

## **CHAPTER SIX: CLASSIFICATION OF PRIORITY CASES**

### **SECTION I. AIR QUALITY MANAGEMENT PRIORITY CASE CLASSIFICATION**

#### **A. AIR QUALITY MANAGEMENT**

The Air Quality Management Section (AQM) within the Division of Air and Waste Management implements the State of Delaware, "Regulations Governing the Control of Air Pollution," which satisfies the requirement of 7 Del. C. Chapter 60 to report and obtain approval of equipment which has the potential to discharge air contaminants into the atmosphere. Delaware is required to implement the Environmental Protection Agency's (EPA) "Policy on Timely and Appropriate Enforcement Response to High Priority Violations" for all *major* (as defined by the Clean Air Act) stationary sources of air pollution in violation of a Federally Enforceable regulation. This policy only covers a subset of violations and was developed by the EPA to enable staff to identify and prioritize enforcement cases.

All violations are reviewed and addressed by the staff in the Engineering & Compliance Branch in an appropriate manner. All penalty calculations are evaluated using EPA's "Clean Air Act Stationary Source Civil Penalty Policy." This policy provides guidance on determining appropriate penalty amounts based upon factors such as: the size of the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, adjustment factors, and seeks to assess the benefit the violator received during the period of violation, and the economic impact of the penalty on the business

#### **1. Engineering & Compliance Responsibilities:**

Engineering & Compliance is responsible for identifying and documenting violations. The DNREC Enforcement Officers (EPO's) also identify and document violations based on their investigations and citizen complaints. The following procedures govern the response to violations of 7 Del. C. Chapter 60 the State of Delaware, "Regulations Governing the Control of Air Pollution," state issued construction and operating permits including Regulation No. 30 (Title V) State Operating Permits.

Violations may be discovered through plant inspections, follow-up to citizen complaints, file reviews, stack testing of the source, etc. Violations may also be discovered through self reporting by the source in the form of regulatory required compliance certification reports, credible evidence, and/or internal audits. The Responsible Staff documents any alleged violations and considers various factors in recommending a course of action.

The Engineering & Compliance Branch does not have a separate permitting and inspection group. Environmental engineers and scientists assigned to the facilities in conjunction with their immediate supervisor and the branch supervisor are responsible for the following duties: permitting, inspection activities, compliance determinations, and enforcement recommendations. As such, the assigned engineer or scientist is responsible for maintaining a knowledge base

in the following areas: State of Delaware, “Regulations Governing the Control of Air Pollution”, 40 CFR Parts 60, 61, 63, 64, 70, 74; EPA’s High Priority Violations (HPV) Policy; EPA’s Clean Air Act Stationary Source Civil Penalty; and tracking of source obligations – includes permit terms and conditions which specify a time frame to complete compliance requirements (installation of a CEM, conduct stack sampling, reporting requirements, etc.)

The assigned engineer or scientist is responsible for ensuring that the immediate supervisor is informed at regular intervals regarding the compliance status and other pertinent information.

## **2. Enforcement Recommendations:**

Engineering & Compliance staff compiles compliance information in order to determine whether a source is in compliance with the State of Delaware, “Regulations Governing the Control of Air Pollution,” permit terms and conditions and federal requirements where the authority to enforce has been delegated to the State. The immediate supervisor is notified of violations and a preliminary enforcement response is determined. This enforcement response can be in the form of the following: Letter of Deficiency, Notice of Violation, Administrative Order, Civil Action, and/or Criminal Action. [Note: a Letter of Deficiency can escalate into a Notice of Violation followed by Administrative, Civil, or Criminal Action if the source fails to comply with the Letter of Deficiency requirements.]

Engineering & Compliance staff are required to review the violation in order to determine whether the violation meets the definition of a High Priority Violation (HPV). All other violations are reviewed to determine an appropriate enforcement response.

## **B. HIGH PRIORITY VIOLATIONS (HPV)**

**1. High Priority Violation (HPV) Policy:** AQM has adopted EPA’s policy entitled, “Issuance of Policy on Timely and Appropriate Enforcement Response to High Priority Violations” from Eric Schaeffer, Director Office of Regulatory Enforcement dated December 28, 1998. The High Priority Violations (HPV) Policy applies to all major (as defined under the Clean Air Act) stationary sources of air pollution which are in violation of a Federally Enforceable Regulation. This policy is meant to enable agencies such as AQM to give priority attention to those violators and violations which they believe are the most environmentally important and to permit an increased degree of agency flexibility in identifying and resolving HPVs. This policy provides for specific timeframes to resolve the HPV.

EPA’s HPV Policy supersedes previously issued policy documents related to Significant Violators (SV) and Timely and Appropriate (T&A) Policy. The HPV policy applies to all States, Locals, Territories, and Tribes within the United States and any “major” (as defined by the Clean Air Act Amendments of 1990 (CAAA) or subsequent revisions, or as clarified in national guidance) stationary sources of air pollution which are in violation of Federally-enforceable regulations. This policy also applies to “synthetic minor” sources as described in the general criteria. A “synthetic minor” source is any source that avoids Title V

or New Source Review (NSR) permitting by means of a minor source permit limiting its potential to emit below major source thresholds. Additional violations, whether major or minor sources, may rise to the level of a high priority violation at the mutual agreement of EPA Region III and AQM on a case by case basis.

