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ENFORCEMENT RESPONSE GUIDANCE

POLICY ENF-97.001
Revised 12/10/2004, 6/18/2008

I. INTRODUCTION

A. PURPOSE AND INTENT

The 1997 Enforcement Response Guidance (ERG) consists of a set of guiding principles, policies and procedures, all of which collectively establish a framework for DEP to use in exercising its enforcement authority and discretion in determining appropriate enforcement responses. Some portions of the ERG are newly developed guidance and policies, and some portions have been implemented for some time. A complete index of ERG components is attached to this document.

The ERG is intended to enhance the fairness, consistency, predictability, deterrence value and efficiency of the DEP enforcement process. The principles and policies contained in the ERG are intended to guide DEP managers and staff in:

1) designing appropriate case-specific enforcement strategies; and

2) developing comprehensive compliance assurance strategies.

In addition, the ERG is intended to further the overall mission of DEP by advancing certain goals and objectives, including, but not limited to:

1) pollution prevention principles outlined in M.G.L. Chapter 21I, the Toxics Use Reduction Act;

2) multimedia, whole-facility approach to compliance assurance and enforcement;

3) comprehensive compliance assurance and enforcement strategies in Massachusetts watersheds; and

4) innovative regulatory approaches that target DEP's limited resources on actions which yield greatest protection and optimize protection by increasing flexibility for, and accountability of the regulated community.

Finally, the ERG is intended to help DEP managers and staff use sound professional judgment. **The ERG is not intended to be a substitute for the use of sound professional judgment.**

B. RELATIONSHIP TO OTHER AGENCY GUIDANCE AND POLICY

The ERG is effective on April 26, 1997, and on that date supersedes the 1986 Comprehensive DEQE Enforcement Policies and Guidelines.

To the extent that components of the ERG are not inconsistent, all components should be read in conjunction with one another, and, collectively, define the DEP enforcement program.

If a regulated entity is deemed eligible for consideration under one of the policies set forth in ERG Section IV (A-G), the regulated entity may not receive additional penalty mitigation for satisfying conditions under other mitigation policies for the same violations, unless explicitly permitted within the terms of the policies.

The ERG **applies to all enforcement actions** taken under the authority of all Massachusetts environmental statutes and regulations administered by DEP, and all Federal environmental statutes and regulations delegated to Massachusetts and administered by DEP, **except** where a case:

1) falls within a category explicitly exempt pursuant to a comprehensive compliance assurance initiative approved by the Commissioner after review by the Office of Enforcement, General Counsel, and Deputy Commissioners for Operations and Policy and Planning; (12/10/04 changes)

2) is subject to a program statute or regulation that requires a result at variance with the ERG, in which case that statute or regulation shall govern; or

3) applies enforcement actions unique to M.G.L. Chapter 21E, as that term is defined in ERG Section II (except where the ERG specifically refers to such actions).

The ERG also applies to all enforcement cases pending as of the effective date of this policy in which DEP has not reached agreement in principle with the regulated entity on the specific terms of a resolution. The ERG also applies to all enforcement cases commenced after the effective date of this policy.

There may be exceptional cases not adequately addressed by the ERG. In those cases a decision to act at variance with the ERG should be discussed in advance with the appropriate Regional Enforcement Review Committee, and must be approved by the Regional Director, or Assistant Commissioner for cases in which the lead is in Boston, provided, that said deviations from the ERG shall be reported quarterly to the Enforcement of Enforcement.

C. LEGAL EFFECT

The guidance, policies and procedures set forth in the ERG do not constitute final agency action, and are intended solely as guidance for DEP employees in the exercise of enforcement authority. The ERG is not to be relied upon to create rights, duties, obligations, or defenses, implied or otherwise, enforceable at law or in equity, by any person in litigation with DEP. This guidance is not intended to, nor does it, constitute "regulations" as that term is used in M.G.L. Chapter 30A. DEP reserves the right to act at variance with this guidance, and to change the guidance and procedures, at any time without public notice.

In general, the following laws and regulations will govern the release of disclosures made pursuant to any provisions and policies within the ERG: M.G.L. Chapter 4, Section 7; M.G.L. Chapter 66, Section 10; 310 CMR 3.00; and 950 CMR 32.00. Any material claimed to be confidential will be treated in accordance with 310 CMR 3.00.

II. DEFINITIONS

For the purposes of this guidance and the policies incorporated within, the following definitions apply. Some terms or concepts defined below may also be described more fully within other relevant sections of the ERG.

"Administrative consent order" **(also known as "consent order")** means an administrative order that is **agreed to** in writing by the regulated entity against whom noncompliance is alleged or who may be obligated to comply with a statute or a regulation, and **is thus not subject to administrative appeal**. A consent order may be negotiated and executed either in advance of an administrative order being issued unilaterally, or in settlement of an appeal following the issuance of an administrative order. In all other respects, a consent order is the same as an administrative order. **[NOTE:** Consent orders negotiated pursuant to M.G.L. Chapter 21E may not always allege noncompliance, but instead may specify details of cleanup actions and a schedule for completion.**]**

"Administrative order" **(also known as "unilateral order" or "order")** means a document, **generally subject to appeal**, issued by DEP to one or more regulated entities, that:

1) specifies a requirement(s) with which the regulated entity failed to comply;

2) specifies an occasion(s) on which the alleged noncompliance was discovered;

3) requires the regulated entity to take appropriate response action to achieve and/or maintain compliance with statutory or regulatory requirements by a specific date or dates.

[NOTE: An Order of Conditions issued pursuant to M.G.L. Chapter 131, Section 40 is an approval, not an administrative order. In addition, this definition does not include orders issued pursuant to Chapter 21E, Section 10(b).**]**

"Alternative payment plan" refers generally to several methods that DEP may use to collect payment of an administrative penalty as an alternative to one lump sum payment of the penalty. The **preferred method of collection** is payment of one lump sum. However, if a regulated entity demonstrates financial hardship, DEP may consider an alternative payment plan in order to obtain full compliance and as much of the prescribed penalty as possible. Any agreement enabling payment through an alternative method must be contained in a consent order. The alternative payment plan options, **in order of preference**, include, but may not be limited to the following:

1) Installment payment plan may be used to obtain full payment of a prescribed penalty by allowing a regulated entity to **pay the penalty in periodic installments over the course of one year** from the effective date of the consent order (e.g., an $8,000 penalty is paid in four installments of $2,000, each installment being due on the 1st of each month over a four month period).

2) Delayed payment plan may be used to obtain full payment of a prescribed penalty by allowing a regulated entity to **delay payment of one lump sum for a period of time not to exceed one year** from the effective date of the consent order (e.g., regulated entity must pay full $10,000 penalty within 90 days following effective date of consent order).

[NOTE: In addition, a **suspended penalty** may be considered as an alternative payment option. However, a **stipulated penalty** is **not** considered an alternative payment option. (See definitions of "suspended penalty" and "stipulated penalty" below.) In addition, performance of a Supplemental Environmental Project (SEP) is not considered an alternative payment option. However, a regulated entity's agreement to perform a SEP may be considered evidence of good faith, and thus be used to mitigate a penalty. (Refer to: DEP Interim Policy on Supplemental Environmental Projects (POLICY ENF-97.005).)

"Approval" means any permit, license, certificate, formal determination, registration, variance, statement,

opinion, notification, plan or other approval, or other form of permission issued by or required by DEP or any of it divisions, pursuant to any statute or by regulation or order of DEP. **[NOTE:** The term "notification" within this definition does not include notifications of releases or threats of release of oil/hazardous materials pursuant to M.G.L. Chapter 21E.**]**

"Billing and Accounts Receivable Subsystem" **(BARS)** refers to a subsystem of the Massachusetts Management Accounting and Reporting System **(MMARS)** which is used by DEP and the Comptroller's Office to bill, track and collect payment of fees and administrative penalty money due the Commonwealth.

