



North Carolina Department of Environment and Natural Resources

Beverly Eaves Perdue
Governor

Dee Freeman
Secretary

MEMORANDUM

TO: JOINT SELECT REGULATORY REFORM COMMITTEE
The Honorable David Rouzer, Chair
The Honorable Marilyn Avila, Co-Chair
The Honorable Pat McElraft, Co-Chair
The Honorable Harry Brown, Co-Chair

FROM: Kari Barsness *KB*
Director of Legislative and Intergovernmental Affairs

SUBJECT: Report on Tiered Enforcement Policy Development

DATE: October 1, 2011

Pursuant to Section 61 of S.L. 2011-398, the Secretary is required to report on the development of a tiered enforcement policy in the department. The report shall be submitted to the Joint Select Regulatory Reform Committee by October 1, 2011. Please see the attached report to satisfy this reporting requirement.

If you have any questions or need additional information, please contact me by phone at (919) 715-4189 or via e-mail at Kari.Barsness@ncdenr.gov.

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September 29, 2011

**Report to the Environmental Review Commission and the Joint Select
Regulatory Reform Committee**

**Uniform Violation Notification Policy for the Department of Environment and
Natural Resources**

Introduction

The Regulatory Reform Act of 2011 (referred to herein as the Act) that became law on July 25, 2011, directs the “Secretary of Environment and Natural Resources to develop a uniform policy for notification of deficiencies and violations for all of the regulatory programs within the Department of Environment and Natural Resources (DENR).” The Act further specifies that the different types of notification be based on the potential or actual level of harm to public health, the environment, and the natural resources of the state. The report on the development of the notification policy is to be submitted to the Environmental Review Commission and the Joint Select Regulatory Reform Committee no later than October 1, 2011, and the policy is to be implemented no later than February 1, 2012.

The purpose of this document is to report on development of the uniform notification policy for DENR. The notification policy has been based on a tiered enforcement structure so that the enforcement response is commensurate with the environmental violation or deficiency. In developing the notification policy, DENR reviewed the policies of the United States Environmental Protection Agency (US EPA) and the environmental regulatory programs of other States as required by the Act.

DENR regulatory programs have always used a tiered enforcement approach in dealing with environmental deficiencies and violations. DENR’s *Principles of Enforcement* (March 31, 2000)¹ emphasize that enforcement decisions should be proportional to the degree of potential harm and that enforcement actions should increase in severity for regulated entities with poor compliance histories.

Under the framework provided by DENR’s Principles of Enforcement, each regulatory program has maintained a certain level of autonomy in dealing with environmental enforcement. Some autonomy is necessary because individual programs operate under different statutes and rules. Any DENR notification policy or tiered enforcement structure must balance consistency across programs with enough flexibility to allow each program to act in accordance with its statutes and rules.

¹ DENR’s *Principles of Enforcement* is available at <http://portal.ncdenr.org/web/guest/enforcement-principles>.

Implementation

DENR will implement a three-tiered approach to enforcement, with the severity of enforcement response increasing for each tier. The new policy is consistent with the way many divisions are already implementing compliance and enforcement programs. The policy recognizes that violations of rules typically fit into three categories – 1. recordkeeping and paperwork that result in little or no harm to the environment or public health; 2. more serious infractions that could result in harm to the environment or public health; and 3. violations that have clearly impacted the environment or public health. The policy will formally recognize the tiered approach, so that a “Tier 1” violation will be met with a less severe response than a “Tier 3” violation. A general description of the three enforcement tiers is provided below, and examples of violations within a tier are found in Appendix 1 for each regulatory division in DENR.

The tiers described below are intended to allow flexibility in responding to regulatory violations or deficiencies. With the tiered structure, a regulatory program can tailor its enforcement response as necessary to address the specific circumstance of a given violation.

Tier 1 Violations

Tier 1 violations represent minor violations resulting in little or no harm to the environment or public health. Tier 1 violations are of minor duration and gravity. The violations are not committed willfully or intentionally. Tier 1 violations often represent the first offense committed by the violator.

A Notice of Deficiency is normally issued for Tier 1 violations.

Tier 2 Violations

Tier 2 violations represent more serious violations where there is documented or moderate to severe potential for harm to the environment or public health. Tier 2 violations can be of moderate duration and gravity. Tier 2 violation notifications would typically be issued to violators with a prior history of noncompliance with regulations. Tier 2 violations can also include continued noncompliance with Tier 1 violations.

