

NEWMOA Call Notes from March 9, 2010

Topic: Determining Seriousness of Violations and Enforcement Response CT, MA, ME, NH, NJ, NY, VT

Connecticut

See attached Document: Notes and Excerpts from the ERP on Determining the Seriousness of a Violation in the Connecticut Hazardous Waste Program

Enforcement Response Policy – similar to EPA’s. CT’s ERP is applied agency-wide.

CT has administrative penalty regulations but no civil penalty regulations (though they have legislative authority).

For RCRA violations: CT’s ERP classifies violations as either High Priority Violations (HPVs) or Secondary Priority Violations (SPVs).

HPVs: There is further classification of HPVs into Definitive HPVs (DHPVs) and Possible HPVs (PHPVs).

DHPVs – violations involving the following situations are classified as DHPVs:

- Actual harm or potential threat of significant harm to public health, safety, or the environment;
- Prompt action needed to prevent further environmental harm caused by the violating activity;
- Violation involves fraudulent or criminal conduct

PHPVs – violations involving the following may warrant PHPV designation:

- Whether violator is a chronic or recalcitrant violator
- Whether there is a significant risk of damage to the regulatory program
- Extent to which a violation deviates from a permit, order consent order or judgment.
- Whether the violation gives the violator a significant economic benefit over its competitors
- Whether the action is necessary to halt improper construction
- Whether the violation occurs in the context of a pre-approved Department compliance assistance initiative
- Whether the violation is one of multiple violations at a site or facility
- Whether the Department is acting in coordination with other agencies

SPVs - could still take a indicate a formal action but usually results in NOAV

Massachusetts

MA has had administrative penalty authority since 1986.

See M. G. L. 21A, Section 16 and Administrative Penalty Regulations: 310 CMR 5.00 on mass.gov. The following URL leads to a page with links to 310 CMR and the Enforcement Response Guidance.

<http://www.mass.gov/dep/service/enfpol.htm>

Generally there are three classes of violations:

Class I (most serious violations) – Enforcement response is consent order or unilateral penalty. If violation is very egregious, case may be referred to the Attorney General.

Examples:

- operating without a permit
- discharge without a permit
- failure to report a release
- false statement

Class II – violations that constitute a failure to adhere to management standards

Typically, enforcement response is first a Notice of Noncompliance (NON); then if violation is repeated within 5 years or not brought in to compliance, higher level enforcement is used.

Class III – minor deviations of management standards, usual enforcement response is NON

MA generally follows the EPA ERP with some deviations. For example, MA does not necessarily call a violator a SNC if they do formal enforcement. It depends on the nature of the violation.

Question – Are there many appeals of enforcement actions?

A. Not many. Most are settled through consent order.

Maine

See attached document: MDEP Hazardous Waste Program Penalty Guidance which is based, in part, on EPA's RCRA Civil Penalty policy.

Penalties consist of a gravity component and an economic benefit component.

Gravity component is calculated for each violation a base penalty assessment as specified in the Guidance and adjusted by mitigating/aggravating factors. Economic Benefit component is added to the gravity component.

Base penalty: assessed for each violation base on 2 criteria:

- Potential or Actual Environmental Impacts
- Causes and Circumstances including the extent of deviation from the environmental standard caused by the violation.

Criteria are used in a matrix that takes into account minor, moderate and major impacts and deviations. Guidance gives multiple examples of each.

Mitigating/aggravating factors - added/subtracted from base penalty.

2 categories:

- Response once notified and level of cooperation, and
- Prior citations and compliance history

Penalties for individual violations are aggregated into a total assessed penalty which is included in a proposed consent agreement for an administrative settlement.

New Hampshire

Have administrative penalty authority through regulations.

Compliance Assurance Response Policy available on website:

<http://des.nh.gov/organization/commissioner/legal/carp/index.htm>

Have Draft RCRA Response Policy

SNCs often end up at Attorney General's office because the calculated penalty amounts exceed the administrative penalty caps.

Average 8 violations per inspection. Out of 30 inspections last year, 15 resulted in administrative penalties

Classify violations into Class I and Class II (no actual harm) similar to the old EPA definitions.