A copy of EPA's "Timely and Appropriate Enforcement Response to High Priority Violations" is attached in Appendix I - 1

Any violation that meets the criteria listed in Table No. 1 is classified as HPV.

<b>Table No. 1 – HPV Criterion</b>	
<b>General Criterion #</b>	<b>General HPV Criteria and Description</b>
1	Failure to obtain a PSD permit (and/or to install BACT), an NSR permit (and/or to install LAER or obtain offsets) and/or permit for a major modification of either
2	Violation of air toxics requirement (i.e., NESHAP, MACT) that either results in excess emissions or violates operating parameter restrictions
3	Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR, or Title V statuses
4	Violation of any substantive term of any Local, State or Federal order, consent decree, or administrative order
5	Substantial violation of the source's Title V certification obligations
6	Substantial violation of the source's obligation to submit a Title V permit application
7	Violations that involve testing, monitoring, recordkeeping, or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits
8	Violation of an allowable emission limit detected during a reference method stack test
9	CAA violations by chronic or recalcitrant violators
10	Substantial violation of CAA Section 112(r) requirements
<b>HPV Matrix Criteria and Descriptions</b>	
1	Violation of allowable emission limitation, detected by stack testing
2	Violation of applicable emissions limitation, detected by coatings analysis, fuel samples, other process materials sampling, or raw/process materials usage reports
3	Violation of parameters limits where parameter is direct surrogate for an emissions limitation, detected by continuous/periodic parameter monitoring
4	Accidence of applicable non-opacity standard, detected by CEMS
5	Exceedance of applicable opacity standard (detected by COMS or by VE)

## **2. Timeframe of HPV:**

One purpose of the HPV policy is to ensure timely and appropriate response to violations through standardized criteria and timeframes.

### **a. Day Zero**

The clock starts (i.e., day zero) no later than 45 days after AQM first receives information concerning a Federally enforceable violation (e.g., date of inspection, stack test or continuous emission monitoring system report). If, during this 45-day period, the enforcement agency decides that additional monitoring or analysis is required to determine or confirm the violation, the clock does not start until the earlier of the date of receipt of such additional data or on the 90<sup>th</sup> day after the violation was initially discovered. This additional period (up to 45 days) provides sufficient time for agency evaluation of the data to determine if a Federally enforceable violation occurred.

### **b. Day Sixty**

Unless AQM requests that EPA issue the Notice of Violation, by Day 60 AQM shall issue a Notice of Violation (NOV). If the State has not taken such action, EPA shall immediately issue an appropriate notice.

Any EPA issue of a NOV or Finding of Violation (FOV), in a case where the State has the lead, will indicate that EPA is still looking to the State to resolve the matter, and further EPA action will be required only in the absence of an acceptable, prompt resolution by the State. If the violation clearly impacts upon the air quality of an adjacent State, EPA will also transmit a copy of the NOV or FOV to that State as well.

### **c. Day 150**

If AQM has the initial lead and the case has not been resolved/addressed by Day 150, the EPA and AQM will have a case-specific consultation concerning overall case strategy, including a discussion of effective means for expeditiously addressing/resolving the case. Possible strategies could include continued deferral to AQM, EPA assumption of the case, or continuation of the case in a work-sharing arrangement between EPA and AQM.

### **d. EPA Responsibilities After It Assumes the Lead**

After EPA assumes the lead in a case, it will have up to an additional 150 days to get the source into compliance, onto a schedule, issue a Section 113(a) administrative order (including administrative remedies), a Section 113(d) administrative enforcement action, or subject the source to a Section 120 action or judicial referral. EPA will encourage continued State participation even in situations where EPA takes over the lead. The possibility of a joint action should be considered as an alternative to a unilateral EPA action where feasible.

**e. Day 270 (no lead change) or Day 300 (lead change)**

By Day 270 (or 300 with lead change to EPA), the case shall either be resolved or addressed, i.e., the issuance of a legally enforceable administrative or judicial order, or be subject to a referral to the State of Delaware Attorney General or (Federal) Department of Justice for an adjudicatory enforcement hearing or judicial action. In some complex cases, more time may be required. The State should discuss with the Region that a case's complexity will require additional time as soon as those factors are determined.

**f. Definitions**

Resolved: means that the violation is addressed and closeout memo has been issued, all penalties have been collected and the source is confirmed to be in compliance.

**C. ALL OTHER VIOLATIONS**

All non-HPV violations are reviewed to determine an appropriate enforcement response. The goals of Engineering & Compliance is to ensure compliance with the State of Delaware "Regulations Governing the Control of Air Pollution," and the ensuing construction and/or operating permit issued pursuant to these regulations, to ensure that the facility is not interfering with the attainment or maintenance of national and state ambient air quality standards, and that the health, safety, and welfare of the citizens of the State of Delaware are not endangered.