A Notice of Violation (NOV) is normally issued for Tier 2 violations. A consent order or other form of compliance schedule may be warranted for Tier 2 violations, depending on the circumstances.

Tier 3 Violations

Tier 3 violations represent the most serious violations where there is documented significant or high potential for environmental or public health harm. Tier 3 violations can be of significant duration and gravity. Also, violations that are committed willfully and intentionally are categorized as Tier 3 violations. Tier 3 violation notifications would typically be issued to violators with a significant prior history of noncompliance with regulations. Tier 3 violations can also include continued noncompliance with Tier 2

violations. Civil penalties, consent orders, injunctions, and other enforcement tools are expected with Tier 3 violations.

A Notice of Recommendation for Enforcement and subsequent civil penalty or other enforcement action described above are normally issued for Tier 3 violations.

Enforcement Actions that Fall Outside the Tier Structure

The tiered enforcement policy does not cover special enforcement actions such as administrative orders for compliance; special orders by consent; or judicial actions for injunctive relief intended to address imminent threats to public health, safety or the environment or to address a continuing violation. Use of those enforcement actions are governed by specific statutory criteria.

A number of DENR programs have specific authority to use administrative orders for compliance. Under Article 9 of Chapter 130A (which includes statutes related to solid waste and hazardous waste), several sections provide specific authority for compliance orders as well as broad authority to issue orders to abate public health nuisances (G.S. 130A-19) and orders to abate an imminent hazard (G.S. 130A-20) in Article 1. Compliance Orders under Ch. 130A are normally issued with a penalty. Federal rules at 40 CFR 239.8 and 256.21 require that a state have authority to issue compliance orders as a condition for approval of state solid waste programs. Federal rules at 40 CFR 271.16 have a similar requirement for state agencies administering hazardous waste programs under delegation from EPA.

Under the state Dam Safety Act, G.S. 143-215(b) authorizes DENR to issue a Dam Safety Order if it finds any dam is not maintained in good repair; is dangerous to life and property; or does not satisfy minimum streamflow release requirements. The order directs the owner of the dam to perform the necessary maintenance or repair or to remove the dam, at the owner's expense, within a specified time. G.S. 143-215(c) authorizes the Department to immediately seek injunctive relief or take measures necessary to provide emergency protection of life and property without issuing an order,

The Division of Water Quality issues Special Orders by Consent under the authority of NCGS 143-215.2. (By rule, the Environmental Management Commission has delegated the authority to issue these orders to the director of the Division of Water Quality.) Special orders by consent are typically used in situations where a wastewater treatment system cannot comply with its permit and infrastructure improvements will be needed to bring the system into compliance. The orders allow the system time to make the needed improvements (avoiding additional penalties for continuing violation in the meantime). It also provides for stipulated penalties if the system fails to make the improvements on the schedule agreed to in the consent order. These orders have a direct analog to those issued by the EPA under the Clean Water Act for these violations and often allow the wastewater system to avoid federal enforcement action.

Special Orders can also be issued without the consent of the permitted facility. This option has very rarely been used and the authority to issue orders without consent lies only with the Environmental Management Commission.

All DENR environmental regulatory programs have authority to seek an injunction in appropriate circumstances. Generally, a request for injunctive relief is only appropriate where there is a threat to public health, safety or the environment and the program and/or the violator has failed to respond to notice of violation and civil penalties.

Enforcement Policies of Other States

As required by the act, DENR reviewed the notification policies of states within the US EPA Region 4² and the local agencies within North Carolina to gain an understanding of other approaches to enforcement. The policies of Virginia, which is not a US EPA Region 4 state, were also reviewed for this report. Uniformity across agencies does not exist because each agency has its own approach to enforcing environmental regulations. However, agencies typically follow a structure of tiered enforcement. A summary of the notification policies and enforcement structure of the states and local agencies reviewed for this report is presented below and is broken out by environmental media.

Air Quality

The Division of Air Quality (DAQ) staff canvassed states and local agencies via phone and reviewed enforcement information on websites to obtain an overview of their enforcement policies and procedures. All state and local agencies use a tiered enforcement strategy with minor violations being met with warning letters or NOVs without penalty, and more serious violations being subject to NOVs, civil penalties, and/or orders. Seven of the eight states surveyed issue warning letters or some similar type of letter for minor violations. Tennessee is the only state that does not use warning letters, while South Carolina indicated that they issue warning letters very rarely (~1 to 2 percent of the time). Local agencies in North Carolina issue only NOVs in most cases. Only Western North Carolina Regional Air Quality Agency in Buncombe County issues warning letters to minor facilities.

