

When It Comes to Penalties, Deadlines Matter

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It has been some time since we've covered Audit or Enforcement cases in this column. This month we'll cover some cases where BWSC assessed penalties as part of Higher Level Enforcement (HLE) in the past twelve months. The cases presented are loosely grouped in three sections.

The first group is where HLE followed multiple years of missed deadlines and Notices of Noncompliance (NONs). The second group of HLE is cases with failures to timely notify and exacerbated by taking response actions without approval and before notification. The third group of HLE includes sites where risk or site conditions were *exacerbated* by actions taken in contradiction to MCP requirements.

Multiple Missed MCP Deadlines

Nearly all HLE includes citations for missing or late submittals – but, are there other problems too? If Tier Classification wasn't submitted by the appropriate deadline, is the progress of the assessment work *also* in question? If an Immediate Response Action (IRA) Status Report is missing, are there people now at risk or did the Respondent just stop work? It is important to think of missed deadlines as a symptom of a more serious problem.

Northampton – ten years of missing/late reports: MassDEP issued an ACOP for or a site with a #2 fuel oil release from an underground storage tank (UST) at a small business building that leaked to soil and groundwater. The original notification was in August 2000 and an IRA was proposed to conduct removal of the UST, petroleum contaminated soil, soil sampling and analysis, and installation of groundwater monitoring wells and a groundwater recovery well. In December 2000, 8 inches of floating product were detected in one of the monitoring wells. In June 2001, a Tier II Classification was submitted. The property changed hands in 2004. In 2005 a new Notice of Responsibility was issued and new deadlines were set for submittals. By 2006 the new PRP was out of compliance. The next few years fell into a pattern of MassDEP issuing NONs for delayed reports and the PRP eventually submitting those reports – until 2009 and 2010. During an enforcement conference, the Respondent agreed to the terms of an ACOP with a new schedule for submittals showing progress toward an RAO. July 2011. Assessed penalties: \$5,000. (RTN 1-13601)

Somerville – multiple overdue MCP submittals: MassDEP issued an ACOP for a site where fuel oil was released during removal of a UST in August 1993. The timing put the site into the “Transition Site” universe and while initial specified deadlines were met for a Phase I and Tier Classification, by 2002 the site was overdue for a Phase II. In June 2005 the PRP failed to submit a Release Abatement Measure (RAM) Status Report. A NON was issued in November 2008. MassDEP held an enforcement conference with the PRP in February 2009 and issued an

Administrative Consent Order (ACO) with a schedule to return to compliance. In September 2011, the PRP contacted MassDEP to say they could not meet the ACO deadlines. At a second enforcement conference in November 2011, the Respondent agreed to the ACOP timelines. A Class A-2 RAO was filed in February 2012. November 2011. Assessed penalties: \$5,000 (\$3,000 suspended, pending compliance). (RTN 3-4801)

Watertown – failure to meet MCP deadlines: MassDEP issued an ACOP with Stipulated Penalties for a site where gasoline was released at an auto repair and gasoline dispensing facility. The release was reported on May 12, 2010 and a RAM Plan was submitted on July 1, 2010. Although the first RAM Status report was received on time, subsequent submittals (Phase I, Tier Classification) were not received. A NON was issued in September 2011. An amended NON was issued in October 2011. In January 2012, the Respondent agreed on a schedule to return to compliance. The ACOP stipulated daily penalties (\$1,000 per day) should additional deadlines be missed. January 2012. (RTN 3-29267)

Failure to Timely Notify

The Penalty statute is explicit – failure to notify within MCP timelines is a “Class I” violation, i.e., the steepest penalty class. The following are examples of failure to timely notify, and in some cases, the failure to notify was exacerbated by conducting (or attempting to conduct) Immediate Response Actions (IRAs) without notification or approval.

Plymouth – failure to notify within 2 hours of a fuel oil release and conducting an IRA without approval: Mass DEP issued two ACOPs for a sudden fuel oil release that occurred as a result of a collision between a fuel delivery truck and a loam company’s front end loader. The collision punctured a fuel line on the oil delivery truck that allowed release of over 1,000 gallons of oil to surface soils. When MassDEP arrived on scene, they discovered that there had been an attempt to conduct an IRA prior to the notification, including soil removal and stockpiling. May and June 2011. The oil company’s assessed penalty: \$20,000 to be paid in four installments; the loam company’s assessed penalty: \$19,625 to be paid in four installments. (RTN 4-22944, two PRPs)