"Calculation Guidance" refers to the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001).

"Case Screening Committee" **(CSC)** is an internal review group, consisting of representatives from DEP, the Environmental Strike Force and Office of the Attorney General, which meets regularly to review and strategize specific enforcement cases for appropriateness and consistency of enforcement response, including whether judicial prosecution may be appropriate.

"Compliance assistance" **(also known as technical assistance)** is information or assistance provided by DEP, another government agency or government supported entity, public or private, to help the regulated community comply with legally mandated environmental requirements. Compliance assistance does not include suggestions or information about how to correct and prevent violations that may be received from inspectors during enforcement inspections or as a result of enforcement actions. **[NOTE:** Compliance assistance is defined here for use in the DEP Interim Policy on Compliance Incentives for Small Business (POLICY ENF-97.002) and DEP Interim Policy on Compliance Incentives for Municipalities (POLICY ENF-97.003), and does not apply to "compliance assistance" as that term is defined in the Audit Program pursuant to M.G.L. Chapter 21E and 310 CMR 40.0006.**]**

"Court order" is a document issued in writing by a court to one or more person(s), and that requires the person(s) to take, or refrain from taking specified action. A court order may be agreed to in writing by the parties and approved by the court, or it may be issued by the court without agreement of the parties. There are three types of court orders pertinent to the ERG, and defined below permanent injunction; preliminary injunction, and temporary restraining order.

"DEP" or "the Department" each refer to the Massachusetts Department of Environmental Protection.

"Due diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

1) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, certifications and other sources of authority for environmental requirements;

2) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignments of specific responsibility for assuring compliance at each facility or operation;

3) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

4) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents, including those concerning disclosure of information about chemicals;

5) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures (e.g., specific responsibilities embodied in job descriptions and sanctions through appropriate disciplinary mechanisms for failure to perform); and

6) Procedures for reporting releases and for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program or facility to prevent future violations and releases; and

7) Use of appropriately licensed, qualified or, where required, mandated experts (e.g., licensed hazardous waste facility, TURA planner, Licensed Site Professional).

"Economic benefit" refers to an adjustment factor that M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00 require DEP to consider in calculating the amount of an administrative penalty. DEP Guidelines for Calculating Administrative Penalties, (POLICY ENF-90.001) provide that economic benefit should be calculated and added to the gravity based penalty whenever there is an indication that noncompliance resulted in delayed compliance costs, avoided compliance costs, and/or profits from unlawful activity.

"Enforcement actions unique to M.G.L. Chapter 21E" refers to an enforcement action taken that is unique to M.G.L. Chapter 21E, and may include the issuance of Notices of Responsibility, Notices of Response Action, Notices of Audit Findings, Requests for Information, orders pursuant to M.G.L. Chapter 21E, Section 10(b), Cost Recovery Demand Letters, Liens, Notices revoking DEP permits, and Notices of Determination Voiding a Response Action Outcome. Those actions invoke the provisions or authority of M.G.L. Chapter 21E and the Massachusetts Contingency Plan, and have been further defined in ERG Section III.G.

"Environmental audit" is a systematic, documented and objective review and evaluation performed by a regulated entity, or performed by a third party, to determine whether a facility is in compliance with all applicable environmental requirements, and if not, which recommends appropriate and timely action to correct existing violations, and prevent, detect and correct future violations, including efforts described in the definition of "due diligence" above. **[NOTE:** This definition is intended for use in the DEP Interim Policy on Incentives for Self-Policing: Environmental Audit Policy (POLICY ENF-97.004, update 5/1/2007 ENF-07-002), and does not apply to the audits or response actions performed pursuant to M.G.L. Chapter 21E.**]**

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit. **[NOTE:** Environmental audit report as defined here is for use in the DEP Interim Policy on Incentives for Self-Policing: Environmental Audit Policy (POLICY ENF-97.004 update 5/1/2007 ENF-07-002), and does not apply to the Notice of Audit Findings used in the Audit Program of the DEP Bureau of Waste Site Cleanup.**]**

"Environmental Justice" refers to the fair distribution of environmental protection and resources relative to programs and policies designed to reduce the risk to public health and the environment, with the goal of improving the quality of life in low income communities and communities of color.

"Expedited Penalty Assessment Notice" **(EXPAN)** is a Penalty Assessment Notice that may be issued:

1) during, or within a very short period of time following an inspection;

2) in response to six or fewer violations of requirements specifically identified as qualifying for use of an EXPAN; and

3) for which a Notice of Noncompliance or Field Notice of Noncompliance has previously been issued.

In all other respects, an Expedited Penalty Assessment Notice is the same as a Penalty Assessment Notice.

"Field Notice of Noncompliance" **(Field NON or FNON)** is a Notice of Noncompliance that may be issued in the field immediately following an inspection in response to six or fewer violations of requirements specifically identified as qualifying for use of a FNON. In all other respects, a Field Notice of Noncompliance is the same as a Notice of Noncompliance.

"Higher level enforcement" means an enforcement response with consequences more severe than those resulting from a Notice of Noncompliance, and includes administrative orders, Penalty Assessment Notices, administrative consent orders (with or without penalties), Notices of Response Action, permit and license sanctions, and civil and criminal judicial prosecution. These actions may involve circumstances where DEP performs response actions and then seeks cost recovery pursuant to M.G.L. Chapters 21E and 21H.

"Municipal environmental audit" is a systematic, documented and objective review and evaluation undertaken by a municipality and performed either by qualified municipal staff, or by a qualified third party, including consultants or volunteer committees performing watershed assessments, to determine whether a municipal facility, operations under the control of an individual municipal department, or municipality-wide operations are in compliance with all applicable environmental requirements, and if not, which recommends appropriate and timely action to correct existing violations, and prevent, detect and correct future violations, including efforts described in the definition of "due diligence" in ERG Section II. **[NOTE:** This definition does not apply to the audits or response actions performed pursuant to M.G.L. Chapter 21E.**]**

"Municipal environmental audit report" means the analysis, conclusions, and recommendations resulting from a municipal environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit. **[NOTE:** This definition does not include Notice of Audit Findings used in the Audit Program of the DEP Bureau of Waste Site Cleanup.**]**

"Municipality" means any city or town, now or hereafter created or established under general law or special act, and regulated under Massachusetts or Federal environmental laws administered by DEP.

"Notice of Noncompliance" **(NON)** means a written notice given to a regulated entity by DEP and which says that the regulated entity has failed to comply on any specified occasion with one or more requirements.

"Pattern of Noncompliance" is described in M.G.L. Chapter 21A, Section 16 and 310 CMR 5.13 as possibly existing when any of the following criteria are evident:

1) the regulated entity has received at least one NON from DEP asserting violations of the same requirements during the previous five-year period;

2) the regulated entity has received two or more NONs asserting violations of different requirements during the previous four-year period;

3) violations previously and currently observed occurred at the same facility;

4) violations previously and currently observed, considered together, indicate

   a) a potential threat to public health, safety, or welfare, or the environment; or

   b) an interference with DEP's ability to efficiently and effectively administer its programs; or

c) an interference with DEP's ability to efficiently and effectively enforce any Requirement to which M.G.L. Chapter 21A, Section and 310 CMR 5.00 apply.

In addition, DEP may consider, but is not limited to considering, the following criteria in determining whether a pattern of noncompliance exists:

1) what the regulated entity did to prevent the noncompliance;

2) what the regulated entity did, and how quickly the regulated entity acted, to return to compliance;

3) what the regulated entity did, and how quickly the regulated entity acted, to remedy and mitigate whatever harm may have occurred as a result of the noncompliance;

4) the actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or any other person, as a result of the occurrence of the noncompliance.

