

Decoding the Enforcement Alphabet¹

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Aside from discovering one has suddenly entered “The MCP Zone,” what most Potentially Responsible Parties (PRPs) would probably like to avoid is the maze of DEP enforcement: NONs, UAOs, ACOs, ACOPs, NOIMs, NORAs, PANs, Stips, SEPs, Attorneys General and penalties. Last fiscal year’s assessed penalties ranged from \$250 to near \$50,000. Why one tool and not another? Where’s the logic?

There are ways to *avoid* enforcement. As discussed in the “Timelines” issue in March of this year, timely reporting, relevant and adequate progress through the phased MCP process, and submitting **completed** reports to MassDEP within the MCP deadlines is the first (and best) defense. (While we often hear that these only sound like “paperwork” violations, in a semi-privatized program these submittals are the only documentation that work is progressing. If there is no documentation, MassDEP can only assume the work is not done. If you hear no sound in the forest, has a tree fallen?) When required reports are not submitted, or if they are incomplete, there are standard steps MassDEP will initiate to ensure compliance with the MCP. This month, we’ll look at those steps with a few examples from our files. Be advised these are *general* steps: regions consider the facts of particular cases, risks from the non-compliance, and PRP situations when negotiating enforcement. Summaries of DEP enforcement by calendar year may be found at: <http://www.mass.gov/dep/public/press/enforce.htm>.

NONs

Typically, enforcement starts with a Notice of Noncompliance or a “NON.” Initially, a NON is considered a means to bring a site back into compliance, such as after an audit; other times it’s due to a missed deadline flagged by a database query (e.g., missing Status Reports). In most cases, MassDEP will issue a NON and give the PRP a deadline to return to compliance.

ACOs/ACOPs

If a PRP indicates they cannot make the deadline and requests an extension, the next step is typically the entry into “higher level enforcement,” usually Administrative Consent Orders or ACOs. Multiple requests for extension of MCP deadlines have also been addressed with ACOs. ACOs include deadlines that are negotiated between a PRP and MassDEP, and to which a PRP agrees in writing. In most cases the ACO will include Stipulated Penalties (or “Stips”) in the event of failure to meet new deadlines, typically \$1,000 per day for each day of violation. If a PRP notifies the Department in a timely way (i.e., in writing, at least two weeks prior to the deadline) that they cannot meet the original deadlines for a valid reason, an Amended ACO may be negotiated.

Failing to meet deadlines established in a NON or an ACO without a prior request for an extension, certain willful violations of the MCP (e.g., non-notification), or failure to address a serious risk, such as failure to conduct an Immediate Response Action as required, *or* conducting an IRA without approval may all trigger higher level enforcement and go directly to Administrative Consent Orders with Penalty (ACOP) without MassDEP first issuing a separate NON. Penalties for individual MCP violations listed in an ACOP depend on the Class of the violation as determined by the Penalty Statute. During the

¹ A scary topic for the Halloween season.

enforcement conference, MassDEP has a certain amount of discretion to negotiate a reduced penalty, or a partially suspended penalty (e.g., to encourage a quick settlement) pending full future compliance by the PRP *if* the PRP is demonstrating a good faith effort and is making progress toward the required assessment and/or clean up. In some cases, a Supplemental Environmental Project or SEP may also be proposed. Generally a SEP must benefit the community where the violations occurred - beyond the work required to meet the cleanup requirements.

Below are some examples of ACOs, ACOPs, Amended ACOs, assessed penalties, amounts suspended pending compliance, and one SEP.

5/15/12: MassDEP negotiated an ACO with the PRP for failure to file an RAO, DPS or Tier Classification within one year of a reported release of petroleum that occurred in Bridgewater. The PRP contacted MassDEP prior to the deadline established in the NON indicating that they could not make the submittal by the deadline established in the NON. The ACO establishes timelines for future submittals for compliance with the BWSC regulations.

3/2/12: MassDEP entered an *Amended ACO* with the PRP for BWSC violations in Gloucester. The violations were associated with a final RAO statement submitted to MassDEP on 4/19/11. MassDEP audited this RAO and found four violations. The company had submitted the RAO in response to a previous ACO with MassDEP. Under the Amended ACO, the PRP is required to submit a Ph II, Ph III and Ph IV as site conditions require. The Amendment sets a reasonable schedule for site investigations and document submittal.

