

US EPA ARCHIVE DOCUMENT

PROGRAM DESCRIPTION

Attachment 2

Secretary's Enforcement Policy



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL

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SECRETARY'S ENFORCEMENT POLICY
FOR THE DIVISION OF AIR AND WASTE MANAGEMENT
AND THE DIVISION OF WATER RESOURCES

Dated: April 3, 1987

No. 87-EP-1

I. INTRODUCTION

Achieving and maintaining a high level of compliance with environmental laws and regulations is one of the most important goals of this agency and is an essential prerequisite to realizing the benefits of our regulatory programs. However, in the process of developing an effective enforcement policy at the state level, it is necessary to keep in mind the broad objectives of parallel Federal programs upon which many of our statutes and regulations are based. In addition, we must endeavor to reach an acceptable degree of consistency within the various programs so that the regulated community, as well as concerned and affected parties, will be treated in generally the same manner in similar situations. The following policy therefore, is intended to achieve all 3 objectives - a high degree of compliance, consideration of overall Federal objectives where applicable, and case-by-case consistency within the framework of existing DNREC/DOJ enforcement authorities as set forth in various state statutes.

II. STRUCTURE AND PROCEDURE

Each Division Director shall designate a panel for review of enforcement matters. The Panel shall consist of the Branch Supervisor, the section Manager, the Division Director and/or Deputy Director, Supervisor of Enforcement and a representative of DOJ. It shall be the duty of the Panel to periodically meet and review the status of violations brought to its attention either by program personnel or Environmental Protection Officers. EPO's investigative reports should be filed with the appropriate Branch Supervisor with a copy to the Director. Such reviews shall be performed in accordance with the guidelines set forth in Section III below. Upon completion of the review process, if the decision is made to pursue enforcement action, the matter shall be forwarded to the Secretary with a recommendation as to a proposed enforcement response. After approval or modification of the Panel's recommendation, the Division Director shall refer the violation and approved recommendations to the DOJ for appropriate action, except in the case of minor violations handed by EPO's in J.P. Court as discussed below.

III. GUIDELINES FOR ENFORCEMENT ACTION

In selecting an enforcement response that will be both timely and appropriate for a given violation, the Panel will necessarily have to exercise its collective judgment in a wide variety of factual and legal contexts, many of which cannot be anticipated. When making a determination on the appropriate response in a given case, the Panel will choose from a variety of statutory authorities and will consider a series of fundamental factors.

With respect to enforcement responses, the alternatives available to the Panel are set forth primarily in three statutes:

- 1) 7 Del. C. Ch. 60 - Air, Water, Solid Waste, etc.
- 2) 7 Del. C. Ch. 63 - Hazardous Waste
- 3) 7 Del. C. Ch. 66 - Wetlands

Essentially there are four types of actions under each statute, depending to some extent on the violator's state of mind and the type of harm to be addressed as well as the range of penalties to be sought. These provisions are summarized as follows:

	<u>STATUTE</u>		
<u>RESPONSE</u>	<u>Ch. 60</u>	<u>Ch. 63</u>	<u>Ch. 66</u>
<u>ADMIN. ORDER</u>	\$6018 Cease and Desist Order any violation \$6005 (b) (2) Conciliation any violation	\$6309 (a) Compliance Order any violation Reasonable penalty based on seriousness and efforts to comply	\$6614. Ceas Desist Order any violation
<u>INJUNCTION</u>	\$6005 (b) (2) "continuing or threatening to begin" (Chancery)	\$6309 (c) "threatened or continuing or likely to reoccur" (Chancery)	\$6615 Injunctio to prevent violation (Chancery)
<u>CIVIL PENALTY</u>	\$6005 (b) (1) \$1,000 - 10,000 any violation (Superior Court)	\$6309 (b) \$1,000 - 25,000 any violation (Superior Court)	\$6617 (c) \$1,000 - 10,000 any violation (Superior Court)

CRIMINAL
PENALTY

<p>\$6013(c) --\$50.- 500 any violation (J.P. Court)</p>	<p>\$6309(f) \$2,500 - 25,000 1 year \$50,000; 2 years "intentional or knowing violation" (Superior Court)</p>	<p>\$6617(b) \$50 - 500 any violation (J.P. Court)</p>
<p>\$6013(b) \$500 - 5,000; 6 months "knowing false statement in application, approval, etc."</p>	<p>\$6309(g) \$500 - 25,000 or 1 year \$50,000; 2 years "knowing false statement" (Superior Court)</p>	<p>\$6617(a) \$500 - 10,000 "intentional or knowing violati (Superior Court)</p>
<p>\$6013(a) \$2,500 - 25,000 "willful or negligent violation" (Superior Court)</p>		

It is obvious that all three statutes exhibit the same pattern - a range of responses from administrative orders and J. P. Court Criminal cases through injunctions and civil penalties and finally criminal actions in Superior Court. These Superior Court criminal actions, it should be noted, are the only responses requiring proof of "scienter" or the violator's state of mind. All of the rest merely require evidence that some regulation, order, permit condition etc. has been violated, regardless of any state of mind. This principle serves as a good starting point for a discussion of appropriate responses: Unless there is adequate proof of the requisite state of mind, a criminal prosecution in Superior Court would be ruled out.

Having established the requisite "scienter" however is not necessarily enough to warrant an all out criminal response. The Panel should also consider at least the following factors:

- harm to the environment or health;
- seriousness of the violation;
- duration of the violation;
- notification efforts by the violator;
- previous enforcement history;
- consistency within the program.