(Refer to 310 CMR 5.13: Pattern of Noncompliance.)

"Penalty Assessment Notice" or "Notice of intent to assess a civil administrative penalty" **(PAN)** each refer to a written notice that DEP is seeking to assess a Penalty pursuant to M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00. When a Penalty Assessment Notice is issued unilaterally, it is **subject to administrative appeal**.

"Penalty exposure" refers to the maximum potential penalty amount, **prior to making any downward adjustments** based on mitigating factors, for which a regulated entity is potentially liable and is based **solely** on the gravity of the violations. Penalty exposure includes upward adjustments made to the base number on the basis of:

1) the actual and potential impact of the violations;

2) the actual or potential costs incurred, and actual and potential damages suffered, by the Commonwealth;

3) the duration of the noncompliance; and

4) the extent to which the regulated entity deviated from requirements.

Penalty exposure does not otherwise reflect any considerations specific to the regulated entity in a particular case, which may result in mitigating the penalty.

"Penalty Statute and Regulations" refers to M.G.L. Chapter 21A, Section 16, the Civil Administrative Penalty Statute, and implementing regulations at 310 CMR 5.00.

"Permanent injunction" is a court order issued after a case is fully litigated. A permanent injunction can be issued in any appropriate case (whether or not there is an emergency) in order to compel or restrain specified conduct, and may last for any appropriate length of time.

"Person" [Refer to definition of "Regulated entity".]

"Preliminary injunction" is a court order issued after opportunity for hearing but before a case is fully litigated. A preliminary injunction can be issued in any appropriate case (whether or not there is an emergency) in order to compel or restrain specific conduct, and may last for any appropriate length of time. However, because the case has not been

fully litigated, a preliminary injunction is an interim measure that should be replaced in due course by final measures.

"Public health, safety and welfare" refers to human health, safety and welfare.

"Punitive penalty" is that portion of an administrative penalty, which reflects the gravity of the violations, duration of noncompliance, behavior and financial condition of the regulated entity and other relevant public interest considerations. A punitive penalty includes adjustments from the base number, as described in the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001)(the "Calculation Guidance"), on the basis of:

1) the actual and potential impact of the violations;

2) the actual or potential costs incurred, and actual and potential damages suffered, by the Commonwealth;

3) multiple days of occurrence;

4) existence or lack of good faith;

5) financial condition of the regulated entity; and

6) any other relevant public interest considerations.

[NOTE: Punitive penalty does not include that portion of the penalty representing the regulated entity's economic benefit or gain from noncompliance. Also, punitive penalties do not include Natural Resource Damages recoverable pursuant to M.G.L. Chapter 21E or CERCLA.**]**

"Regional Enforcement Review Committee" **(RERC)** refers to an internal review group in each DEP Regional office which meets regularly to review and strategize specific enforcement cases for appropriateness and consistency of enforcement response.

"Regulated entity" **(or "person")** means any agency or political subdivision of the Commonwealth, any state, public or private corporation or authority, individual, trust, firm, joint stock company, partnership, association, or other entity, or any group thereof, or any officer, employee, or agent thereof. Without limiting the generality of the foregoing, the term "regulated entity" shall also include

1) any city, town, district, or body politic of the Commonwealth, and

2) any agency or authority of the Federal government whenever, as a matter of Federal law, that Federal agency or authority is required to comply with State law, and is subject to State-imposed penalties for noncompliance.

"Requirement" means any statute, regulation, order, license or approval issued or adopted by DEP, or any law, which DEP has the authority or responsibility to enforce.

"Small business" includes a person, corporation, partnership, or other entity employing fewer than ten (10) persons (measured as FTE equivalents on an annual basis [2000 hours per year of employment], including contract employees) to manufacture a product or to provide a service, and which does not fall into one or more of the following categories:

1) large quantity generator of hazardous waste, hazardous waste facility or Level III recycler of hazardous waste pursuant to M.G.L. Chapter 21C and 310 CMR 30.000;

2) NPDES major source pursuant to M.G.L. Chapter 21, Sections 26-53 and 314 CMR 3.00;

3) air quality major source pursuant to 310 CMR 7.00;

4) TUR filer pursuant to M.G.L. Chapter 21I, the Toxics Use Reduction Act;

5) a solid waste disposal or recycling facility pursuant to Chapter 584 of the Acts of 1987, M.G.L. Chapter 21A, Sections 2 and 8, and Chapter 111, Section 150A and 310 CMR 19.00;

6) any facility or location owned and/or operated by local, county, state or Federal government;

7) branch offices, divisions, or subsidiaries of a business that in the aggregate employs ten or more persons; or

8) a location franchised by a parent corporation.

"Stipulated penalty" is a settlement provision in which a regulated entity agrees to pay a predetermined penalty amount for future violations of specified requirements. A stipulated penalty, which sets a pre-determined penalty amount for **future noncompliance**, should not be confused with a suspended penalty for **past noncompliance**, payment of which may be triggered by future noncompliance.

"Supplemental environmental projects" **(SEPs)** are environmentally beneficial projects which a regulated entity agrees to undertake, or to cause to be undertaken, in settlement of an enforcement action, but which the regulated entity is not otherwise legally required to perform.

1) "Environmentally beneficial" means a SEP must improve, protect, or reduce risks to public health, safety or welfare, or the environment at large. While in some cases a SEP may provide the regulated entity with certain benefits, the project must **primarily** benefit the public health, safety, or welfare, or the environment.

2) "In settlement of an enforcement action" means: 1) DEP has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after DEP has identified a violation.

3) "Not otherwise legally required to perform" means the SEP is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the regulated entity may already be required to perform: as injunctive relief in the instant case; as part of a settlement order in another legal action; as a result of any contractual obligation, by state or local license or permit, or other state or local requirements. SEPs may include activities, which the regulated entity will become legally obligated to undertake two or more years in the future. Such "accelerated compliance" projects are not allowable, however, if the regulation or statute provides a benefit (e.g, a higher emission limit) to the regulated party for early compliance.

"Suspended penalty" is a settlement provision in which DEP agrees to suspend payment of all or a portion of a penalty, provided that the regulated entity does not violate particular requirements specified in the consent order. In the event that the regulated entity violates the consent order, the suspended amount of the penalty **for past violations** becomes fully due upon demand by DEP. In addition to payment of the suspended penalty, the regulated entity may be subject to further enforcement **for the current violations**. **[NOTE:** A suspended penalty may be used as an alternative payment option where a regulated entity demonstrates financial hardship, although it is not a favored option.**]**

"Temporary restraining order" **(TRO)** is a court order issued at the request of one of the parties on very short, or no notice to one or more of the other parties in a case, and with minimal, or no opportunity for hearing before the TRO is

issued. Because the opportunity for hearing is so limited, TROs are issued only in response to emergencies, and may not last longer than 10 days without the express permission of the court.

"Voluntary" means freely performed, and not as a result of being required by statute, regulation, license, permit, administrative or judicial order, consent order or agreement. **[NOTE:** Voluntary does not include performance of self-certification statements under the DEP Environmental Results Program or response actions performed by Potentially Responsible Parties pursuant to M.G.L. Chapter 21E.**]**

"Watershed" is a region or area measured in a horizontal topographic divide, which directs surface runoff from precipitation, normally by gravity, into a stream, or a body of impounded surface water.

"Willful blindness" is the deliberate avoidance of learning facts or the failure to acquire specific knowledge when other facts are known that would induce most people to acquire the specific knowledge in question.