Water Quality

NC DWQ surveyed other state programs through an Association of Interstate Water Pollution Control Administrators (ASIWPCA) email list. Staff members from nine state water quality programs responded. Seven of nine respondents indicated the use of a “tiered” enforcement response strategy, though all did not employ that specific term. Tier 1 responses were very similar across the states surveyed, with emphasis on violations that had caused no environmental harm and “paperwork” violations.

²US EPA Region 4 states are Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. Three local air quality programs operate in North Carolina - Forsyth County, Mecklenburg County, and Western North Carolina Regional Air Quality Agency (Buncombe County).

Water Resources

States in Region 4 were surveyed as to their enforcement approach. States indicated that while terminology used may be different, the approach to enforcement directly paralleled the approach taken in North Carolina, whereby the severity of the violation led to increased levels of enforcement. All states including North Carolina have primary enforcement authority for Safe Drinking Water Act implementation and therefore for federal violations must follow USEPA enforcement directives.

Land Resources

Surrounding states were contacted by the Division of Land Resources to investigate their approach to enforcement the following is a summary of the results of that investigation for each of the regulatory programs within the division:

Dam Safety Program:

The enforcement approaches used by the states contacted varies. Virginia issues a “certificate to operate” for a dam. If the dam is not in compliance with state law a conditional certificate with requirements is issued. If that is not complied with then a “Special Order” is issued by the secretary of the Department of Conservation and Recreation. Tennessee and South Carolina Issue NOV’s if the NOV’s don’t bring compliance then these states have several levels of orders such as Director’s Orders, Inspection and Repair Orders and Maintenance Orders. If these Orders don’t bring compliance then the cases are referred to the department's general counsel and to court.

Mining Program:

Enforcement approaches are generally similar in each of the surrounding states. If an inspection finds non-compliance a Notice of Deficiency or Non-Compliance is issued. In Georgia, an NOV is then issued. If these are not complied with then bond forfeiture and civil penalties are pursued.

Erosion and Sedimentation Control Program:

All of the states contacted issue a warning letter of some type with a deadline. If the letter is not complied with then a civil penalty, stop work order or restoration order may be issued.

Waste Management

States in US EPA Region 4 were canvassed via phone and/or information gained via state internet websites. All states had enforcement approaches in a manner consistent with a tiered approach depending on the severity of the violation. For authorized federal grant programs, states must follow US EPA enforcement guidelines just as North Carolina does.

Coastal Management

The Division of Coastal Management (DCM) staff requested information through the Coastal States Organization Information Request network and researched other states Coastal Management Enforcement policies on the internet. Those that provided information indicates a consistent enforcement response to match the degree to which a violation causes or could cause harm and are categorized as such (i.e., minor, moderate, and major). All the responses, however, had varying options for enforcement and most have non-hierarchy tiered enforcement.

US EPA's Enforcement Policy

As required by the Act, DENR reviewed the notification policy of the US EPA. The results of this review are presented below and are broken out by environmental media.

Air Quality

The US EPA's policy for enforcement of air quality violations is provided in its Timely and Appropriate Enforcement Response to High Priority Violations (HPVs) policy of December 1998³, which provides a method of prioritizing air quality violations for enforcement purposes. The HPV policy applies to any "major"⁴ stationary source of air pollution that is in violation of a federally-enforceable regulation. The policy also applies to "synthetic minor"⁵ facilities meeting specific criteria. Additional violations, whether at major or minor sources, may rise to the level of a high priority violation on a case-by-case basis.

As stated in the HPV policy, the "[US] EPA expects that all violations of air pollution regulations, whether meeting the HPV criteria or not, will be addressed by states, local agencies, or US EPA." That being said, an air quality violation can be labeled as an HPV in one of three ways. The violation may fall under the General HPV Criteria. It also may fit the HPV Matrix Criteria based on magnitude or duration. Finally, the violation may be categorized as an HPV at the discretion of the state or local agency and US EPA.

The US EPA expects states and local agencies to address HPV cases in accordance with guidance laid out in its Timely and Appropriate Enforcement Response to HPVs. The HPV guidance establishes milestones dates triggered from the date of violation discovery. States and local agencies must meet the milestones for issuing NOV's or similar type letters and addressing violations. Under the HPV guidance, a violation is addressed with "a legally-enforceable and expeditious administrative or judicial order...[or]... referral to

³ The Timely and Appropriate Enforcement Response to High Priority Violations policy is available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/issue-ta-rpt.pdf>.

