1/12 of the annual fee.

3. After receipt by DNREC of a certified letter as required in V.A.1.b. above, the Department will provide the person with a letter which:
1) acknowledges receipt of the disclosure; and 2) indicates whether or not the disclosing person is initially qualified for penalty mitigation under this policy. Once DNREC has determined that the disclosing person has fully satisfied all terms and conditions of this Policy, fully qualified for penalty mitigation under this policy, and come into full compliance, DNREC will provide a letter so stating. However, discovery of new evidence that would have disqualified the disclosing person, after issuance of the letter of full qualification, shall not estop or preclude DNREC from disqualifying the disclosing person on the basis of the new evidence. The reporting person shall be responsible for providing DNREC with all relevant information in determining the reporting person's qualification under this policy.
4. The fact that penalty mitigation has been granted shall not prohibit the Department from using the fact of the violation in any future regulatory decision or penalty assessment, such as a consideration in penalty enhancement for a second offense.

B. VOLUNTARY DISCLOSURE

1. Disclosure is voluntary if:
 - a. the disclosed violation was first discovered by the disclosing person performing a compliance assessment; and
 - b. the disclosure is not required by an administrative or civil enforcement action, environmental law, regulation, permit, license, order or other legal requirement or process or any environmental regulatory requirements; and
 - c. the disclosure identifies violations that were not known to the Department prior to the date of discovery.

C. EXCEPTIONS

1. The Department, in its sole discretion, will determine whether a person is eligible for consideration under the terms of this policy. Other requirements are set out in other sections of this policy, but the terms of this policy are specifically not applicable if any of the following exist:

- a. the disclosure was not voluntary within the meaning of section B above;
- b. the person intentionally or knowingly committed the disclosed violation;
- c. the disclosing person does not correct the violation strictly in accordance with Section V.A.1.d.;
- d. significant environmental harm or a significant threat to public health was caused by the violation;
- e. substantially similar violation(s) occurred previously at the same facility within the last three years;
- f. significant economic benefit accrued to the person as a result of the non-compliance. In such cases the Department reserves the right to seek penalties commensurate with that economic benefit. Significant economic benefit does not include mere nonpayment of monetary charges within the meaning of V.A.2.;
- g. repeated environmental regulatory violations (not necessarily of the same kind) reveal a pattern of conduct or condition such that the Department determines that the disclosing person should not be afforded the benefits of this policy;
- h. the violation or disclosure involved fraud, misrepresentation or concealment;
- i. a person seeking consideration under this policy was in financial arrears for any reason to the Department for a period of six months or longer at the time of the violation. Financial arrears do not include mere previous nonpayment of monetary charges within the meaning of Section V.A.2.; and
- j. this policy shall not apply to persons who do not respond to requests, for information or affidavits, related to the violation or otherwise required by law from the Department in a complete and timely manner.

VI. RELATIONSHIP TO REGULATORY AUTHORITY

The Department's authority to regulate facilities and activities and to require the collection, development, maintenance and reporting of documents, communications, reports, and other information is not affected by this policy.

VII. RELATIONSHIP TO FEDERAL LAW

This policy shall not prevent the Department from pursuing enforcement actions specifically required by the federal government as a condition to receiving and maintaining program delegation or primacy. This policy in no way limits or precludes the U. S. Environmental Protection Agency or other governmental agencies from exercising their authority to enforce all requirements.

VIII. PUBLIC ACCESS TO INFORMATION

Information concerning violations of environmental requirements, which are voluntarily disclosed, will be available to the public as a public record, except for information which otherwise is confidential under Delaware law.

IX. ELIGIBILITY DETERMINATIONS

The Department in its sole discretion and judgment shall determine the sufficiency of all requirements for eligibility under this policy and whether exceptions may or may not apply.

X. TERM

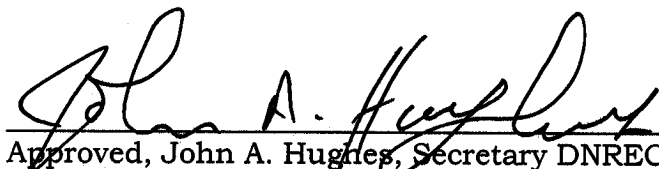
This Policy shall be effective until rescinded by the Secretary. Any disclosures provided to DNREC as specified in Section V.A above and received prior to the Secretary's rescission of this policy shall not be affected by the rescission and shall be afforded the benefits of this policy provided all policy conditions and requirements are met.

XI. CRIMINAL LIABILITIES NOT INCLUDED

This policy shall not affect any criminal liability or penalties.

XII. CONTACT PERSONS

All disclosing persons, except those with 10 or fewer full time employees, receiving consideration under this Policy shall designate a contact person, including address and phone number, who shall be available and accessible to the Department and to the public to answer questions relating to consideration under the Policy. Such contact person shall provide a copy of the disclosure in sections V.A.1.b. and c. within 15 days to any member of the public who requests it. If desired, small businesses with 10 or fewer full-time employees may request in writing that DNREC's Planning and Compliance Assistance Section handle requests for information from the public concerning this policy.


Approved, John A. Hughes, Secretary DNREC

9-10-03
Date