Typically, procedural violations which are limited in nature to monitoring, record keeping, and reporting which do not substantially interfere with Engineering & Compliance staff determining the compliance status of the source or minor work practice standard violations are considered minor and result in a Letter of Deficiency or Notice of Violation. Should the facility still fail to comply, the Engineering & Compliance Branch may recommend an Administrative action, refer for civil action, or refer for criminal action. A minor violation can be elevated to HPV status at any time upon mutual agreement between EPA Region III and AQM.

**Timeframe:**

Violations that occur at natural minor sources or violations that occur at major stationary sources but are not determined to be HPVs, are still subject to enforcement review and the enforcement mechanisms available to AQM - Letter of Deficiency, Notice of Violation and administrative, civil, or criminal action.

Although non-HPV violations are not subject to the timeframes specified in the EPA's HPV Policy, Engineering & Compliance prioritizes these cases and adheres to a similar timeframe of resolution.

**D. ASBESTOS ABATEMENT FROM RENOVATION AND DEMOLITION (R/D) ACTIVITIES**

On June 2, 1987 Senate Bill No. 95 amended Part VII, Title 16 of the Delaware Code by adding Chapter 78, "Asbestos." In the interest of the public it is the purpose of this Chapter to control, reduce and prevent the exposure of the public to asbestos from R/D activities where the general public can reasonably be expected to have access.

Via the authority of Chapter 78, the Department of Administrative Services adopted the regulation entitled, "Regulation Governing the State of Delaware Contractor/Supervisor/Worker Asbestos Training and Certification Program and Training/Certification for Asbestos Professional Services." The regulation was first adopted in 1988 and later amended in 1991. In accordance with Chapter 78, the Department of Administrative Services, Division of Facilities Management, Environmental Section administers the Regulation. The Department of Natural Resources and Environmental Control (DNREC) is charged with enforcing the Regulation.

The enforcement of the training/certification requirements for asbestos abatement contractors, professional service persons/firms, field technicians, abatement workers and supervisors will reduce the public exposure to life-threatening asbestos exposure from R/D activities. Such training/certification will assure asbestos operations are performed by qualified personnel in accordance with state of the art work practices.

In addition to Chapter 78 and the regulation identified previously, DNREC adopted the federal asbestos abatement regulation via the State of Delaware, "Regulations Governing the Control of Air Pollution," Regulation No. 21 by incorporating 40 Code of Federal Regulations Chapter 61 Subpart M, "National Emission Standard for Asbestos." This subpart gives the Department additional asbestos abatement authority.

Upon discovery of R/D abatement violations, Department personnel have all enforcement options provided in 7 Del. C., Chapter 60.

## **SECTION II. SOLID AND HAZARDOUS WASTE PROGRAM PRIORITY CASE CLASSIFICATION**

### **A. BACKGROUND**

Delaware's hazardous waste program, authorized by the United States Environmental Protection Agency (EPA), implements statewide hazardous waste compliance activities and enforcement through the application of regulatory, permitting and enforcement authorities contained within 7 Del. C., Chapter 60, 7 Del. C., Chapter 63 and *the Delaware Regulations Governing Hazardous Waste* (DRGHW). As an authorized state, Delaware implements its program in a manner consistent with EPA's, including addressing enforcement actions consistent with EPA's "1990 RCRA Civil Penalty Policy" (RCPP) and "Hazardous Waste Civil Enforcement Response Policy of March, 1996" (ERP). These policies provide guidance on timely and appropriate enforcement responses, escalation of enforcement actions for lack of compliance achievement, and calculation of gravity based penalties.

Delaware's solid waste program implements solid waste compliance activities and enforcement statewide through the application of regulatory, permitting and enforcement authorities contained within 7 Del. C., Chapter 60 and the *Delaware Regulations Governing Solid Waste* (DRGSW). While not directly applicable to the solid waste program, the EPA Enforcement Policies referenced above have been adapted to reflect the statutory provisions of 7 Del. C., Chapter 60 and are applied to the solid waste program in a manner similar to that used within the hazardous waste program.

### **B. INSPECTOR RESPONSIBILITIES**

The goal of the solid and hazardous waste compliance monitoring programs is to ensure solid and hazardous waste handlers are properly complying with the requirements of the statutory provisions of 7 Del. C., Chapters 60 and 63 and the DRGSW and DRGHW as applicable. This requires monitoring of handlers by staff experienced in the solid and hazardous waste programs and the application of program regulations. Program staff members receive both on-the-job and classroom training, and are afforded guidance from EPA and state prepared inspection manuals.