⁴ A major source is defined under 40 CFR 70.2.

⁵ A synthetic minor facility is a facility that accepts federally-enforceable permit limitations to avoid being a classified as a major facility.

the state Attorney General or federal Department of Justice for an adjudicatory enforcement hearing or judicial action.” In practical terms, a violation is addressed when a civil penalty is assessed or a consent order is signed. The US EPA has federal oversight to ensure that the state and local agencies are handling HPVs appropriately. If the US EPA determines that agencies are not making appropriate progress towards addressing a violation or that the penalty is not sufficient, the US EPA can overfile for a given case. The US EPA will continue tracking the HPV until it is resolved. Complete resolution of the case occurs when the violator has returned to compliance and all penalties assessed against the violation have been paid. The US EPA and states or local agencies meet monthly to discuss the HPV until the case has been fully resolved.

Milestones associated with an HPV are also tracked in the US EPA’s compliance and enforcement data system known as AFS. The DAQ recognizes that the HPVs are an US EPA construct and under the Memorandum of Understanding with the US EPA, the DAQ has not agreed to take on the burden of identifying and tracking HPVs. Instead, the DAQ meets monthly with the US EPA Region 4 to discuss HPV cases. The US EPA Region 4 determines which cases meet the HPV criteria and assumes all responsibility for entering and tracking HPVs in AFS.

Water Quality

General information about EPA’s enforcement information is located online at <http://www.epa.gov/oecaerth/basics/enforcement.html>. From that website: “If violations of the environmental statutes and regulations are found, generally a NOV is issued to the violator. In some instances, a warning letter may instead be issued for first-time violations that are neither highly significant in nature, nor present an imminent hazard or endangerment.” Activities beyond these initial actions include information audits, “show cause” meetings, civil penalty assessments and injunctive relief.

Water Resources

The US EPA’s policy for enforcement of violations under the Safe Drinking Water Act is provided in its Drinking Water Enforcement Response Policy of December 2009. The policy uses and Enforcement Targeting Tool (ETT) to prioritize regulated public water systems for enforcement. According to the policy, the goals are to 1) align public water system violations of the Safe Drinking Water Act within a prioritization that is more protective of public health, 2) view public water system compliance status comprehensively, 3) ensure that both EPA and the states act on and resolve drinking water violations, 4) recognize the validity of informal enforcement response efforts while ensuring that, if these efforts have proven ineffective, enforceable and timely action is taken, 5) ensure that EPA and the states escalate enforcement efforts based on the prioritization approach, and 6) increase the effectiveness of state and federal enforcement targeting efforts by providing a "tool" that calculates comprehensive noncompliance status for all systems and identifies those systems not meeting national expectations as set by EPA. It also provides an additional resource for identifying systems possibly in need of other State/EPA assistance in the areas of Capacity Development and Sustainability.

The policy can be found at <http://cfpub.epa.gov/compliance/resources/policies/civil/sdwa/>. Each quarter, EPA provides the ETT list to states and requires states take action to address public water systems with an ETT score of 11 or greater.

Land Resources

Dam Safety Program;
EPA does not have a comparable program.

Mining Program;
EPA does not have a comparable program.

Erosion and Sedimentation Control Program;
The US EPA's policy for enforcement of erosion and Sedimentation Control is under Section 309 of the Clean Water Act.

Waste Management

The US EPA's policy for enforcement of hazardous waste and underground storage tank violations under the Resource Conservation and Recovery Act (RCRA) are provided in its UST/LUST Enforcement Procedures Guidance Manual OSWER Directive 9610.11 of May 1990, and the Hazardous Waste Civil Enforcement Response Policy (ERP) of December 2003. These provide a method of prioritizing violations for enforcement purposes. Significant Non-Compliers (SNCs) are violators that have caused actual exposure or a substantial likelihood of exposure to hazardous waste or its constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements.

Coastal Management

None provided specifically for coastal management.

