POLICY ON COMPLIANCE INCENTIVES FOR MUNICIPALITIES

(MUNICIPAL POLICY)

POLICY ENF-97.003

I. INTRODUCTION

A. PURPOSE AND INTENT

This policy sets forth how the Department of Environmental Protection (DEP) expects to exercise its enforcement discretion in determining an appropriate enforcement response and, where applicable, the amount of an administrative penalty to be assessed against municipal entities.

Municipalities confront unique constraints in complying with environmental requirements:

*Public financing typically is more cumbersome than for regulated entities in the private sector;

*Municipal functions can trigger large enviromental obligations which may overwhelm municipal tax bases;

*Some municipal noncompliance occurs in areas in which the municipality is the enforcement lead (e.g., conservation commissions), creating political tensions within the municipality; and

*Despite noncompliance, some services provided by a municipality are essential and must often continue to operate (e.g., provision of water and sewer service).

Despite the unique constraints typically experienced by municipalities, every municipality is required to comply fully with the statutes and regulations administered by DEP, and will be regulated in a manner consistent with regulated entities in the private sector to the fullest extent possible.

However, in recognition of the unique constraints experienced by municipalities, this policy is intended to:

1) provide incentives for municipalities to:

*identify and address existing and potential compliance problem areas aggressively through self-policing;

*improve environmental performance by establishing policies and practices which emphasize pollution prevention, source reduction and resource conservation;

*enable municipal personnel to perform their functions consistent with environmental regulatory requirements;

*address environmental performance by municipal personnel and ensure full accountability of environmental functions; and

2) achieve statewide consistency in responding to non-compliance by municipalities by providing guidance to DEP staff on the exercise of enforcement discretion in such cases.

B. APPLICABILITY AND LEGAL EFFECT

This policy applies to all administrative enforcement actions against a municipality within Massachusetts, regardless of whether the noncompliance was detected through a DEP inspection, report from the public, a self-report resulting from regulatory or permit requirements, compliance assistance, a municipal environmental audit or documented, systematic due diligence, or otherwise self-disclosed.

This policy applies to all such actions commenced after the effective date of this policy, April 26, 1997, and to all pending administrative cases in which DEP has not reached

agreement in principle with the regulated entity on the amount of an administrative penalty.

This policy supplements the principles and presumptions in Sections III and IV of the Enforcement Response Guidance (ERG), and should be read in conjunction with them.

The DEP Interim Policy on Incentives for Self-Policing: Environmental Audit Policy (POLICY ENF-97.004) does not apply to municipalities. Instead, this interim policy sets forth in Section IV how DEP expects to exercise its enforcement discretion in determining an appropriate enforcement response and administrative penalty for violations discovered during the course of an environmental audit voluntarily performed by a municipality.

This policy does not apply to settlements of claims for stipulated or suspended penalties for violations of consent orders or other settlement agreement requirements.

II. DEFINITIONS

For the purposes of this policy, the following definitions apply. Some terms used in this policy may also be more fully discussed in the ERG.

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

"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 as defined here 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.]

"Due diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of each of its facilities or operations, 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);

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 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.

"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.

"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), on the basis of:

* the actual and potential impact of the violations;

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

* multiple days of occurrence;

* existence or lack of good faith;

* financial condition of the regulated entity; and

* 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.]

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

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

"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 - MUNICIPALITIES

The selection of an appropriate enforcement response is integral to the DEP enforcement program. In determining an appropriate response upon discovering noncompliance by a municipality, DEP managers and staff will be guided by the principles and presumptions that are described in ERG Sections III and IV, except as otherwise provided below.

M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00 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.

A. NOTICE OF NONCOMPLIANCE

As with any regulated entity, DEP's initial enforcement response to violations by a municipality will be a Notice of Noncompliance (NON), or a Field NON (FNON), where applicable, provided that:

* none of the preconditions for assessment of an administrative penalty exists, as described in ERG Section III.C.1.; and

* the violations are not within the categories listed in ERG Section IV - Presumptions for Higher Enforcement.

When DEP issues an NON, DEP will encourage the municipality to seek compliance assistance, as defined and discussed in this policy, preferably from a third party or government supported program that offers services to municipalities, in order to return to compliance, assure future compliance and institute alternative waste management techniques or enhance protection of natural resources.

B. DEADLINES FOR RETURNING TO COMPLIANCE

In setting deadlines for actions required for a municipality to cease polluting and implement any necessary emergency measures, DEP will establish reasonable deadlines consistent with those imposed against regulated entities in the private sector for violations of the same or similar requirements.