In addition to being adequately trained in preparing for inspections, staff members are required to complete certain activities. Such activities include identifying the scope of the inspection, review of facility files to gain a thorough understanding of a facility, identification of the regulations applicable to a facility, development of an inspection plan, obtaining inspection equipment, and determining health and safety requirements. An important component of this review includes becoming familiar with a facility's compliance and enforcement history, information valuable in determining the type of enforcement to be sought should violations be identified. Each responsible staff member is familiar with the enforcement authorities of 7 Del. C., §6005, and for hazardous waste program staff, also 7 Del. C., §6309. While solid waste staff members have knowledge of EPA's ERP and RCPP as amended by the program, hazardous waste staff members are thoroughly familiar with the ERP and RCPP as developed by EPA, and the suggested enforcement timeframes therein. Additionally, in both the solid and hazardous waste programs, each staff member has an annually developed performance plan which includes the expected timeframes for the completion of inspection reports, enforcement

action recommendations and the actual preparation of administrative enforcement documents. All reports, recommendations and prepared enforcement documents are presented to the responsible staff member's program manager for concurrence. In the case of escalated enforcement requiring review by the Enforcement Panel, documentation is submitted through the program manager to the Division's Paralegal. Staff members are responsible for tracking each inspection, resulting violations, as well as enforcement actions and return to compliance. While the solid waste side of the program maintains this information in an in-house database, hazardous waste information is maintained in a shared state/EPA database designated as "RCRA Info". The immediate supervisor verifies the data contained in "RCRA Info" on a periodic basis.

### **C SIGNIFICANT NON-COMPLIERS**

Facilities receive classification based on factors of overall compliance, recalcitrant behavior or a history of non-compliance. The first of these classifications, Significant Non-Compliers (SNC) are facilities that cause an actual exposure or a likelihood of exposure to hazardous waste or its constituents, or a solid waste posing a substantial threat to public health or the environment. The SNC designation is also given to recalcitrant or chronic violators, those that substantially deviate from the requirements of statute or regulation, a permit, order or agreement. A facility may also be classified as a SNC, should it fail to achieve compliance in the timeframe specified by the Department. The SNC designation is formerly attached by the State to hazardous waste handlers within the "RCRA Info" database. The facility remains a SNC until the State removes the designation following a facility's return to compliance. The facility's new designation within the "RCRA Info" database becomes SNN, indicating the facility was once a SNC, but has achieved compliance.

### **D. SECONDARY VIOLATORS**

Facilities are designated as secondary violators (SV) when they do not meet the criteria of a SNC. SVs are usually reserved for first time violators, those posing no actual threat or a low potential threat to hazardous waste or its constituents, or a harmful solid waste, and those without a history of non-compliance or recalcitrant behavior. Violations incurred by a facility designated as a SV are easily corrected resulting in a timely return to compliance. In the event a SV fails to address its violations in a specified timeframe, the SV designation is changed to that of a "SNC".

### **E. VIOLATION CLASSIFICATION EXAMPLES**

The following examples are provided as a means in assisting determination of a facility's designation as SNC or SV. The examples do not intend to encompass all criteria evaluated in making a SNC or SV determination, for example, a recalcitrant or chronic violator.

#### SNCs

- Failure to carry out waste analysis for a waste stream.
- Operating without first obtaining appropriate permits.
- Commencing construction prior to permit approval.
- Failure to comply with the manifest system for generators and transporters of infectious solid waste or hazardous waste.

- Disposal of solid or hazardous waste at a non-permitted facility.
- Storage of hazardous waste in a container in poor condition, increasing actual or potential exposure.
- Failure to date and label hazardous waste tanks or containers.

#### SVs

- Failure to maintain a copy of a closure plan onsite. Failure to prepare a closure plan results in a SNC designation.
- Failure to submit required annual reports.
- Minor deviations from schedule of closure.

### **F. TIME SCHEDULES FOR PROCESSING SNCS/SVS**

Enforcement actions are divided into two categories, informal and formal. Informal actions, for example, Letters of Warning, Notices of Violation, or Notices of Deficiency, are the minimum appropriate for a SV. SNCs are addressed via formal actions. Examples of formal actions include Notices of Conciliation, Notices of Administrative Penalty Assessment, and Secretary's Orders. Civil actions filed in the Court of Chancery or Superior Court, and criminal actions filed in Superior Court are formal actions. In accordance with the ERP, the hazardous waste program has 90 days from the date of inspection to make SV or SNC determinations. Those facilities determined to be a SV, must receive an informal hazardous waste action and achieve compliance within 180 days of the date of the first inspection. Typically, informal actions are issued prior to the 90<sup>th</sup> day from the date of inspection with compliance achieved before the 180<sup>th</sup> day. Facilities, upon receiving an informal hazardous waste action, have 30 days in which to achieve and demonstrate compliance. This timeframe is specified in 7 Del. C., §6309(a). Should a facility fail to achieve compliance in the timeframe specified, that facility receives the designation of SNC, and in most instances, enforcement is escalated to that of a Secretary's Order which may include penalties up to \$25,000 per day for each continued day of non-compliance.

As outlined above, the hazardous waste program has 90 days from the date of first inspection to make SNC or SV determinations. If it is determined that the facility is a SNC, the program has 300 days from the date of initial site evaluation to enter into a Consent or Administrative Order with the facility. For cases requiring judicial action or referral to the DOJ, the case must be referred within 210 days from the site inspection date.

While the solid waste program is not bound by the ERP or the timeframes specified therein, the policy is informally applied to solid waste enforcement actions taken pursuant to 7 Del. C., §6005.