III. APPROPRIATE ENFORCEMENT RESPONSE - GUIDING PRINCIPLES AND PRESUMPTIONS

The Penalty Statute and Regulations and various program statutes provide enforcement options from which DEP may select to address noncompliance. The selection of an appropriate enforcement response is integral to the DEP enforcement program. Upon discovering noncompliance, DEP managers and staff will be guided by the following principles and presumptions in determining an appropriate response. **The principles and presumptions apply to all regulated entities, except as otherwise provided.**

A. GENERAL PRINCIPLES

1) Whenever DEP staff discover noncompliance, the noncompliance will be addressed by an appropriate enforcement response which will, at a minimum:

   a) document the noncompliance;

   b) achieve a prompt return to compliance;

   c) whenever feasible, remedy the adverse impacts of noncompliance;

   d) escalate as appropriate based upon the conduct and compliance history of the violator and other relevant factors;

   e) impose sanctions which are credible and proportional to the nature and severity of the offense; and

   f) impose sanctions which are severe enough to deter future noncompliance effectively by the regulated entity and others in the regulated community.

2) The Penalty Statute and Regulations provide that when DEP addresses noncompliance through the administrative process, it must address the noncompliance either by issuing a written notice alleging noncompliance or by assessing an administrative penalty.

3) A **verbal warning** alone is **not** an appropriate enforcement response to the occurrence of noncompliance. When a verbal warning is given, it should be supported by an appropriate

enforcement response (e.g., a written notice alleging noncompliance or a penalty).

4) A **warning letter** is **not** an appropriate enforcement response to the occurrence of noncompliance, and should not be used in lieu of a written notice alleging noncompliance (e.g., FNON, a NON, an order or a consent order), **unless** the use of a warning letter is specifically authorized by an Assistant Commissioner, with input by Office of Enforcement, to effectuate the purposes of a comprehensive compliance assurance initiative. Examples of initiatives or programs in which use of a warning letter has been specifically authorized include:

   a) Clean State Program (Executive Order 350) -- In matters in which noncompliance would normally merit a NON, DEP will send a letter notifying the agency or authority of the noncompliance and extending an opportunity to handle the matter first through the Clean State program.

   b) BWP Printers Environmental Partnership -- DEP sent letters describing noncompliance observed during Round 1 inspections that were intended to establish baseline compliance among participants in the initiative. Each letter explicitly stated that it did not constitute a Formal enforcement action, but that it could serve as the basis for future enforcement action if the printer failed to correct the noncompliance described within 30 days.

   c) BWSC notification to Potentially Responsible Parties that a site to which they have a connection will be placed on a list of hazardous waste sites.

5) Under the administrative enforcement process, unless at least one precondition for assessment of an administrative penalty exists, as described in ERG Section III.C.1., a written notice alleging noncompliance must be the initial enforcement response to noncompliance rather than assessment of a penalty.

6) Instances of noncompliance falling within the categories listed in ERG Section IV - Presumptions for Higher Level Enforcement are presumed to warrant an enforcement response which includes consequences more severe than those resulting from issuance of a NON (e.g., administrative order, Penalty Assessment Notice, consent order (with or without a penalty), permit or license sanction, or judicial prosecution). This presumption may be overcome. However, at a minimum, cases involving such instances of noncompliance must be discussed at the RERC to determine appropriate enforcement strategy.

7) As a general rule, whenever, during a reinspection, DEP staff discovers that a regulated entity failed to comply fully with a NON, and that additional violations, not previously observed during the initial inspection, are evident, **DEP will address all noncompliance through one enforcement response.** The appropriate response will address the recurring or continuing violations appropriately, and will, at a minimum, provide notice of, and require compliance with the newly observed violations. Examples of this situation include:

   a) During an inspection, DEP staff observes several violations that it appropriately addresses with a NON. Upon reinspecting for compliance with the NON, DEP observes that some of the original violations remain uncorrected, and that some new violations, **never before observed**, now exist. The new violations, if otherwise observed alone, would warrant a NON. In this case, DEP responds appropriately by seeking execution of a consent order in which a penalty is sought for the recurring violations, and notice is provided, and compliance is sought for all violations observed during the reinspection.

   b) During an inspection, DEP staff observes several violations that it appropriately addresses with a NON. Upon reinspecting for compliance with the NON, DEP observes that some of

the original violations remain uncorrected, and that violations not observed during the earlier inspection now exist. A file review indicates that **some of the new violations were observed two years ago and addressed then with a NON and some were observed three years ago and addressed with a NON.** Because the noncompliance observed in past years and addressed with a NON is evidence of a pattern of noncompliance (see definition of "pattern of noncompliance"), DEP may seek a penalty for those violations as well as the most recent violations. DEP thus responds appropriately by seeking execution of a consent order in which a penalty and compliance is sought for all violations observed during the reinspection.

c) During an inspection, DEP staff observes four violations of requirements all of which qualify to be addressed by a Field NON, and issues a Field NON. Upon reinspecting for compliance with the Field NON, DEP observes that the violations originally observed remain uncorrected. Ordinarily, the uncorrected violations would be appropriately addressed by issuance of an Expedited PAN. However, **in addition to the recurring violations, several violations of requirements not qualifying for use of a Field NON are observed.** DEP responds appropriately by seeking execution of a consent order in which a penalty (above EXPAN limits) is sought for the recurring violations, and compliance is sought for all violations observed during the reinspection.

B. WRITTEN NOTICE ALLEGING NONCOMPLIANCE

A written notice alleging noncompliance may take several forms: Notice of Noncompliance, a Field Notice of Noncompliance, an administrative order or an administrative consent order. There are significant differences between a NON and an order in content and in the consequences for noncompliance. The differences render each type of notice appropriate for use in particular circumstances, and thus they may not be used indiscriminately.

1. Notice of Noncompliance (NON)

310 CMR 5.00, specifically at 5.12, prescribes that, in order to assess a penalty for continued noncompliance, a written notice alleging noncompliance must specify:

a) the requirement(s) with which the regulated entity failed to comply;

b) occasion(s) on which the alleged noncompliance was observed or discovered by DEP;

c) a reasonable deadline or deadlines by which the regulated entity is required either to:

i) come into compliance with the requirement(s) described in the NON, or

ii) submit to DEP a written proposal setting forth how and when the regulated entity proposes to comply with the requirement(s) described in the NON (310 CMR 5.12(2)).

The use of a NON is limited, and thus, a regulated entity does not have a right to appeal a NON. 310 CMR 5.12(2) provides DEP two options for how it may seek compliance through a NON. Under the first option, DEP may use a NON **to require compliance with a requirement** when the means or method of compliance is relatively straightforward or specifically detailed by regulation. Under the second option, DEP may use a NON to require **a written proposal describing how and when** the regulated entity proposes to comply when there is uncertainty about how and when a regulated entity may reasonably comply.

In those cases in which DEP wants to establish a legally enforceable deadline for compliance or cessation of activity, or where options for compliance exist and DEP wants to specify the terms of compliance, DEP should use an

administrative order, as discussed below. A regulated entity generally has the right to appeal a unilateral order.

Failure to comply with a NON is not itself a violation of law subject to a penalty, and thus DEP may not assess a penalty for violation of a NON independent of the violations cited within the NON, as it may do for violating an order (discussed more fully below). However, a NON is legally very significant. If a regulated entity fails to comply with a NON within a prescribed deadline, the Penalty Statute enables DEP to assess an administrative penalty for each day of noncompliance with the requirement(s) cited in the NON counting from the date the regulated entity received the NON.

A **Field NON (FNON)** is an abbreviated form of NON used to address a limited number of specifically identified violations, and may be issued in the field at the time of inspection. The FNON has the same legal force and effect as a NON. **[NOTE:** Staff should consult specific guidance on the use of FNONs for more detailed information.**]**

2. Administrative Order

Like a NON, an administrative order requires a regulated entity to take appropriate action to achieve and/or to maintain compliance with statutory or regulatory requirements by a specific date(s). An administrative order, however, differs from a NON in content and significance, and consequently, an order issued **unilaterally** by DEP is subject to **adjudicatory appeal**. **[NOTE:** As discussed below, a consent order is not subject to appeal since it constitutes an agreement between DEP and a regulated entity.**]**

An order, rather than a NON, **must be used** when DEP requires:

a) compliance by a particular means or method not already specifically prescribed in detail by law or regulation;

b) submission of information, a schedule or other action beyond what is specifically prescribed in detail by law or regulation;

c) correction of noncompliance by a legally enforceable deadline (generally to prevent further harm or risk of harm; and/or

d) cessation of an activity pending regulated entity's return to compliance.