September 29, 2011

Appendix 1

Examples of Tiered Enforcement for DENR's Divisions

Appendix 1A – Division of Air Quality

Definitions of Enforcement Tiers for the Division of Air Quality

Tier 1 Violation (Written Notice of Deficiency)

- Minor violations of permit conditions or regulations resulting in no excess or unpermitted air emissions to the environment

Tier 2 Violation (Written Notice of Violation)

- Second violation of a Tier 1 violation
- First time violation of several Tier 1 violations (e.g., first time record keeping where several months of daily records are missed, etc.)
- A small amount of unpermitted equipment at a permitted facility
- Violation where there is a potential for excess air emissions to the environment (e.g., improper operation and maintenance, parametric monitoring violation, certain air toxics violations, 112(r) violation, etc.)

Tier 3 Violation (Written Civil Penalty Assessment/Notice of Recommendation for Enforcement Action)

- Third violation of a Tier 1 violation
- Second violation of a Tier 2 violation
- First time violation of several Tier 2 violations (e.g., a first time occurrence of not properly operating and maintaining several control devices, etc.)
- A significant amount of unpermitted equipment at a permitted facility OR an unpermitted facility
- Violation where there is a documented excess of air emission to the environment (e.g., failed source test, exceeding a permitted limit, opacity violation, etc.)
- Any violation shown to be committed willfully and/or knowingly

Appendix 1B – Division of Water Quality

Definitions of Enforcement Tiers

The purpose of the following guidance is to provide a framework for tiered enforcement within the Division of Water Quality (DWQ). A three tiered approach of increasing severity is provided to allow DWQ to more effectively match enforcement action with the various possible scenarios requiring a division response. Each Tier includes the general conditions that include factors and considerations for establishing that a scenario falls within that Tier level. Additionally, examples for each Tier have been provided to help determine an appropriate enforcement action for different scenarios. However, for any included example it is possible that the conditions under which that example occurred could warrant a more or less severe enforcement action.

Tier 1 (Written Notice of Deficiency)

General Conditions: minor violations; no environmental harm; not willful or intentional; minor duration and gravity

Examples:

1. Late reporting (e.g., standard monitoring report forms)
2. Failure to meet permit schedules
3. Minor operational deficiencies (e.g., inadequate chlorination)
4. Minor design deviation (e.g., 100 vs. 150 gal. tanks)
5. Minor record keeping (e.g., missing data point[s])
6. Failure to apply for renewal of permit
7. Failure to pay fees within specified timeframe
8. Inadequate maintenance
9. Non-repeat limit exceedance
10. Well construction violations (e.g., non-threat to health such as no well tag)
11. Failure to provide notice (e.g., designer's certification, certificate of completion, deed notification)
12. Partial implementation of permit conditions (e.g., sending out education materials 1x/year versus required 2x/year)
13. Minor (0-10%) exceedance of NPDES wastewater permit limit.

Tier 2 (Written Notice of Violation)

General Conditions: more serious violations; potential for environmental harm; potentially willful or intentional violations; potential for impact human health; prior record of non-compliance or violations; moderate duration and gravity

Examples:

1. Repeat of Tier 1 issue (e.g., chronic late reporting)
2. Multiple Tier 1 issues
3. Failure to respond/correct Tier 1 issues within specified timeframe
4. Failure to notify (of repeat minor or any major operational deficiencies)
5. Major operational deficiencies (e.g., no chlorination)
6. Major design deviation
7. Operating without permit (e.g., minimal environmental risks)
8. Missing reports (standard monitoring report forms)
9. Inadequate maintenance (may affect effluent limit)
10. Multiple limit exceedances
11. Over-application/ponding without discharge
12. Well construction violations (e.g., may affect health or the resource)
13. Failure to implement program elements or permit conditions (e.g., failure to issue pretreatment permits, no Stormwater Pollution Prevention Plan)
14. Significant (11-20%) exceedance of NPDES wastewater permit limit.

Note: Notice of Deficiency may not be required prior to issuing Notice of Violation

Tier 3 (Written Civil Penalty Assessment / Notice of Intent / Notice of Recommendation for Enforcement Action)

General Conditions: major violations; environmental harm done or high potential for environmental harm; willful and/or Intentional violations; impact to human health or high potential for impact to human health; non-compliance that results in significant cost savings; Prior record of non-compliance or violations; major duration and gravity

Examples:

1. Repeat of Tier 2 issue
2. Multiple Tier 2 issues
3. Failure to respond/correct Tier 2 issues within specified timeframe
4. Failure to notify (e.g., major operational deficiencies)
5. Operating without permit (e.g., major operation, 401 certification)
6. Illegal discharge (e.g., any volume if surface water standards are violated, fish kill, etc.)
7. Greater than 20% exceedance of NPDES wastewater permit limit

Note: Per Session Law 2011-145 (HB-200), an NOV must be received by a violator at least ten days prior to the issuance of any Civil Penalty Assessment (CPA).