6/1/12: MassDEP entered an ACOP for \$6,612.50 with the PRP for BWSC violations in Leominster. The PRP, based in Fitchburg, was cited for violations following a release of home heating fuel oil at a residence located in Leominster on 1/6/11. MassDEP was not made aware of the release until 3/14/11 when called by the local Board of Health following their inspection of a complaint concerning oil on the road near the release. Under the ACOP the PRP agreed to review and revise its spill management plan, and pay the full \$6,612.50 Penalty for its failure to provide timely notification, and for its failure to conduct an IRA at the site.

4/26/12: MassDEP entered an ACOP for \$4,025 with the PRP for BWSC violations in New Bedford Harbor in New Bedford. Specifically, this corporation failed to notify MassDEP following the release of oil greater than the reportable quantity. On 5/24/11 an undetermined quantity of dyed fuel oil was released from a commercial fishing vessel to the surface waters of New Bedford Harbor. Oil traveled from New Bedford to Fairhaven where it was observed by the town's Harbormaster, leading to a notification to MassDEP by the Harbormaster, but not - as required - by the PRP. An enforcement conference revealed that maintenance personnel aboard the fishing vessel became aware of the release, but failed to notify MassDEP within two hours as required. *A SEP was approved as mitigation for the Penalty portion. Under this SEP, the corporation will pay \$3,019 to the Buzzards Bay Coalition's Water Quality Monitoring program, which samples surface water in New Bedford Harbor and Buzzards Bay.*

UAOs/PANs

If a PRP does not attend the Enforcement Conference, or if a negotiated settlement cannot be reached and time critical actions or Imminent Hazards are *not* present, MassDEP may initiate unilateral

enforcement with a Unilateral Administrative Order (UAO) instructing the PRP to complete the required work, and then issue a Penalty Assessment Notice or PAN. These penalties are typically much higher than negotiated penalties.

6/27/12: MassDEP issued a PAN for \$32,000 to a PRP for BWSC violations in Ashburnham, specifically failure to submit RAM status reports; a Ph II CSA; a Ph III RAP; and, a Ph IV RIP. *MassDEP had issued a NON in 2010 for failing to make the requisite submittals. An enforcement conference was held in October 2011, however, the PRP's Trustee did not respond to MassDEP's attempts to negotiate an ACO.*

1/17/12: MassDEP issued a \$250 PAN to two PRPs of West Springfield who improperly disposed a bucket of used motor oil. The incident was captured on 10/8/11 by a nearby surveillance camera installed by the Environmental Strike Force. The PRPs were identified with vehicle information captured by the camera.

6/6/12: MassDEP issued a UAO to the PRP due to BWSC violations in Springfield. On 10/30/11 at approximately 3:00 a.m. a tractor-trailer unit owned and operated by the PRP caught fire in the vicinity of Exit 2B on Route 291. The fire was extinguished by the Springfield Fire Department but petroleum products, including diesel fuel, motor oil and oil from the melting of the truck's tires, were released to pavement and into the storm drain system. MassDEP inspected the site and observed petroleum-stained pavement, impacted storm drains and a discharge to the Connecticut River. Oily residue from the fire was present at the discharge impoundment. The PRP retained an emergency response cleanup contractor to address the spill. MassDEP provided oversight of the cleanup actions on 10/30/11. Although the cleanup was successfully completed, the PRP failed to submit documentation from the cleanup, and failed to respond to a NON issued in December 2011 establishing a deadline to submit the required information. The UAO required submittal of the missing cleanup documentation, including an RNF and IRA Plan and/or RAO statement.

NORAs/NOIMs/Attorneys General

Finally, MassDEP BWSC has the ability to use state contractors to conduct time critical work if a PRP is unable or unwilling to do so, particularly if there *are* Imminent Hazards or potential Imminent Hazard conditions present. If MassDEP intends to use a state contractor, MassDEP will attempt to issue a Notice of Response Action or "NORA" informing the PRP that MassDEP plans to expend state funds to conduct response actions. This notice outlines the PRP's liability and provides a deadline for the PRP to convince the Department that the PRP is able to conduct the work. If the PRP does not comply with this deadline, MassDEP will hire a contractor to conduct the work. Before the contractor begins the work, MassDEP may also issue a Notice of Intent to Mobilize or "NOIM" establishing the date that MassDEP and its contractor will be in the field.

If MassDEP expends funds at a site, MassDEP will often work with the Massachusetts Attorney General's Office – Environmental Division to recover the costs of the work (and this can be up to three times the costs expended) and to ensure that the remaining response actions are completed. In order to ensure that the costs are recovered, MassDEP could place a lien on the property.

In conclusion, it's better not to enter the **ENFORCEMENT ZONE.**