An order, rather than a NON, **should be used** when:

a) DEP observes numerous violations involving different programs, especially where Class I violations are evident;

b) DEP oversight of regulated entity's return to compliance is required; and/or

c) a substantial amount of time is required for the regulated entity to return to compliance.

In addition to the differences in content between a NON and an order, the consequences for noncompliance with an order are more severe than for noncompliance with a NON. DEP administrative orders are issued under the authority of laws which state that violation of a DEP order constitutes violation of the law. Therefore, once an order is effective, failure to comply with it constitutes additional grounds for further enforcement action, independent of enforcement for underlying violations.

An administrative order issued unilaterally may generally be **effective and enforceable immediately upon issuance only** in those cases involving:

a) hazardous waste in which DEP finds that an imminent threat to public health, safety, welfare, or to the environment could result pending delay in compliance (M.G.L. Chapter 21C, Section 11 and 310 CMR 30.020);

b) releases or threats of release of oil or hazardous material in which DEP finds an imminent hazard exists or could result pending delay in compliance (M.G.L. Chapter 21E, Section 10(b) and 310 CMR 40.0010) **[NOTE:** An order issued pursuant to M.G.L. Chapter 21E, Section 10(b) is specifically excluded from the definition of "administrative order" in ERG Section II.**]**; and

c) violation of drinking water requirements pursuant to M.G.L. Chapter 111, Section 160 and 310 CMR 22.00.

All other unilateral administrative orders become effective and enforceable **only after all required adjudicatory hearing procedures have been completed** (i.e, either when no hearing has been requested within the prescribed deadline, when the case has been settled by agreement of the parties, or when a final decision has been rendered.).

Per Commissioner's Directive effective March 1, 1993, **all enforcement appeals are to be resolved within one year of filing**. **[NOTE:** Staff should consult specific program statutes to determine precise conditions for appeal in each program.**]**

In order for noncompliance with requirements cited in an administrative order or consent order to be subject to future administrative penalties, the order must incorporate all elements of a NON outlined in ERG Section III.B.1. above:

a) the requirement(s) with which the regulated entity failed to comply;

b) occasion(s) on which the alleged noncompliance was observed or discovered by DEP;

c) a reasonable deadline(s) by which the regulated entity is required either to
   i) come into compliance with the Requirement(s), or
   ii) submit to DEP a written proposal setting forth how and when the regulated entity proposes to comply.

3. Administrative Consent Order

A consent order is an administrative order, the terms of which have been agreed to by a regulated entity and DEP. As such, a consent order has the same legal force and effect as a valid, enforceable order. However, since a consent order constitutes an agreement with a regulated entity, it is not subject to appeal.

Pursuant to DEP Policy and Guidelines for Settling Civil Administrative Penalty Cases (POLICY ENF-90.002), negotiation and execution of a consent order to resolve enforcement cases are preferred over issuing an order unilaterally. **[NOTE:** Refer to POLICY ENF-90.002 for specific guidance, and note that **POLICY ENF-90.002 is enforcement sensitive and not a public document.]**

When an order has been issued unilaterally and appealed, a consent order may be used to resolve the appeal.

C. ADMINISTRATIVE PENALTY

M.G.L. Chapter 21A, Section 16 grants to DEP the authority to assess civil administrative penalties upon

persons who violate the requirements of environmental laws enforced by DEP. Regulations implementing such authority were promulgated on June 26, 1986, became effective on September 2, 1986, and are codified at 310 CMR 5.00.

The Legislature gave DEP this authority because it recognized that the Attorney General's office and the courts did not have the resources to penalize many violations that should be penalized.

In those cases described in ERG Section IV, Presumptions for Higher Level Enforcement, the use of administrative penalties should be considered a relatively routine sanction, not an extreme, "last-resort" step. One important purpose in assessing administrative penalties is to prevent small, currently harmless problems from becoming large, harmful ones. Administrative penalties are also an effective enforcement tool that may be used to:

a) promote environmental compliance and help protect public health by **deterring future violations** by the violator and other regulated entities;

b) **ensure that violators do not obtain an unfair economic advantage** over their competitors who made the necessary expenditures to comply in a timely manner by removing economic benefit realized as a result of noncompliance; and

c) **encourage regulated entities to adopt environmentally beneficial techniques** in order to minimize potential liability, including: pollution prevention, recycling, source reduction and resource conservation.

1. Preconditions for Assessment of An Administrative Penalty

As noted above, the Penalty Statute and Regulations provide that when DEP responds to noncompliance administratively, it must do so either by issuing a written notice alleging noncompliance or by assessing an administrative penalty. The Penalty and Statute set forth a **general rule** that upon discovering noncompliance, DEP may assess an administrative penalty, subject to certain exceptions, **only after DEP has issued a written notice of such noncompliance** and provided a reasonable opportunity for the regulated entity to return to compliance.

The Penalty Statute and Regulations set forth **exceptions to the general rule**, however, by providing that DEP may assess a penalty, without having issued a prior written notice of noncompliance, if the failure to comply:

a) is **willful**, and not the result of error; or

b) is part of a **pattern of noncompliance**; or

c) resulted in **significant impact** on public health, safety, welfare or the environment; or

d) consisted of **failure to promptly report** to DEP any unauthorized disposal of hazardous waste, as defined in M.G.L. Chapter 21C, or any unauthorized release or discharge of hazardous material, as defined by M.G.L. Chapter 21E.

[NOTE: Refer to ERG Section III-C, Preconditions for Assessment of A Civil Administrative Penalty, for detailed guidance on the use of each of these four preconditions.**]**

2. Factors Applied in Determining Amount of An Administrative Penalty

Whenever DEP seeks to assess an administrative penalty, the **Penalty Statute and Regulations (310 CMR 5.25) require DEP to consider specific factors** in determining the amount of each penalty:

a) the **actual and potential impact** on public health, safety, and welfare, and the environment, of the noncompliance;

b) the **actual and potential damages suffered**, and actual or potential **costs incurred**, by the Commonwealth, or by any other person, as a result of the noncompliance;

[NOTE: M.G.L. Chapter 21E enables the Secretary of the Executive Office of Environmental Affairs to recover Natural Resource Damages for release of oil or hazardous materials in addition to any penalties assessed for noncompliance.**]**

c) Whether the person took **steps to prevent the noncompliance**;

d) Whether the person took **steps to promptly return to compliance**;

e) Whether the person took **steps to remedy and mitigate whatever harm** might have been done as a result of the noncompliance;

f) Whether the person has **previously failed to comply** with any regulation, order, license, or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce;

g) Making noncompliance more costly than compliance **[NOTE:** Refer to DEP Guidelines for Evaluating Economic Benefit **-- UNDER DEVELOPMENT]**;

h) **Deterring future noncompliance**;

i) The **financial condition** of the person who would be assessed the Penalty **[NOTE:** Refer to DEP Guidelines for Evaluating Claims of Inability to Pay **-- UNDER DEVELOPMENT]**;

j) The **public interest**; and

k) Any other factor(s) that reasonably may be considered in determining the amount of a Penalty, provided that said factor(s) shall be set forth in the Penalty Assessment Notice.