Appendix 1C – Division of Water Resources

Definitions of Enforcement Tiers for the Division of Water Resources Ground Water Management Branch - Capacity Use Area

Tier 1 Violation (Written Notice of Deficiency)

- Minor violations of permit conditions or regulations that may result in excessive or unpermitted ground water withdrawals. There was no environmental harm caused and it was not willful or intentional. It occurred over a minor duration of time. (Examples: Late reporting of compliance forms, operating with an expired permit, non-repeat limit exceedance)

Tier 2 Violation (Written Notice of Violation)

- Second violation of a Tier 1 violation
- First time violation of a significant number of Tier 1 violations
- Violation where there is a potential for adverse impacts to the natural resource through unsustainable ground water withdrawals (Examples: operating without a permit where minimal environmental risks exist, multiple limit exceedance, declining water levels or salt water intrusion, etc.)

Note: Notice of Deficiency may not be required prior to issuing Notice of Violation

Tier 3 Violation (Written Civil Penalty Assessment/Notice of Recommendation for Enforcement Action)

- Third violation of a Tier 1 violation
- Second violation of a Tier 2 violation
- First time violation of a significant number of Tier 2 violations
- Any violation shown to be committed willfully and/or knowingly
- Operating without a permit (ex. major operation over 1 million gallons per day)
- Violation where there are adverse impacts to the natural resource through unsustainable ground water withdrawals (Examples: declining water levels, salt water intrusion, etc.)

Note: Notice of Violation may not be required prior to issuing Civil Penalty Assessment. A Notice of Recommendation for Enforcement Action may be submitted prior to assessment of any penalty.

Appendix 1C – Division of Water Resources

Definitions of Enforcement Tiers for the Public Water Supply Section

The following describes the framework for tiered enforcement implemented by the DWR, Public Water Supply (PWS) Section in accordance with the uniform policy for notification of deficiencies and violations for regulatory programs within the Department of Environment and Natural Resources.

Deficiencies and Violations Determined by Protection and Enforcement Branch (Regional Office)

In accordance with federal rules adopted by reference and conditions specified in primacy documentation for the Drinking Water Program, the PWS Section has defined “Deficiencies” that must be entered into the Safe Drinking Water Information System (SDWIS) database maintained by EPA. Each of the specified “Deficiencies” has a default severity of “Minor” or “Significant,” although each “Deficiency” constitutes a violation of the *Rules Governing Public Water Systems*.”

Based on the eight (8) EPA specified categories of a sanitary survey (i.e., inspection) for a public water system and current rules we have 132 Deficiencies and 25 Significant Deficiencies.

Tier 1 Violations (Written Notice of Deficiency)

When regional office staff identify any of the 132 Deficiencies, they notify the owner of the water system in writing by issuing a “Notice of Deficiency.” This notice specifies the rule that has been violated and a deadline for resolving the deficiency.

Tier 2 Violations (Written Notice of Violation)

If a deficiency is not corrected by the deadline specified in a “Notice of Deficiency” letter, the regional staff may issue a “Notice of Violation” specifying a revised deadline and that failure to resolve the deficiency may result in the issuance of an Administrative Penalty. Depending on violator’s response and/or the potential or actual harm to public health, the PWS Section may issue an Administrative Order or Administrative Penalty.

Tier 3 Violations (Notice of Violation and Administrative Order/Penalty)

When regional staff identify any of the 25 Significant Deficiencies, they issue a “Notice of Violation” as required by EPA rules adopted by reference. An Administrative Order or Administrative Penalty is expected to follow a Significant Deficiency Notice of Violation.

Violations Determined by the Compliance Services Branch

The Compliance Services Branch is responsible for enforcing state and federal drinking water regulations relating to water quality, filtration and disinfection. The US EPA has granted North Carolina primacy for the implementation and enforcement of the federal requirements and has established violation and enforcement codes with reporting timelines as conditions of our primacy agreements. Therefore, in accordance with the federal rules adopted by reference and our primacy agreements, the Compliance Services Branch is obligated to cite violations and follow-up with enforcement actions, as necessary, in response to numerous types of drinking water violations including, but not limited to, monitoring and reporting violations, maximum contaminant level violations, treatment technique violations, public notification violations and various lead and copper rule related violations. The violations and enforcement actions issued by the Compliance Services Branch as they relate to the uniform violation notification policy are described below:

Tier 1 Violations (N/A)

This level (warning letter) is not applicable to the Branch's required enforcement actions.