After reviewing the matter in light of all of the above, the Panel should then be able to either recommend proceeding with a major criminal effort in Superior Court or to rule out that approach. If the decision is to proceed with a Superior Court criminal case, approval of the Secretary should be immediately obtained and the Department of Justice should be involved through the State Solicitor's office.

Should the Panel rule out Superior Court criminal action, a decision should be made on the remaining options. If the violation is a continuing one or is threatening to begin, some thought should be given to injunctive relief. However, despite clear statutory authority to seek injunctions for any violation, practical experience has shown that such remedies are only available where there is adequate evidence of harm or potential harm to human health or the environment. In the absence of such proof, therefore, such a response should be normally ruled out. As with Superior Court criminal cases, approval of the Secretary and immediate coordination with DOJ is essential.

Generally it will not be difficult to decide on Superior Court criminal cases or injunctions since they usually involve the most extreme violations and environmental harm. If these options have been eliminated, as they usually will be, the more difficult choices will remain among civil penalties in Superior Court, J. P. Court criminal cases and administrative orders. For the most part, Superior Court civil actions should be used for serious violations where the requisite "scienter" is lacking for a major criminal case. Consideration should be given to all of the factors discussed earlier - harm to the environment, seriousness of violations, etc. However, the civil penalty approach raises a variety of issues including the appropriate amount of the penalty, abatement of the problem, installation of pollution control equipment, etc. A decision will also have to be made on whether to litigate the case or resolve it by means of a pre-trial settlement and consent order.

Needless to say, civil penalty cases should usually be settled if the agency's main objectives of achieving compliance, creating a deterrent effect by appropriate penalties and remaining consistent within the framework of each program can be reached. Toward that end, the Division Directors are hereby authorized to develop civil penalty policies which will guide the Panel in arriving at appropriate settlement proposals. These policies shall become part of this enforcement policy once they have been approved by the Secretary and should incorporate the following factors:

- (1) Economic benefit from non-compliance;
- (2) Gravity of the violation;
- (3) Degree of willfulness or negligence;
- (4) Degree of cooperation/noncooperation;
- (5) History of noncompliance;
- (6) Ability to pay;
- (7) Credit projects;
- (8) Unique factors.

Further, any policy must also make special provisions for chronic violators which will include, at a minimum, the concept of escalating penalties for recurring violations. As with the Superior Court criminal and injunctive responses, immediate involvement of DOJ is essential following approval by the Secretary.

In connection with civil cases, it should also be noted that under 7 Del. C. §6005(c) and under 7 Del. C. §6308(4) the Secretary may undertake abatement action and recover the costs from the violator in addition to any other enforcement actions. Cost recovery should always be considered when the Department has expended State funds to address an environmental problem. Since these two statutory provisions differ somewhat in both the circumstances under which cost recovery is available and the scope of recoverable costs, the Panel should carefully review those sections before making a recommendation.

The remaining choices - J. P. Court criminal and administrative orders - have traditionally been handled within this agency without DOJ review although occasionally DOJ guidance may be helpful in more complicated matters or where the case is likely to draw considerable public attention. Presumably, if the Panel has eliminated the three most serious responses, the situation does not yet pose a threat to human health or the environment and each of the factors listed earlier have been discussed and have not yielded significantly negative results. One exception may be the Cease and Desist Order under Chapters 60 and 66 which may be issued unilaterally by the Secretary to bring a serious threat under control and may be used as a first step prior to seeking an injunction.


Except for the Cease and Desist situation, administrative orders and J. P. Criminal actions will be reserved for minor violations which do not pose any significant, immediate threat to health or the environment and do not reflect very negative evaluations by the Panel after considering all of the factors listed previously. As a rule of thumb, J.P. Court criminal cases should be used for minor, isolated violations where little or no corrective action is required and where our objective is to bring the matter to the violator's attention. Since it would not be practical or even desirable to require Panel review of every minor violation, the EPO's will continue to prosecute most of these cases directly in J. P. Court, although all of these matters should be reported to the Panel afterward. However, special circumstances such as those having significant public interest, media coverage, involvement of other agencies, etc. may warrant consideration by the Panel. In such cases, the EPO's will be instructed accordingly by the Supervisor of Enforcement after he has consulted with the rest of the Panel to determine if it warrants their attention.

Finally, Administrative Orders are available where there is no immediate threat to health or the environment and our objective is to bring the violator back into compliance so as to avoid further violations. Often, this approach will involve a compliance order with possible penalties and appropriate deadlines for meeting compliance goals and, if unsuccessful, may also be the first step toward more serious enforcement responses.

As noted early on, enforcement must not only be appropriate but must also be timely in order to achieve this agency's objectives. Since no single set of time periods and deadlines may be workable for all programs, the Directors are hereby authorized to develop guidelines which shall become part of this enforcement policy upon approval by the Secretary on what is "timely" enforcement action within each of their respective programs. Necessarily such guidelines will consider resource capabilities, status of investigative efforts, the violator's cooperation or lack thereof, progress toward compliance and enforcement history. Once in place, these guidelines will set the pace for reviewing violations, making recommendations to the Secretary, and referring cases to DOJ for enforcement.

The above enforcement policy shall become effective immediately.

SO ORDERED, this 3rd day of April, 1983.


John E. Wilson, III
Secretary