3. General Guidelines Pertaining to Calculation of Administrative Penalties

The following guidance is consistent with, and should be considered in conjunction with the DEP Guidelines for Calculating Administrative Penalties (POLICY ENF-90.001). Staff should refer to POLICY ENF-90.001 for more detailed guidance in support of each of the following guidelines.

a) When calculating an administrative penalty, in each case **all upward adjustments should be made to determine** the regulated entity's maximum potential **penalty exposure, as that term is defined in ERG Section II, prior to any downward adjustments** being made on the basis of mitigating factors.

b) The **burden to demonstrate inability to pay** a penalty rests on the regulated entity. If the regulated entity fails to provide sufficient written documentation to support its claim, alleged inability to pay should not be considered in a penalty assessment determination. **[NOTE:** Refer to DEP Policy in Evaluating Claims of Inability to Pay **-- UNDER DEVELOPMENT]**

c) If a regulated entity satisfactorily demonstrates an inability to pay an appropriate penalty, in whole or in part, the next step **prior to a downward adjustment for inability to pay** should be consideration

of an alternative payment plan, as that term is defined in ERG Section II, to obtain the prescribed penalty.

d) If a regulated entity satisfactorily demonstrates that full payment of an appropriate penalty will significantly impede its ability to comply or perform a remedial measure, downward adjustments in the amount of the penalty should be considered.

e) The Penalty Statute and Regulations at 310 CMR 5.25(7) require DEP to consider making noncompliance more costly than compliance in calculating the amount of an administrative penalty. Use of the **economic benefit** adjustment factor ensures that noncompliance by the regulated entity is more costly than compliance. It is meant at a minimum to remove any economic benefits resulting from noncompliance. An estimate of economic benefit should be calculated and added to the gravity based penalty whenever there is an indication that a violation resulted in an economic benefit to the regulated entity and it is reasonably possible to quantify the benefit.

4. Penalty Mitigation in Particular Circumstances

The following principles are intended to provide guidance: to staff in how to consider the factors that the Penalty Statute and Regulations require DEP to apply in determining penalty amounts in particular types of cases; and to Bureaus in the design of comprehensive compliance assurance strategies:

a) There are **valid distinctions between small and large businesses** that may warrant mitigating a penalty differently between the two. **[NOTE:** Refer to DEP Interim Policy on Compliance Incentives for Small Businesses, (POLICY ENF-97.002).**]**

b) There are **valid distinctions between private (homeowner), commercial and public regulated entities** that may warrant mitigating a penalty differently between them. **[NOTE:** Refer to: DEP Interim Policy on Compliance Incentives for Homeowners **(Policy ENF-03-001 effective 10/17/2003)**; DEP Interim Policy on Compliance Incentives for Municipalities (POLICY ENF-97.003); and POLICY ENF.95-001.**]**

c) The exercise of enforcement discretion through penalty mitigation is a valid means of encouraging greater compliance by regulated entities through **self-audits**. **[NOTE:** Refer to DEP Interim Policy on Incentives for Self-Policing: Environmental Audit Policy (POLICY ENF-97.004, **revised ENF-07-002**).**]**

d) The performance of **a supplemental environmental project (SEP)** by a regulated entity is:

i) a valid demonstration of the existence of good faith **[NOTE:** Refer to POLICY ENF-90.001.**]**, and as such, may be used to mitigate a penalty amount;
ii) in the public interest **[NOTE:** Refer to POLICY ENF-90.001).**]**, and as such, may be used to mitigate a penalty; and
iii) a valid means of promoting certain goals, including environmental justice, pollution prevention, source reduction and resource conservation.

[NOTE: Refer to DEP Interim Policy on Supplemental Environmental Projects (POLICY ENF-97.005), updated 2/21/2007 ENF-07.001**]**.

D. LICENSE OR PERMIT SANCTIONS

Suspension or revocation of an approval previously issued by DEP may be necessary or appropriate in order to

address the source of a noncompliance problem effectively, particularly in cases in which either:

a) the actual or potential harm posed by continued noncompliance is high, and/or

b) other enforcement options have previously been used, and been insufficient to induce compliance or deter repeated noncompliance.

This option may be used alone, or together with other enforcement options. Relevant provisions in program-specific statutes, regulations and/or approvals identify the permissible grounds for suspension or revocation which vary between programs.

Note that **only DEP may suspend or revoke an approval** that it has issued, and that suspension or revocation of an approval must be in the form of an administrative order or consent order. If an order is issued unilaterally, suspension or revocation of an approval is generally effective and enforceable only after all required adjudicatory hearing procedures have been completed (i.e., either when no hearing has been requested within the prescribed deadline, when the case has been settled by agreement, or when a final decision has been rendered).

The only cases in which suspension or revocation is effective and enforceable immediately upon issuance of a unilateral order are those cases where:

a) DEP finds that an imminent threat to public health, safety, welfare, or to the environment could result from hazardous waste violations pending avoidable delay in compliance, pursuant to M.G.L. Chapter 21C, Section 11 and 310 CMR 30.020; and

b) the revocation, suspension or refusal to renew is based solely upon failure of the regulated entity to file timely reports, schedules, or applications, or to pay lawfully prescribed fees, or to maintain insurance coverage as required by any law or by regulation, pursuant to M.G.L. Chapter 30A, Section 13(3).

E. JUDICIAL ENFORCEMENT OPTIONS

1. Civil Judicial Prosecution

ERG Section III describes specifically the types of cases and criteria to consider for referral to the Office of the Attorney General ("AG") for civil judicial prosecution. However, as a general matter, cases involving the following situations should be considered for referral to the AG for civil judicial prosecution:

a) the violation or threat to public health, safety and welfare, or the environment is so serious that administrative processes are inappropriate;

b) administrative processes have already been used and have not been sufficiently effective to induce the regulated entity to respond appropriately;

c) legal issues raised are of such value that they should be litigated in court in order to establish legal precedent; or

d) attachments of property or other up-front financial security should be sought because of potentially large costs to the Commonwealth.

A case referred to the AG does not automatically have to be handled in its entirety by the AG. In appropriate cases, it is permissible to handle some aspects of a case through the judicial process, and other aspects handled through the administrative process. When a case is considered for judicial referral at the Case Screening Committee, discussion should include consideration of whether the AG will handle the case in its entirety or not. When a case is handled jointly,

the division of effort should be carefully coordinated between DEP and the AG.

Civil judicial prosecution has several advantages. In the event of an emergency, a judge can generally be found on short notice to hear the case, and impose some form of injunctive relief. Sanctions for violation of a court order are more severe than for violation of administrative actions. Effectively compelling a regulated entity to respond appropriately has a high deterrent value, and may result in DEP conserving its enforcement resources.

This option also has some disadvantages. Court proceedings are subject to more stringent rules of procedure and evidence than those in force in administrative proceedings. Therefore, preparing a case for court requires a commitment of effort and resources from both DEP and the AG. In addition, the AG, on behalf of DEP, must compete with others for the time and resources of the court, and must be able to persuade the judge about what is necessary and in the public interest.

In determining an appropriate enforcement response, DEP staff should consider the value of the following enforcement mechanisms that are available through civil judicial prosecution.

a. Injunctive Relief

Injunctive relief, in the form of a temporary restraining order, preliminary injunction, or permanent injunction, as defined in ERG Section II, may be appropriate in cases:

i) involving a significant release or threat of significant release of oil or hazardous material, or significant harm or threat of significant harm involving violation of hazardous waste or drinking water requirements; and/or

ii) in which activity must be immediately halted, or immediately initiated, to respond adequately to a significant threat to public health, safety, or welfare, or the environment; and

iii) in which a written administrative notice alleging noncompliance either will not be sufficient to induce a regulated entity to respond immediately and appropriately, or will otherwise not be an appropriate enforcement response.

b. Civil Judicial Penalty

Imposition of a civil penalty by a court requires referral of the case to the AG. In addition to prosecuting cases on behalf of DEP, the Attorney General and local District Attorneys have the right to seek a civil penalty in court independent of any recommendation by DEP.