Class I - 25% of violations- violations that present a threat to human health and the environment, e.g., illegal disposal, failure to make a hazardous waste determination

Class II – everything else

NH also evaluates the violator in a manner similar to the new EPA ERP (SNC or SV).

The grading of violations is done in a meeting among Inspector/Environmental Manager/Compliance Manager comparing to how violation was classed in inspections over last 5 years. May use overall facility compliance to help grade the violations. Results are put into a Trip Summary Outline that includes a summary of the violations, the classifications, and the potential to lead to exposure.

New Jersey

Generally follow the EPA ERP but tweak according to national priorities of PPA changes, e.g., if they focus on a sector or area.

See attached document – Penalty Table

NJ legislature required that they formalize their penalty classifications as minor and non-minor.

Penalty Table lists each violation as Minor or non-Minor
Minor violations have a 30-day grace period to return to compliance without penalty
Following an inspection, if there are violations, an NOAV can be issued on the spot.

Non-minor violations are assessed a penalty regardless of whether or not they return to compliance.

Penalty Table identifies whether each violation is subject to a base penalty amount or must be calculated by matrix.

Violations that require the use of the matrix are the most serious.
Matrix can also be used if the base-penalty violation is serious– i.e., great potential for release, previous history of violation, a willful violation.

Have about 800 LQGs about 600 of which are really LQGs and do 150 - 200 LQG inspections annually.

Have civil administrative penalty authority in regulations which allows them to do enforcement in-house. 95% of cases are settled in-house.

New York

Have a state ERP that generally follows the federal ERP. Look at facility compliance as a whole and classify facility as a SNC or SV.

55% of inspections result in violations. After inspection, follow policy and classify facility as whole as a SNC or SV
SVs issued an NOV and have 30 days to return to compliance
SNCs referred to central office, where a case is developed and sent through the general counsel's office within their agency.

- if penalty is < 10,000 – use Consent Order
 - if penalty is > \$10,000 use notice of hearing and complaint
 - occasionally refer cases to the Attorney General's office
- 95% of cases resolved through a consent order

For penalties, follow NY's Civil Penalty Policy
<http://www.dec.ny.gov/regulations/25227.html>

Vermont

Administrative Penalty authority and rules:
<http://www.anr.state.vt.us/site/html/enf/enf-adminpenrule.htm>

The Agency has administrative enforcement authority and can do unilateral orders and consent orders. Civil and criminal Enforcement is done by the Attorney General's office. In practice, we use civil enforcement through the AG's office for more complex cases and ones where the calculated penalty amounts would exceed administrative enforcement caps.

Have hazardous waste program ERP that is similar to EPA's ERP which specifies that we will classify the violator as SNC or SV according to the nature of the violations. SNCs are referred for formal (either administrative or civil) enforcement.

Inspectors fill out an Enforcement Decision Document for each inspection including information on the violations, previous violations and whether or not they are repeats, and general facility compliance and enforcement response recommendations.

If the enforcement response is a referral for enforcement, then we calculate penalties for each violation (or group of violations) according to an agency-wide formula which takes into account:

- degree of actual or potential impact on public health, safety, and welfare
- degree of actual or potential impact on the environment
- respondent's knowledge of the regulatory requirements
- respondent's knowledge of the facts of the violation
- respondent's previous history of formal enforcement
- length of time the violation existed;

Then adjusts penalty for egregious harm to HH&E; knowing non-compliance, history of multiple penalty actions, a long duration of violations, economic benefit, cost of enforcement.

In the process of rulemaking for ticketing authority for all of our rules. Anticipate using this when a case or violation is too small for formal enforcement referral but we have been unable to get compliance with informal enforcement.

Question:

CT asked: do you assign penalties for every single violation when you take enforcement?

NY: do not necessarily assign for each violation

VT: usually lump violations together for settlement, but can assess penalties for each violation individually

NJ: There is a grace period where no penalties are assigned, after that, there is a penalty assessed for every violation

NH: For purposes of settlement, you do not typically seek fine for class II violations but can if they need to