Tier 2 Violations (Notice of Violation and Administrative Order)

Notices of Violation and Administrative Orders are initially issued for the various types of drinking water violations listed above. Each violation is cited and the requirements and deadline for returning to compliance are indicated in these letters.

Tier 3 Violations (Administrative Penalty)

Administrative penalties are follow-up enforcement actions that are issued to systems that fail to resolve the previously cited violation by the required deadline.

Appendix 1D – Division of Waste Management

Definitions of Enforcement Tiers for the Division of Waste Management

Tier 1 Violation (Written Notice of Deficiency)

- Minor violations of permit conditions or regulations resulting in no excess or unpermitted releases to the environment
- Not submitting permit information within timeframe

Tier 2 Violation (Written Notice of Violation)

- Second violation of a Tier 1 violation or failure to meet the compliance schedule for a Tier I enforcement action
- First time violation of a significant number of Tier 1 violations
- Violation where there is a potential for excess releases to the environment (e.g., improper operation and maintenance, parametric monitoring violation, lack of or improper labeling of waste containers, employee training not documented or performed within proper timeframe, etc.)

Tier 3 Violation (Written Civil Penalty Assessment/Notice of Recommendation for Enforcement Action)

- Third violation of a Tier 1 violation
- Second violation of a Tier 2 violation or failure to meet the compliance schedule for at Tier II enforcement action
- First time violation of a significant number of Tier 2 violations
- Violation where there is a documented release to the environment
- Any violation shown to be committed willfully and/or knowingly

Appendix 1E – Division of Coastal Management

Definitions of Enforcement Tiers for the Division of Land Resources

The Division of Coastal Management (DCM) has the responsibility of making civil assessments on behalf of the Coastal Resources Commission (CRC) pursuant to G.S. 113A-126(d) and NCAC 7J.0409(f). Local governments with Implementation and Enforcement Grants with the Department of Environment and Natural Resources (DENR) have the responsibility of enforcing the Coastal Area Management Act (CAMA) pursuant to G.S. 113A-117, of restraining violators pursuant to G.S. 113A-126(b) and of notifying violators that they are in violation of CAMA pursuant to G.S. 113A-126(c).

In determining the amount of the assessment, the CRC shall consider the following factors:

- a) The degree and extent of harm, including, but not limited to, harm to the natural resources of the State, to the public health, or to private property resulting from the violation;
- b) The duration and gravity of the violation;
- c) The effect on water quality, coastal resources, or public trust uses;
- d) The cost of rectifying the damage;
- e) The amount of money saved by noncompliance;
- f) Whether the violation was committed willfully or intentionally;
- g) The prior record of the violator in complying or failing to comply with programs over which the Commission has regulatory authority; and
- h) The cost to the State of the enforcement procedures.

The primary objective of DCM is resource recovery through restoration or mitigation of the damaged environment. Meeting this objective restores the loss of public resources. A secondary objective is the protection of adjoining riparian property owner rights, including rights of access. The Department and State also incur certain expenses of investigating unauthorized development and processing these violations through the required procedures.

The DCM staff has implemented an informal enforcement policy for minor development violations that was approved by the CRC on 03/08/1985. This policy has certain criteria that will allow a person, without previous violations, work still in progress, and work done (and proposed) is consistent with current CRC rules, to stop work and apply for and obtain a CAMA Minor Development Permit to resume work without issuance of a formal Notice of Violation, thus avoiding a civil penalty. This policy currently remains in effect and is documented in the Local Permit Officer training manual. This same policy would be implemented for major development violations with the exception of significant dredge and fill violations such as unauthorized excavation and/or filling in estuarine or public trust waters or coastal wetlands.

On 05/08/1989, the DCM director at the time, Mr. George Everett, issued authority to the District Managers which allowed the division to issue a “proposed” civil penalty assessment to violators. This procedure allowed the respondents to assume responsibility for the violation and pay the proposed civil penalty through an informal assessment process rather than being formally

assessed a civil penalty. If the respondent wishes to appeal the amount of the penalty or request a settlement or remission, then a formal civil penalty is issued. This procedure is unique to DCM and is currently in effect for DCM. Since 2003, there have only been six requests for settlement or appeal. The CRC rules states the Director shall issue a notice of assessment when restoration of adversely impacted resources is complete.