Similarly, in setting deadlines for actions required for a municipality to return to compliance, DEP will establish reasonable deadlines consistent with those imposed in the private sector. DEP will, when appropriate, incorporate time needed to appropriate funds and/or to accomodate the public bidding process. If the municipality requires additional time to comply, the municipality must demonstrate to DEP that additional time is required, identify potential funding source(s) to perform necessary work, explain strategy to obtain authorization and ultimate use of the funds, and provide a schedule for compliance.

C. ADMINISTRATIVE PENALTY CALCULATION AND MITIGATION

If any violations are within the categories listed in ERG Section IV - Presumptions for Higher Level Enforcement, or otherwise warrant the assessment of an administrative penalty, DEP will consider the assessment of a penalty that is consistent with those assessed against regulated entities in the private sector for violations of the same or similar requirements. In such cases, the presumption of higher level enforcement may be overcome as a result of review by the

Regional Enforcement Review Committee and possibly the Case Screening Committee.

DEP will not waive an administrative penalty simply because the regulated entity is a municipality. DEP, in its sole discretion, will exercise its enforcement discretion under M.G.L. Chapter 21A, Section 16 to mitigate administrative settlement penalties in cases involving municipalities as follows:

1) As provided in the Calculation Guidance, DEP staff will first calculate all upward adjustments to the penalty base numbers on the basis of all facts known about the violations. DEP will then calculate any downward adjustments based on relevant facts to mitigate the penalty and arrive at an appropriate final penalty amount.

2) If a municipality claims an inability to pay the full penalty, or otherwise raises financial constraints, the burden is on the municipality to demonstrate why such constraints result in an inability to pay a full penalty or significantly impede its ability to comply or perform a remedial measure. DEP will not accept claims of, or assume financial constraints on a municipality without detailed substantiation from a municipal official, normally the chief municipal officer, with direct responsibility for the municipality's financial status.

3) If a municipality satisfactorily demonstrates an inability to pay the penalty, in whole or in part, DEP staff should first consider the use of an alternative payment plan, as that term is defined in ERG Section II, to obtain an appropriate penalty prior to considering suspension or waiver of a penalty. DEP staff should consider suspending or waiving a penalty based solely on inability to pay only when a municipality demonstrates that payment of any penalty will impede its ability to comply or perform a remedial measure.

4) DEP may suspend or waive the entire administrative penalty in an enforcement action against a municipality, even when a municipality has not claimed financial constraints, regardless of whether noncompliance was detected through a DEP inspection, report from the public, or self-report resulting from regulatory or permit requirements, compliance assistance or a municipal environmental audit, or otherwise self-disclosed, provided that all of the following conditions are satisfied within the terms of an administrative consent order:

a) Municipality agrees to return to compliance promptly, and remedy any adverse impacts of noncompliance within a reasonable period of time; and

b) Noncompliance has not caused actual harm to public health, safety or welfare, or the environment, or otherwise presented a significant threat; and

c) Noncompliance does not involve criminal conduct; and

d) Municipality demonstrates a good faith intention to maintain future compliance with all applicable environmental requirements by:

i) obtaining on-site compliance assistance from a Licensed Site Professional, other third party or government supported program that offers services to municipalities, provided that such services are not already required by law or regulation; and/or

ii) conducting a municipal environmental audit that conforms with terms and conditions described in Section IV of this policy; and

iii) where response actions are required pursuant to M.G.L. Chapter 21E and 310 CMR 40.0000, conducting risk reduction measures on an expedited basis and paying a penalty equal to any Tier IB compliance fees that may have been avoided.

[Note: In the event that a municipality seeks penalty mitigation under Section IV of this policy for noncompliance initially discovered through on-site compliance assistance or an environmental audit, satisfying this condition is not required since it has effectively been satisfied.]

e) Municipality or appropriate municipal department agrees to investigate pollution prevention, source reduction and resource conservation opportunities, and implement them, as established to be feasible by the municipality and agreed to by DEP; and

f) Municipality has not been the subject of a higher level enforcement action, as that term is defined in ERG Section II, for violations of environmental requirements, which has been initiated within five (5) years of the current noncompliance.

If a municipality does not satisfy all of the conditions for mitigation described above, DEP will not suspend or waive the entire penalty, but may mitigate the penalty consistent with the degree to which the conditions are satisfied, and with the factors set forth in M.G.L. Chapter 21A, Section 16, as they relate to the facts of the specific case.

D. COMPLIANCE ASSISTANCE

The content of compliance assistance varies greatly, and may be delivered in a variety of ways. The penalty mitigation considerations provided by this policy are restricted to on-site compliance assistance in order to increase the potential for violations to be detected and thus corrected.