In considering whether to recommend a case to the AG for a civil judicial penalty, one must note that assessment of a civil administrative penalty precludes imposition of a civil penalty by a court, and conversely, imposition of a civil judicial penalty precludes assessment of a civil administrative penalty. Imposition of a civil penalty by a court also precludes criminal prosecution.

Imposition of a civil penalty by a court has some advantages. The chief advantage is that in many cases, the potential amount of the penalty is much greater than that available with civil administrative penalties. Also, a court-imposed penalty attaches the added stigma associated with having a penalty assessed by a court rather than by an administrative agency.

A civil penalty imposed by a court is an option that is available in all cases to the extent appropriate and available. The option is particularly appropriate in cases in which:

i) a civil administrative penalty is inappropriate, or appropriate but would be too low due to limitations imposed by the Penalty Statute and Regulations;

ii) violations caused, or potentially could have caused significant actual harm to public health, safety or welfare, or the environment has occurred;

iii) the occurrence of violations can be proved by a preponderance of the evidence; or

iv) criminal prosecution if not appropriate or available based on the evidence of the case.

[NOTE: Refer to ERG Section III-E for detailed guidance concerning criteria for referral for civil prosecution.**]**

c. Cost Recovery

If DEP or its contractor conducts assessment, containment and/or removal action pursuant to M.G.L. Chapter 21E, DEP may seek recovery of these costs, and may recover up to three times the actual amount of these costs under certain circumstances. This option requires referral of the case to the Office of the Attorney General. **[NOTE:** Refer to ERG Section - Guidance on Applying Enforcement Actions Unique to M.G.L. Chapter 21E, scheduled for development.**]**

d. Compensation for Damage to Natural Resources

If a release or threat of release of oil or hazardous material resulted in injury to, or destruction or loss of natural resources, DEP may seek damages for such injury, destruction, or loss, pursuant to M.G.L. Chapter 21E, and the Comprehensive Environmental Response and Liability Act (CERCLA), Section 107(a)(4)(D). Such damages may include the costs of assessing and evaluating injury, destruction, or loss. DEP may seek such damages regardless of whether or not DEP or its contractor conducts assessment, containment, and/or removal action. This option requires referral of the case to the Office of the Attorney General. **[NOTE:** Refer to ERG Section - Guidance on Applying Enforcement Actions Unique to M.G.L. Chapter 21E, scheduled for development.**]**

2. Criminal Prosecution

Criminal prosecution requires referral of the case to the AG. In addition to prosecuting cases on behalf of DEP, the Attorney General and local District Attorneys have the right to initiate criminal prosecution independent of any recommendation by DEP.

In considering whether to recommend a case to the Attorney General for criminal prosecution, one must note that imposition of a civil penalty by a court precludes criminal prosecution, and conversely, a criminal conviction precludes assessment of a civil judicial penalty.

ERG Section III-E describes specifically the types of cases and criteria to consider in referring cases to the AG for criminal prosecution. However, as a general matter, criminal prosecution should be considered in cases in which:

a) the occurrence of violations can be proved in court beyond a reasonable doubt;

b) the violations actually caused, or potentially could have caused, significant harm to public health, safety, or welfare, or the environment;

c) the violations were the result of willfulness and/or negligence and/or indifference so serious that society should respond by imposing the stigma and punishment associated with being convicted of a crime.

The chief advantage of criminal prosecution is that it is the only option for which imprisonment is a possible punishment. As such, it carries the greatest deterrent value of any other enforcement mechanism. Also, it is the only option that attaches the stigma associated with being "convicted" of a "crime".

Criminal prosecution has several disadvantages. A person may be found guilty of a criminal charge only if guilt is proven beyond a reasonable doubt. This is a very stringent standard, and is very resource intensive to meet. Evidence must not only be sufficient to meet the standard, but must also be obtained in accordance with strict rules designed to protect constitutional rights. Substantial effort, time and resources, and careful coordination between DEP and the AG must be devoted to a case in order to obtain the necessary evidence in compliance with these rules. In addition, the AG, on behalf of DEP, must compete with others for the time and resources of the court, and must be able to persuade the judge about what is necessary and in the public interest.

F. FEDERAL ENFORCEMENT OPTIONS [RESERVED]

G. CHAPTER 21E ENFORCEMENT OPTIONS

This subsection briefly describes enforcement mechanisms that are unique to M.G.L. Chapter 21E and the Massachusetts Contingency Plan, 310 CMR 40.0000. These mechanisms are used in situations where DEP seeks to compel potentially responsible parties (PRPs) to conduct appropriate response actions. **[NOTE:** More specific guidance, Guidance on Applying Enforcement Actions Unique to M.G.L. Chapter 21E, is scheduled to be develop, and will be incorporated as an addendum to the ERG.**]**

The enforcement mechanisms discussed in this subsection may be issued to PRPs without DEP being required to establish that a regulated entity is responsible pursuant to M.G.L. Chapter 21E. However, in order to issue administrative orders pursuant to M.G.L. Chapter 21E, Section 10(b) and administrative penalties for violations of M.G.L. Chapter 21E, DEP must first establish that a regulated entity is responsible pursuant to M.G.L. Chapter 21E.

1. Notice of Responsibility (NOR)

A Notice of Responsibility (NOR) is a written notice informing a regulated entity that it is potentially liable under M.G.L. Chapter 21E, Section 5(a) for a release or threat of release. A NOR generally includes a brief statement explaining why DEP believes the recipient is responsible. Field NORs are included in this category.

A NOR does not refer to a large mailing that informs a group of PRPs of an impending deadline even if the mailing includes a general statement indicating that a person may have a connection to a site that may make them potentially liable.

2. Notice of Response Action (NORA)

A Notice of Response Action (NORA) informs PRPs in writing that DEP intends to undertake one or more actions to assess contain or remove a release or threat of release of oil or hazardous materials by a certain date. NORAs generally provide PRPs one last opportunity to perform work before DEP spends public funds to do so. A DEP threat to take action must be supported by a definite commitment by DEP to spend public funds to perform the work if the PRP fails to do so.

A NORA may be issued prior to, or in conjunction with a Notice of Intent to Mobilize (NOIM) (formerly referred to as a Notice of Commencement of Work (NOCW)). The NOIM informs property owners that DEP intends to enter property on a specified date to commence a response action.

3. Notice of Audit Findings (NOAF)

A Notice of Audit Findings (NOAF) provides written notice of the results of an audit conducted pursuant to Subpart K of the Massachusetts Contingency Plan, including notice of violations or deficiencies in a response action identified by DEP during an audit.

4. Request for Information (RFI)

A Request for Information (RFI) is a request issued by DEP to any person for documents or information relating to a location, site or vessel where oil or hazardous material is, or might be located. RFIs are issued pursuant to M.G.L. Chapter 21E, Sections 2, 4 and 8, and 310 CMR 40.0165.

5. Chapter 21E Section 10(b) Order

M.G.L. Chapter 21E, Section 10(b) enables DEP to issue orders to remedy an "imminent hazard", to apply for a permit to conduct response actions, or to conduct response actions at a listed site. **An order issued pursuant to M.G.L. Chapter 21E, Section 10(b) is not appealable.** However, a regulated entity subject to a Section 10(b) order may seek reimbursement from the Commonwealth after complying with the order provided that it was not already liable pursuant to M.G.L. Chapter 21E to perform a response action.

6. Cost Recovery Demand Letters

A Cost Recovery Demand Letter is any written demand for payment of costs incurred by DEP in conducting a response action.

7. Liens

A Lien refers to a written notice filed with a Registry of Deeds asserting DEP's claim of a lien on a property for response action costs owed pursuant to M.G.L. Chapter 21E.