## **SECTION III - NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM PRIORITY CASE CLASSIFICATION**

### **A. BACKGROUND**

The NPDES Program reviews violations as the program becomes aware of the violations to determine whether enforcement is warranted. Factors considered in determining the proper enforcement response for a violation include, but are not limited to: the nature, circumstances, extent and gravity of the violation, or violations; ability of the violator to pay; any prior history of such violations; the degree of culpability; economic benefit or savings (if any) resulting from the violation; and such matters as justice may require (Chapter 60).

### **B. SIGNIFICANT NONCOMPLIANCE**

Significant noncompliance (SNC) is a subset of violations. SNC is not a regulatory distinction. SNC is a program definition used for management purposes and serves to classify those violations that merit priority enforcement attention. Facilities are considered in SNC when certain reports are late by 30 days or more, violations of compliance schedule milestones by 90 days or more, violations of effluent limits that exceed the Technical Review Criteria (TRC) or other permit requirements (pretreatment).

### **C. EXCEPTIONS LIST**

EPA's Timely & Appropriate policy states that SNC violations be addressed within one quarter of their occurrence. Rigid compliance with this policy, however, may result in hasty action that does not lead to a desired long-term solution. As a result, EPA developed an "Exceptions List" process.

The "Exceptions List" is a report which identifies Major water program permittees that are in SNC for two consecutive quarters. Any Major permittee listed on the QNCR for two consecutive quarters for the same instance of SNC (e.g., same pipe, same parameter for effluent violations; same milestone for schedule violations; same report for reporting violations; and same requirement for "other" violations) must be listed on the Exceptions List unless the facility was addressed with a formal enforcement action prior to the completion date of the second QNCR.

DNREC's goal is to address alleged violations before they become SNC.

## SECTION IV. ACCIDENTAL RELEASE PREVENTION (ARP)

### A. PROGRAM DESCRIPTION

The purpose of this regulation is to protect the lives and health of citizens living and working in the vicinity of facilities handling extremely hazardous substances (EHS).

1. Delaware's ARP group obtains its authority from 7 Del. Code, Chapter 77 and the *Accidental Release Prevention Regulation* (ARP Regulation). The Department has applied to EPA Region III for delegation of the EPA's *Chemical Accident Prevention Provisions* 40 CFR Part 68 that is also known as Section 112(r) of the Clean Air Act Amendments of 1990 (CAAA).
2. The ARP program has been in existence since the enactment of the *Extremely Hazardous Substances Risk Management Act* (EHSRMA) in 1988. The Department developed the regulation that became effective on September 25, 1989 in cooperation with environmentalists and industry experts. With the enactment of this regulation, Delaware became the third state to develop an accident prevention regulation and became the first state to go beyond the regulation of toxic substances to include both flammable substances and highly reactive substances.
3. The Delaware regulation became the model for similar federal regulations. The CAAA of 1990 established the federal authorities for OSHA to develop its *Process Safety Management Standard* 29 CFR 1910.119 (published February 24, 1992) and EPA to develop the *Chemical Accident Prevention Provisions* 40 CFR Part 68 (published June 20, 1996). The CAAA also created the federal *Chemical Safety and Hazard Investigation Board* that acts to oversee the two federal agencies. The ARP Group continues to work with all three federal agencies.
4. In 1998, EHSRMA was updated to reflect EPA terminology. A new regulation was developed and became effective on January 11, 1999. This regulation duplicated 40 CFR Part 68 in Section 5 and added a "Delaware Only" Section 6 that retained original Delaware list of EHS and Delaware's lower thresholds.
5. Risk Management Plan. The risk management plan is a document that summarizes the facility's risk management programs. The risk management plan was to be submitted to EPA and to Delaware on June 21, 1999. This plan must be updated once every five years unless the facility updates its plan sooner. The plan must be updated:
  - a. When the facility introduces a new regulated substance to an existing process.
  - b. When the facility begins operation of a new process that contains a regulated substance.
6. Risk Management Program. The risk management programs are the activities that must be performed by the facility to comply with this regulation.

There are three Program Levels (or three types of compliance program levels).

- a. Program Level 1 applies to facilities having no off-site consequence for their worst-case scenario and allows these facilities to have no prevention program.
  - b. Program Level 2 applies to facilities that are not regulated by OSHA 29 CFR 1910.119 (typically municipal chlorination facilities). This allows facilities to implement a streamlined prevention program.
  - c. Program Level 3 applies to all other facilities and requires facilities to implement the full risk management program.
  - d. The risk management Program Level 3 (or prevention program) consists of fourteen major elements while the risk management Program Level 2 consists of nine major elements:
    - Management Systems (Program Levels 2 and 3)
    - Process Safety Information (Program Level 3) or Safety Information (Program Level 2)
    - Process Hazard Analysis (Program Level 3) or Hazard Review (Program Level 2)
    - Operating Procedures (Program Levels 2 and 3)
    - Training (Program Levels 2 and 3)
    - Mechanical Integrity (Program Level 3) or Maintenance (Program Level 2)
    - Management of Change (Program Level 3)
    - Prestart-up Review (Program Level 3)
    - Compliance Audits (Program Level 2 and 3)
    - Incident Investigation (Program Level 2 and 3)
    - Employee Participation (Program Level 3)
    - Hot Work Permit (Program Level 3)
    - Contractors (Program Level 3)
    - Emergency Response (Program Level 2 and 3)
7. See the program web page at [www.dnrec.state.de.us/air/aqm\\_page/arp.htm](http://www.dnrec.state.de.us/air/aqm_page/arp.htm) for more information concerning this program.