Compliance assistance does not include basin assessments or surveys, facility inspections or enforcement actions. DEP does not have the resources to provide on-site compliance assistance to all municipalities that may seek it. DEP may, however, refer a municipality to other public or private sources of assistance that may be available. This policy does not create any right or entitlement to compliance assistance.

IV. MUNICIPAL ENVIRONMENTAL AUDITS

This section sets forth how DEP expects to exercise its enforcement discretion in determining an appropriate enforcement response and administrative penalty, where appropriate, for violations discovered during the course of a municipal environmental audit.

A. INCENTIVES FOR SELF-POLICING

Where the municipality has established that it satisfies all of the conditions of Section IV.B. below, DEP may exercise its enforcement discretion by providing the following incentives to encourage voluntary self-policing.

1. No Notice of Noncompliance

If the initial enforcement response for the violations would normally be a Notice of Noncompliance (NON), DEP will not

issue a NON, or otherwise use the violations to establish a foundation for future enforcement.

2. No Punitive Penalties

If any violations warrant the assessment of an administrative penalty, DEP will not seek a punitive penalty, as that term is defined in this policy, for the violations. This policy limits the complete waiver of the punitive portion of the penalty to municipalities that discover violations through either (a) a municipal environmental audit, as defined in this policy, or (b) a documented, systematic procedure or practice which reflects the municipality's due diligence, as defined in this policy, in preventing, detecting, and correcting violations. The municipality has the burden of establishing that it satisfies all conditions of Section IV.B., and is entitled to a waiver of the punitive penalty.

It is DEP's practice to collect any economic benefit that may have been realized as a result of noncompliance, even where a municipality has met all other conditions of Section IV of this policy. Recovery of economic benefit may be waived, however, where DEP determines that it is insignificant.

Further, waiver of a punitive penalty does not include waiver of the obligation to remediate harm caused by any violation of environmental requirements. DEP reserves the right to use the record of such violations as a foundation for establishing a pattern of noncompliance as a component of any future enforcement action.

If the municipality sufficiently demonstrates an inability to pay the economic benefit, and satisfies all of the conditions of Section IV.B. of this policy, DEP may offer an alternative payment plan, as that term is defined in ERG Section II, to recover all or part of the economic benefit.

If the municipality sufficiently demonstrates that payment of any penalty will significantly impede its ability to comply or perform a remedial measure, DEP may suspend or waive payment of any penalty. In this case, DEP staff should first consider the use of an alternative payment plan to recover at least a portion of the economic benefit prior to considering waiver of the full amount.

3. Reduction of Punitive Penalty by 50%

Municipalities often discover violations through means less systematic than an environmental audit. To provide encouragement for this kind of self-policing, DEP will reduce the penalty for any violation of environmental requirements up to 50% of the punitive penalty, provided that the municipality satisfies all of the conditions of Section IV.B.(2) through (9) below (i.e., the municipality voluntarily discovered, promptly disclosed and expeditiously corrected a violation even though it was not found through an environmental audit and the regulated entity cannot document due diligence). Specifically, DEP will reduce the punitive portion, not including the municipality's economic gain from noncompliance, up to 50%.

In resolution of these cases, the establishment of a management process that satisfies the six (6) criteria included in the definition of due diligence should be included as a term of settlement as appropriate to the nature and size of the regulated entity.

4. No Criminal Recommendations

DEP will not recommend to the Massachusetts Office of the Attorney General or other prosecuting authority that criminal charges be brought against a municipality where DEP determines that all of the conditions in Section IV.B. are satisfied and where the violations, in the judgment of the DEP/AG Case Screening Committee, do not demonstrate or involve:

(a) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

(b) high-level municipal officials' or managers' willful blindness, as that term is defined in this policy, to the violations, or conscious involvement in the violations after blindness.

Whether or not DEP recommends the municipality for criminal prosecution under this section, DEP reserves the right to recommend prosecution for the criminal acts of individual municipal officials, managers or employees.

Whether or not DEP recommends the municipality for criminal prosecution under this section, the Massachusetts Office of

the Attorney General and other prosecuting authority retain independent authority to initiate criminal charges against a regulated entity.

5. No Routine Request for Audit Reports

DEP will not routinely request or use a municipal environmental audit report, as that term is defined in this policy, to initiate an investigation of, or an enforcement action against the municipality. For example, DEP will not routinely request environmental audit reports when it conducts inspections. However, if DEP has reason to believe, independent of information in an environmental audit report, that a violation has occurred, DEP may seek any information, including environmental audit reports, relevant to identifying violations and determining liability or extent of harm.

DEP reserves its right to inspect a municipal facility or operation after deadlines for correcting noncompliance disclosed through a municipal audit have elapsed. In addition, DEP will inspect a facility at any time should it have reasonable cause to believe that an imminent threat or actual harm has occurred and is ongoing at the time.