8. Notice Revoking DEP Permits

A Notice Revoking DEP Permits refers to a written notice issued pursuant to M.G.L. Chapter 21E, Section 3B suspending or revoking DEP permits for failure to pay annual compliance fees required pursuant to M.G.L. Chapter 21E.

9. Notice of Determination Voiding a Response Action Outcome

A Notice of Determination Voiding A Response Action Outcome refers to a written notice that DEP has determined that a response action has not been completed at a site. Such notice is issued after DEP issues a Notice of

Noncompliance and/or Audit Finding, and **is not appealable**.

IV. PRESUMPTIONS FOR HIGHER LEVEL ENFORCEMENT

In the following situations, it is presumed that **an NON is not an appropriate response to noncompliance**, and that higher level enforcement should be taken. As defined in ERG Section II, higher level enforcement is any enforcement response with consequences more severe than those resulting from a NON, and includes administrative orders, Penalty Assessment Notices, administrative consent orders (with or without a penalty), permit or license sanctions, and civil and criminal judicial prosecution.

The presumption of higher level enforcement may be overcome. However, **at a minimum, cases involving the following situations should be discussed at the RERC** to determine appropriate enforcement strategy, and may be referred to the CSC for review, **unless they are explicitly excluded from those review processes**.

This list is not exclusive or exhaustive, and should not operate to limit evaluation of any cases for higher level enforcement. Higher level enforcement may be appropriate for serious or repetitive environmental violations other than those listed below. During the one-year interim period, this list may be supplemented by examples identified during RERC case reviews and through further discussion by the Bureaus.

A. NON PREVIOUSLY ISSUED

Cases in which a **NON has previously been issued** to a regulated entity **for violation of the same requirement(s)** observed presently, and the regulated entity:

1) failed to comply within the deadline specified in the NON, or with the Requirement(s) described in the NON; or

2) failed to submit a proposal for returning to compliance within the deadline specified in the NON; or

3) continued or repeated noncompliance with Requirement(s) described, or after the deadline specified in the NON.

B. VIOLATION OF ORDERS, CONSENT ORDERS, JUDICIAL DECREES

Cases involving **violations of outstanding administrative orders or consent orders or judicial decrees**.

C. CLASS I VIOLATIONS - $25,000 PENALTY LIMIT

Cases involving the **types of violations, the nature of which the Legislature considers to be especially serious**, as evidenced by its establishing a maximum potential penalty of $25,000 per day in M.G.L. Chapter 21A, Section 16 (i.e., **Class I Violations)**:

1) Any release, discharge or disposal of material into the environment without approval of DEP, or in a manner not approved by DEP, whenever such release, discharge or disposal requires the approval of DEP;

a) Abandonment of hazardous waste; [BWP/BWSC]

b) Discharges subject to NPDES permit without a permit; [BRP]

c) Groundwater discharges greater than 10,000 gallons per day without a permit; [BRP]

d) Industrial groundwater discharges without a permit; [BRP]

e) Disposal of wasterwater sludge or septage without authorization or an unrestricted use classification; [BRP]

f) Excess air emissions discovered through Excess Emissions Reports from Continuous Emissions Monitoring Systems; [BWP]

g) Air emissions of toxics caused by illegal storage and resulting in fires or evacuation of persons; [BWP].

2) Engaging in any business or activity without a license or other approval from DEP whenever engaging in such business or activity requires such license or approval by DEP;

a) Performing an Immediate Response Action that requires approval from Bureau of Waste Site Cleanup; [BWSC]

b) Violation of orders or permit conditions specifying terms of remedial response undertaken pursuant to M.G.L. Chapter 21E; [BWSC]

c) Unpermitted alterations of wetlands above performance standards required by regulation; [BRP]

d) Operating a commercial hazardous waste facility (including recycling) without a license even though all activities on site occur in compliance with regulatory requirements; [BWP]

3) Failure to promptly report to DEP each unauthorized disposal of hazardous waste, as defined by M.G.L. Chapter 21C;

a) Failure to report unauthorized disposal of hazardous waste in quantities within reportable quantity limits established in 310 CMR 40.0350. [BWP]

4) Failure to promptly report to DEP each unauthorized release or discharge into the environment of hazardous materials, as defined by M.G.L. Chapter 21E.

a) Failure to notify of a release posing an imminent hazard; [BWSC]

b) Failure to notify of a release that caused or is causing substantial or visible harm; [BWSC]

c) Failure to notify of large releases (greater than 10 times the reportable quantity limits); [BWSC]

d) Pattern of failing to notify of releases above Reportable Quantities (e.g., oil deliveries); [BWSC]

e) Failure to notify of a **threat** of release that could result in an imminent hazard. [BWSC]

D. SITUATIONS OF AN ESPECIALLY SERIOUS NATURE (NO PREVIOUS NON REQUIRED)

Cases involving **situations, the nature of which the Legislature considers to be especially serious**, as evidenced in M.G.L. Chapter 21A, Section 16, by its enabling DEP to assess an administrative penalty in these situations without having first issued a written notice alleging noncompliance:

1) Failure to comply is **willful, and not the result of error**;

   a) Abandonment of hazardous waste; [BWP/BWSC]

   b) Hazardous waste generator substantially exceeds accumulation quantities and/or permissible accumulation periods; [BWP]

   c) Developer alters a wetland without first obtaining an order of conditions or other required approval. [BRP]

2) Failure to comply is part of a **pattern of noncompliance**;

   a) Pattern of failing to notify of releases above reportable quantity limits established in 310 CMR 40.0350 (e.g., oil deliveries); [BWSC]

   b) Persistent failure to complete planning requirements of the Toxics Use Reduction Act and regulations; [BWP]

3) Failure to comply resulted in **significant impact** on public health, safety, welfare or the environment; or

   a) Odor violations from wastewater treatment plants or landfills. [BWP]

4) Failure to comply consisted of **failure to promptly report to DEP unauthorized disposal of hazardous waste** pursuant to M.G.L. Chapter 21C, or **unauthorized releases of hazardous materials** pursuant to M.G.L. Chapter 21E.

   a) Failure to report unauthorized disposal of hazardous waste in quantities within reportable quantity limits established in 310 CMR 40.0300; [BWP]

   b) Failure to notify of a release posing an imminent hazard; [BWSC]

   c) Failure to notify of a release that caused or is causing substantial or visible harm; [BWSC]

   d) Failure to notify of large releases (greater than 10 x reportable quantities; [BWSC]

E. IMMINENT HAZARD

Cases involving an imminent hazard or other threat where action cannot be responsibly delayed or deferred pending full completion of administrative or judicial proceedings. [BWSC]

F. BWSC COST RECOVERY CASES

BWSC cost recovery cases, especially those in which:

1) DEP seeks to recover more than $10,000 or will likely spend more than $100,000;

2) DEP has spent or will likely spend more than $10,000 and the regulated entity is in bankruptcy;

3) the statute of limitations for higher level enforcement is nearly expired and DEP has or could spend more than $10,000 or significant Nature Resource Damages have occurred.

[NOTE: These BWSC cases are not subject to RERC/CSC review process.**]**

G. SITUATIONS THAT DO NOT WARRANT HIGHER LEVEL ENFORCEMENT

The following situations are not considered to warrant higher level enforcement unless they are observed with other violations which do warrant higher level enforcement. This list is not intended to be exclusive or exhaustive, and, as noted above, may be supplemented as experience dictates.

1) Six or fewer violations of requirements specifically identified as qualifying for use of a FNON or EXPAN;

2) Failure to obtain an air quality program Limited Plan Approval (310 CMR 7.02(2)(b));

3) Violations of record-keeping requirements at automotive refinishers (310 CMR 7.03(13)(k)).