## **B. INSPECTOR RESPONSIBILITIES**

The inspectors for this group are chemical engineers that have extensive experience working in the chemical industry. This regulation requires inspections of chemical plant operations involving EHS by staff experienced in the application of the program's regulation. This group has trained third party inspectors for Delaware and EPA Region III for an EPA pilot project. The group has developed inspection protocols that can be found on our web page. These protocols are used to evaluate a facility's risk management program elements and the risk management plan that is submitted to EPA and Delaware. Delaware inspectors keep their training current by attending continuing education courses and by attending workshops and conferences.

## **C. INSPECTIONS**

The following is based on 7 Del. Code, Chapter 77:

1. The Accidental Release Prevention group inspects all facilities that are subject to the ARP regulation.
2. At the end of the inspection, the ARP group holds a closing conference with the facility's management. The ARP group discusses the findings of the inspection. The findings include both exceptional practices and any deficiencies.
3. The ARP group sends a report reflecting the closing conference to the facility's management within 45 days after completing the inspection.
4. The facility's management has 60 days to respond to the inspection report with either a description of the additions and changes that were implemented to resolve the deficiencies or with a remediation plan and schedule that must be approved by the ARP group.
5. If the facility's management and the ARP group fail to agree, then the ARP group may issue a "Notice of Violation."

## **D. CLASSIFICATION OF INSPECTION FINDINGS**

The following is based on 7 Del. Code, Chapter 77:

1. Deficiencies often involve paper work omissions or an interpretation that a particular risk management program element is not complete. A deficiency may become significant non-compliance if there are many deficiencies coupled with recalcitrance to implement a remediation program or if the facility fails to implement the Department's recommendations or the agreed remediation program within the agreed schedule.
2. Significant Non-Compliance or Violation involves missing or non-functioning elements of the risk management program. These elements are designed to work together to prevent accidental releases of EHS. Missing or non-functioning elements represent a potential danger to citizens living near facilities handling these EHS.
3. Criminal Violation involves knowing falsification of records or documents required by Chapter 77.

## **SECTION V. UNDERGROUND STORAGE TANK PROGRAM**

### **A. PROGRAM AREA**

The Underground Storage Tank Program is responsible for enforcing both the *Regulations Governing Underground Storage Tank Systems* and the Vapor Recovery portion of the *Regulations Governing the Control of Air Pollution*. Both sets of regulations are adopted pursuant to 7 Del. C. Chapter 60 and the *Regulations Governing Underground Storage Tank Systems* are adopted pursuant to 7 Del. C. Chapter 74. As a result, there are two enforcement procedures available for the *Regulations Governing Underground Storage Tank Systems*. The Chapter 60 procedures can be used for both sets of regulations and will be described first.

### **B. PRIORITIZATION OF COMPLIANCE ASSESSMENTS AND ENFORCEMENT ACTIONS**

The Underground Storage Tank (UST) Program including the Vapor Recovery Program has developed a prioritization system for conducting compliance assessments. The system is based on environmental protection, potential risk to the environment and public health and the type of UST system. The weighted factors in the system are: distance to a water supply; sensitive water resource; product stored; tank material of construction; piping material of construction; type of leak detection; age of the tank and piping; pressurized or suction piping; existing or former leaking underground storage tank (LUST) site; and have there been previous violations at the site. This will be used to determine the sites to be assessed in any given year. However, other sites may be moved ahead of the priorities for reasons such as an emergency response at the facility.

### **C. ENFORCEMENT PROCEDURES**

The project officer conducts an inspection, reviews a file or receives a release report and identifies violations that exist at a facility or a group of facilities owned by the same owner. On site or at the time of review, the project officer determines if a warning letter should be issued immediately, an Enforcement Officer should be called to issue a criminal citation or the violations are serious enough to warrant deciding on the administrative process in collaboration with other project officers and managers. If an Enforcement Officer is called to issue a criminal penalty under Section 6013(c), the project officer calls the office to discuss the issue with the program manager prior to calling the Enforcement Officer. All criminal actions must be referred to the Enforcement Section. If the case follows the administrative path, the project officer discusses the site with other project officers and the program manager, a decision is made as to whether the violations warrant moving immediately to an administrative order with a penalty under Section 6005(b)(3) or if Section 7411 will be followed.