B. CONDITIONS TO SATISFY FOR PENALTY RELIEF

1. Systematic Discovery

The violation was discovered through:

(a) a municipal environmental audit, as defined in this policy; or

(b) an objective, documented, systematic procedure or practice reflecting the municipality's due diligence in preventing, detecting, and correcting violations. The municipality must provide accurate and complete documentation to DEP as to how it exercises due diligence to prevent, detect and correct violations according to the criteria outlined in the definition of due diligence in this policy. DEP may require as a condition of penalty mitigation that description of the municipality's due diligence efforts be made publicly available in order to allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance

and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring, testing, record-keeping, reporting, sampling or notification requirement prescribed by statute, regulation, license, permit, judicial or administrative order, consent order or agreement. For example, this policy does not apply to:

(a) self-certification statement required under the DEP Environmental Results Program;

(b) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(c) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or

(d) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The municipality fully discloses to DEP a specific violation within ten (10) days (or such shorter period required by law) after it has discovered that the violation occurred, or may have occurred. Where a statute or regulation requires reporting be made in less than ten (10) days, disclosure shall be made within the time limit established by law.

The initial notification of a violation pursuant to this policy may be by telephone call within the ten-day period, but must then be confirmed in writing within five (5) days of the telephone call. Both must be received by the responsible compliance and enforcement manager, or designated alternate in the appropriate DEP office.

In situations where the violation is complex and the municipality believes that it cannot definitively determine compliance within the ten-day period, the municipality must

notify DEP of the situation within the ten-day period, request an extension of time, assume the burden of showing that additional time is needed to determine compliance status, and work with DEP to make a definitive determination of compliance status. DEP may extend the period of time if the circumstances do not, in the sole discretion of DEP, present a serious threat and the municipality meets its burden of showing that the additional time was needed to determine compliance status.

4. Discovery and Disclosure Independent of Government or Third Party

The violation must also be identified and disclosed by the municipality prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the municipality;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third-party;

(d) the reporting of the violation to DEP (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the municipality; or

(e) discovery of the violation through any other means by a regulatory agency.

5. Correction and Remediation

The municipality corrects the violations within thirty (30) days of discovery, certifies in writing that violations have been corrected, and takes appropriate measures as determined by DEP to remedy any harm to public health, safety and welfare or the environment due to the violation.

If DEP determines that an imminent threat to public health, safety or welfare, or the environment results, or could result from the violations, DEP may, pursuant to any relevant authority, require correction of violations and remediation of any harm earlier than thirty (30) days of the municipality's discovery.

If more than thirty (30) days will be needed to correct the violations, the municipality must notify DEP in writing before the thirty-day period has passed, request an extension of time, identify potential funding source(s) to perform necessary work, explain strategy to obtain authorization and ultimate use of the funds, and provide a schedule for compliance.

Where appropriate to satisfy conditions 5 and 6, DEP may require that a municipality enter into an appropriate, publicly available, enforceable agreement (e.g., administrative consent order). Where compliance or remdial measures are particularly complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required, DEP and the municipality should consider the development of a municipal Environmental Master Plan.

DEP may require the municipality to agree to a stay of the statute of limitations if necessary to assure completion of remediation.

6. Prevent Recurrence

The municipality agrees in writing to take steps to prevent a recurrence of the violation, which may include, but not be limited to improvements to its environmental auditing or due diligence efforts.

7. No Previous Higher Level Enforcement

The specific violation (or closely related violation) has not been included in a higher level enforcement action, as that term is defined in ERG Section II, taken by DEP, the Massachusetts Office of the Attorney General, or U.S. Environmental Protection Agency against the municipality within the past five (5) years at the same municipal facility or operation, or is not part of a pattern of federal, state or local violations by the municipality which have occurred at other municipal facilities or operations within the past three (3) years.

For purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law or regulation identified in a judicial or administrative

order, consent agreement or order, complaint, conviction or plea agreement; or

(b) any act or omission for which the municipality has previously received penalty mitigation from DEP.

8. Other Violations Excluded

The violation is not one which, in the sole discretion of DEP:

(a) resulted in actual harm, or presented a significant risk of harm to public health, safety or welfare, or the environment;

(b) violates the specific terms of any administrative or judicial order, or consent agreement; or

(c) results from a failure to timely notify DEP of a release or threat of release of oil and/or hazardous materials.

9. Cooperation

The municipality cooperates as requested by DEP, and provides such information as is necessary and requested by DEP to determine applicability of this policy. Cooperation includes, at a minimum, providing reasonable site access, all requested documents and access to employees and assistance in investigating the violation, any noncompliance related to the disclosure, and any environmental consequences related to the violations.