Shelburne Falls – failure to notify within 2 hours to a catch basin (draining to a river): MassDEP issued an ACOP for an oil release that impacted the Deerfield River. Notification of the sheen on the river was made by a local Fire Department. Upon investigation, it was determined that oil had been released to a catch basin during road paving operations. During initial interviews, the paving crew denied any knowledge of a release. However, an engineer in charge of the project later indicated that there had been a release of diesel fuel. MassDEP assessed a \$3,000 penalty and the Respondent also agreed to conduct a Supplemental Environmental Project (SEP) to train their personnel in MCP notification requirements regarding releases and threats of releases of oil and/or hazardous materials associated with their operations. November 2011. Assessed penalties: \$3,000, plus the SEP. (RTN 1-18392)

Exacerbating Site Conditions Is Not Acceptable, Some Approvals Are Still Required, and There Are Reasons for Performance Standards

The following cases are more complex than can be relayed here in a summary (perhaps a future article will explore one in greater depth), but it's a reminder that there *are* restrictions and requirements in the MCP based on environmental and human health concerns.

Attleboro – exacerbating site conditions with remedial additives: MassDEP issued an ACOP for a site where remedial additives were applied to subsurface contaminants resulting in free product being “expelled” upward out to the ground surface – a condition not anticipated in the proposed response actions for the site. The original notification for the site was in 2002 after detection of non-aqueous phase liquid (No. 6 oil) in two monitoring wells following removal of a UST. Following early response actions at the site, two Activity and Use Limitations were recorded for two different properties (different owners) within the footprint of the site. Post-remedial additive activities, additional soil sampling was *not* conducted in or near the on-site buildings that may have been affected by the mobilizing effects of the remedial additive. Additionally, upon review, it was determined that the nature and extent of the release had not been adequately determined before application of the additives and was further not inspected after the addition of the additives. March 2011. Penalties assessed: \$12,072 (\$4,255 potentially suspended, pending compliance). (RTN 4-17390)

Lancaster – failure to notify or to get approval to turn off a Remedial Operating System at a Tier IA Site: MassDEP issued an ACOP at a site where a remedial operating system consisting of a groundwater extraction and treatment system was shut down without prior notification and approval. The original notification for this convenience store/gas station occurred in October 1997 and after assessment, the site was classified as a Tier IA site. A remedial action plan was submitted and revised in 2004. The treatment system ran for several years, but was shut down in February 2008, reportedly to evaluate the site conditions. In September 2009, MassDEP visited the site and learned that the system had been shut off. Further investigation revealed that the groundwater contamination at the site exceeded Method 1 Standards and that a condition of No Significant Risk had not been achieved. The Respondent did not notify MassDEP of termination of the ROS, or that conditions of the ROS were no longer being met, did not provide an update in a Status Report, and did not appropriately renew the Tier IA Permit to conduct further response actions. An enforcement conference was held and the Respondent agreed to the conditions and timelines in the ACOP. March 2011. Penalties assessed: \$7,500. (RTN 2-11952)

Rockland – failure to conduct appropriate assessments: MassDEP issued an ACOP for failure to conduct proper site characterization at a site with multiple contaminants and potential ecological impacts. The original notification for the site was received in October 2006 when a RAM Plan was submitted to remove three petroleum USTs and associated contaminated soil. The initial correspondence discussed *only* Extractable Petroleum Hydrocarbons (EPH). During the removal actions, two additional site conditions pertaining to volatile organic vapors were discovered that

required notification and the initiation of two IRAs (additional soil excavation); these notifications resulted in two additional RTNs being assigned (later rolled into the original RTN). A RAM Completion statement and RAO were filed in November 2007. During audit activities in 2010 and 2011, MassDEP learned that sampling of the soil stockpiles revealed that elevated total chromium (exceeding Reportable Concentrations) had been detected but not reported or evaluated. Likewise, MassDEP learned that polyaromatic hydrocarbons (PAHs) were detected in the sediments of a nearby stream within 100 feet of the site, and bio-accumulating polychlorinated biphenyls (PCBs) were detected in soils within two feet of the ground surface on the central portion of the site. Groundwater elevation surveys were not conducted and there were no groundwater flow directions in reports for the site, nor were there discussions of topography, hydrogeology, geology, surface characteristics and other pertinent aspects of site information. The ACOP required several additional areas of site and risk characterization to demonstrate understanding of the site conditions and achievement a Response Action Outcome. The entire penalty was suspended during the enforcement conference, pending full compliance with the terms of the ACOP. April 2011. Penalty assessed: \$4,315 (total penalty potentially suspended, pending full compliance). (RTN 4-20136)