### **D. CHAPTER 60 PROCEDURES**

If a decision is made to proceed with a Chapter 60 enforcement package, the project officer develops the Enforcement Panel Package that is then reviewed by the program manager and the Paralegal. Based on the nature of the violations and the degree to which we have had cooperation with the company, either a Notice of Conciliation and Administrative Penalty Assessment or Notice of Administrative Penalty Assessment and

Secretary's Order is recommended. The project officer uses the UST and/or Vapor Recovery Penalty calculation to determine the recommended penalty.

If the violation is such that it is causing an immediate threat to human health, public safety or the environment, a Cease and Desist Order can be issued under Section 6018. This Order is good for 30 days after which an injunction must be obtained. This option is used in very few cases.

Section 6013 also provides for penalties for willfully or negligently violating and for knowingly making false statements, representations or certifications to the Department. These violations are under the jurisdiction of Superior Court.

#### **E. CHAPTER 74 PROCEDURES**

When Section 7411 is used for enforcement, a Notice of Violation must be issued. Should the violation extend beyond 30 days, a Secretarial Order with penalties is issued. Should the violations continue, the Department may choose to revoke any permits issued to the violator. The penalties under this Chapter are \$1000 to \$25,000 per day of violation. Finally, Section 7411(f) allows for a civil penalty not to exceed \$1000 to be brought in Justice of the Peace Court for violations that consist solely of failure to register or submit other notifications required by the Department.

## **SECTION VI. SEDIMENT AND STORMWATER PROGRAM**

### **BACKGROUND**

The Sediment and Stormwater Law - Chapter 40 Title 7 Del. C. became effective June 15, 1990. The accompanying Regulations became effective January 23, 1991. While the Sediment and Stormwater Regulations (Regs) give DNREC the authority to regulate land disturbing activity over greater than 5,000 square ft., the program elements of plan review, and construction inspection are delegated to local agencies and Conservation Districts, with the exception of State and Federal projects.

The authority for delegation of program elements is contained in 7 Del. C. Chapter 40, Section 4007. The local agencies must develop programs that are consistent with Sediment and Stormwater Regulations. DNREC conducts regular meetings and field visits with all of the delegated agencies to monitor program performance. Also, a formal program review must take place every three years. General construction review (inspection) is undertaken to be consistent with section 14 of the Regs.

There is a federal level of oversight concerning Land Disturbing Activities, which are regulated by EPA through the NPDES Stormwater Program. The EPA Stormwater Program regulates runoff from land disturbing activities as a permitted category of industry. Since Delaware has a statewide program for managing stormwater, EPA has allowed the requirements for this permit to closely follow State requirements. A Notice of Intent (NOI) to begin construction serves as the notice of permit application. All land disturbing activities unless exempted by the Regs must have an approved Sediment and Stormwater Plan for the proposed activity. It is often adherence to the approved plan, rather than a specific reference to the Regs that is the basis for issues of non-compliance and enforcement.

Some of the terminology and procedures for the State's Sediment and Stormwater program may differ from the DNREC policy because it is defined that way in the regulations. Local inspections of construction sites by all of the delegated agencies are performed regularly. A written inspection report is generated describing the items that need to be corrected. The local agencies may continue with written correspondence referencing local ordinances or codes as adopted, to cite additional violations.

Typically, a local agency implementing the Sediment and Stormwater program will utilize a variety of local enforcement options including withholding building permits, and certificates of occupancy, as a way of enacting compliance with an approved Sediment and Stormwater Plan. A locally delegated agency also has the option to refer a project to DNREC for enforcement action under the Regs.

DNREC under the current Section 16 of the Regs may pursue penalty action under 7 Del. C. Chapter 40, as a criminal action in either Justice of the Peace Courts or in Superior Court if the activity is intentional. All criminal actions must be referred to the Enforcement Section. A violation of the Sediment and Stormwater Regulations however, may place the owner in violation of the Stormwater General Permit and conditions imposed in 7 Del. C. Chapter 60, Section 9 Construction, (9.1.02). Administrative penalties could be appropriate under a violation of this statute.

DNREC Sediment and Stormwater program will post for public notice any Notice of Violation that is sent by DNREC. There may be earlier correspondence sent that could include an Inspection Report or a Notice to Comply. A Notice of Violation is the last correspondence sent before an enforcement action is sought.

## **ENFORCEMENT PROCEDURES**

This policy establishes a formal enforcement procedure to be followed by the Department of Natural Resources and Environmental Control (DNREC) and Delegated Agencies (DA) when enforcement action is necessary on sites that do not comply with the State's Sediment and Storm Water Management law and regulations. Enforcement cases can be generated in any of three ways: (1) through the construction review process; (2) through referrals from delegated agencies; and (3) through complaints from individuals, groups, etc. Procedures to be followed for each of these methods are outlined below.

### **1.0 Construction Review**

Every effort is made to use the Construction Review process to correct deficiencies in site compliance whenever possible. Should that process fail to achieve expected results or if the site reviewer feels that a violation is serious enough to warrant enforcement action, the following procedures shall be followed:

#### **a. Issuance of Notice to Comply:**

If site deficiencies have not been corrected in accordance with the construction review report, the owner/developer or authorized agent shall be given a notice to comply. A copy shall also be given to the contractor's representative or responsible person on site. In the event that no authorized person is on-site, a copy of the inspection report and notice to comply shall be sent certified mail to the owner/developer. The notice to comply shall be specific as to the noted violation, corrective measures to be taken, and time frame allowed to complete the work.