Since 2007, DCM has enhanced its compliance-monitoring program in which four new positions (one in each district office) were created to specifically monitor CAMA permitted projects. The main purpose of these positions is to monitor permitted CAMA projects to be proactive in the prevention of violations. When monitoring a project, if staff finds a permittee in noncompliance with the terms and conditions of the CAMA permit, staff advises the permittee of the deficiencies with an opportunity to bring the project into compliance without formal enforcement action. This depends, of course, on the compliance history of the violator and the factors found NCGS 113A-126(d). Since the implementation of the compliance positions, the compliance rate of permitted projects has not dropped below 96% compliance.

Definitions of Enforcement Tiers for the Division of Coastal Management

Tier 1 Violation (Letter of Concern or Warning Letter)

- “Minor development” violations of the Coastal Resources Commission’s rules for permissible offenses, work still in progress, and no previous CAMA violations.
- “Major development” violations of the Coastal Resources Commission’s rules for offenses that could have been permitted under a General Permit, work still in progress, no previous CAMA violations, does not involve dredge and fill activity in estuarine or public trust waters or coastal wetlands.

Tier 2 Violation (Notice of Non-Compliance)

- Second violation of a Tier 1 violation or failure to meet the compliance schedule for a Tier 1 violation (i.e, stopping work and applying for a permit to continue work).
- “Minor development” violations of the Coastal Resources Commission’s rules for permissible offenses, work completed, and no previous CAMA violations.
- “Major development” violations of the Coastal Resources Commission’s rules for offenses that could have been permitted under a General Permit, work completed, no previous CAMA violations, does not involve dredge and fill activity in estuarine or public trust waters or coastal wetlands.
- Non-permittable Minor or Major development, however, resources are recoverable through restoration of the impacted area to pre-development condition and brought into compliance within the specified schedule, excluding dredge and fill activity associated with unauthorized excavation and filling activities in estuarine and/or public trust waters.

Tier 3 Violation (Notice of Violation with Civil Penalty/Injunction)

- Third violation of a Tier 1 violation

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- Second violation of a Tier 2 violation
- Unauthorized dredge and fill activity within estuarine and/or public trust waters.
- Continuing minor or major development violation due to failure or refusal to restore or bring project into compliance.
- Violation is of such a degree, gravity, or duration that significant environmental harm has been documented (i.e., unrecoverable resources) or high potential for environmental harm exists.
- Willful and intentional violations.

Appendix 1F – Division of Land Resources

Definitions of Enforcement Tiers for the Division of Land Resources

The Division of Land Resources administers the three regulatory programs of mine reclamation, erosion and sedimentation control and safety of dams. All three programs generally follow the same three tier enforcement, which consists of a notice of deficiency for minor violations, a notice of violation for repeat and significant violations and civil penalty or injunctive relief to gain compliance.

Tier 1 (Written Notice of Deficiency)

General Conditions: minor violations or where no significant environmental harm or danger to the public would be expected in the near term.

Examples:

1. Failure to obtain permit for minor modification of approved activity;
2. Erosion and sedimentation control measure installed, but not in accordance to approved plan;
3. Control measures appear inadequate, but little or no offsite impact has occurred so far;
4. Impounding a lake before receiving final approval;
5. Failure to submit required reports;
6. First notice of the failure to reclaim a mine within two years of termination of mining.

Tier 2 (Written Notice of Violation)

General Conditions: more serious violations that either are repeat violation or are causing or could cause significant environmental damage or a hazard to public safety or adjoining properties;. Note that the notice of violation for the safety of dams program is called a “Dam Safety Order.”

Examples:

1. Mining company violation of the permit limitations for ground vibration, airblasts and flyrock;
2. Significant offsite sedimentation;
3. Excavating too close to an adjoining property;
4. Failure to maintain the required minimum stream flow release,
5. Seepage of slope stability problems with a dam;
6. Starting the activity without first obtaining the required permit or plan approval.

Tier 3 (Civil Penalty, Injunctive Relief, Bond Forfeiture)

General Conditions: repeated violations or major violations causing environmental harm or threat to public or property;

Examples:

1. Serious problem with dam structure or spillway that poses immediate threat to dam;
2. Abandonment of site without correcting violations;
3. Failure to respond to Notice of Violation or other Tier 2 Violation within specified schedule;
4. Violation of permit or plan approval conditions that is causing or could cause significant environmental damage or hazard to adjoining persons or property.