#### **b. Compliance Review**

At the end of the time period specified above, a follow-up site inspection shall take place to determine whether compliance has been achieved. Depending on that determination, the following actions may occur:

##### **1. Site Violations Corrected:**

If all previous site violations have been corrected, the site reviewer shall issue an inspection report stating that fact and the site shall be returned to a normal Construction Review status.

##### **2. Previous Violations Not Corrected:**

If previously noted violations have not been satisfactorily corrected, the further actions may be initiated as outlined in Section 2.0.

## **2.0 Enforcement Options for Failure to Comply**

- a. DNREC may issue a cease and desist order to any persons violating any provision of Chapter 40, and/or the regulations by ordering that all site work stop except that necessary to comply with any Administrative Order.
- b. DNREC may request that the appropriate plan approval agency refrain from issuing any further building or grading permits until outstanding violations have been remedied.
- c. DNREC may initiate penalties as stipulated in Section 16 of the Delaware Sediment and Storm Water Management Regulations.

Complete information concerning enforcement and penalties is contained in Chapter 40 Title 7 of the Delaware Code and the Delaware Sediment and Storm Water Regulations, effective January 23, 1993 as amended March 11, 1993.

## **SECTION VII. COASTAL ZONE ACT ENFORCEMENT**

### **A. BACKGROUND**

The Delaware Coastal Zone Act (CZA), 7 Del. Code, Ch. 70, is primarily a land use law which regulates certain activities within Delaware's Coastal Zone. Specifically, the law prohibits new heavy industry uses within the Coastal Zone and requires permits for other manufacturing uses not otherwise prohibited by the Act. Coastal Zone permits, however, are land use permits and do not ordinarily contain emission limits, performance standards or other regulatory requirements often found in other DNREC permits. Permits simply authorize the use of a parcel of land for a particular purpose, and once granted, do not expire. Facilities constructed within the Coastal Zone under a coastal zone permit are still required to obtain all other state and federal permits and are otherwise subject to enforcement procedures under those other permits as detailed in this guide.

The Act addresses enforcement in Sections 7010, 7011 and 7012 of Title 7 with respect to cease and desist orders, penalties and injunctions, respectively. The recent "Regulations Governing Delaware's Coastal Zone" (May 11, 1999) briefly discuss the Secretary's enforcement powers and refer back to the enforcement provisions found in the Act.

A regulated facility has "violated" the Act by beginning construction on new production lines, process equipment, boilers, etc or by initiating new manufacturing operations without first having obtained a permit. Upon such a finding, a DNREC employee will contact the company, inform them of the requirements of the CZA, require that all construction work must immediately stop and provide them with an application for a status decision or a permit to be filed with DNREC within 30 days. This process has historically been very effective. In the Act's almost 30 years, there has been no known fine or cease and desist orders issued against a regulated facility for violating the Act.

### **B. ENFORCEMENT PROCEDURES**

**1. *New or expansion or extension of a regulated use without a CZA Permit.*** The CZA enforcement policy consists of a tiered approach with escalating consequences for failure to adhere to the Act.

- a. At first report of a possible violation: DNREC personnel are dispatched to the site for evaluation (this includes determining if site is in Coastal Zone, is changing land use or new project likely to be a regulated use).
- b. If the site is in the Coastal Zone and the use appears to be a regulated use, the DNREC official will inform the company representative/contractor to stop operations and file for a CZA Status Decision or Permit within 30 days. The Coastal Zone administrator then immediately follows up the site inspection with a certified letter requiring the filing of an application.
- c. If work does not stop, the Attorney General's Office may issue a cease and desist order and may pursue fines as authorized in Sections 7010 and 7011 of Title 7.

- d. Failure to adhere to the Cease and Desist Order may result in an injunction from the Court of Chancery as authorized in Section 7012 of Title 7.

## **2. Failure to implement and/or maintain Environmental Offset Project**

Under most CZA Permits issued after May 11, 1999, an 'environmental offset proposal' is made a part of the CZA Permit. This project must be implemented on schedule as proposed within the company's application and permit. If the offset proposal is not carried out as required, the following enforcement actions would be taken:

- a. Once the issue is brought to the Department's attention, the Secretary will send a Letter of Deficiency via certified mail to the company. This letter will give the company 10 business days to inform the Secretary, in writing, why the offset project has not been fully implemented or maintained and provide to the Secretary the applicant's plan to correct the deficiency. The Secretary may accept the applicant's "cause of non-compliance" and reschedule the final date of implementation, or reject the applicant's stated "cause of non-compliance" and immediately revoke the CZA Permit.
- b. If the company does not proceed with the offset project as originally required or according to a revised schedule as approved by the Secretary, the Secretary may immediately revoke the CZA Permit as specified in the Regulations Governing Delaware's Coastal Zone.