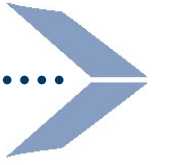


DEFENDING THE STATE NOV IN THE RIGHT WAY

EMPLOYERS NETWORK
2024 SC EHS CONFERENCE
GREENVILLE, SC
FEBRUARY 8, 2024

WILLIAMS MULLEN

OVERVIEW – NOTICE OF VIOLATIONS (NOVs)



> Process

- Pre-NOV
- Post-NOV

> Options

- Pre-NOV
- Post-NOV

> Outcomes



PRE-NOV TRIGGERS



- > Physical Inspection
- > Records Request
- > Review of Files submitted per Permit Requirements (DMRs, Quarterly Reports, etc.)
- > Emergency
 - Spills, Fires, Overflows, etc.
- > Compliance Outreach????

FIRST STEP



- > Inspection Report with alleged violations/facts
- > Written request for more information
- > Emails
- > Phone Calls
- > Research



THE STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

IN RE: [REDACTED]

NOTICE OF ALLEGED VIOLATION/NOTICE OF ENFORCEMENT CONFERENCE

[REDACTED] is hereby notified that an enforcement conference has been scheduled for Thursday, September [REDACTED] at 1:00 P.M., via Microsoft Teams. An invitation will be sent via email with a link to the conference. Representatives of New-Indy have the opportunity to be present at the conference to discuss the violations of the Pollution Control Act and Water Pollution Control Permits as cited herein.

Representatives of [REDACTED] may be accompanied at the conference by legal and/or technical counsel. The possibility of a Consent Order may be discussed.

This Notice is based upon the following findings of the South Carolina Department of Health and Environmental Control:

1. [REDACTED] owns and is responsible for the proper operation and maintenance of a wastewater treatment facility (WWTF) located on [REDACTED] County, South Carolina. The WWTF serves [REDACTED] manufacturing operation.
2. The South Carolina Department of Health and Environmental Control (Department) issued National Pollutant Discharge Elimination System (NPDES) Permit SC [REDACTED] (Permit), authorizing the discharge of treated wastewater from the WWTF, a Group IV Biological treatment system, to the [REDACTED] River in accordance with the effluent limitations, monitoring requirements, and other conditions contained therein. The permit became effective on [REDACTED], and expired on September [REDACTED]. The Department received submittal of a timely permit renewal application and permit coverage was administratively continued. The permit renewal application is under Department review.
3. On [REDACTED], the Department issued Construction Permit [REDACTED]-IW to a previous owner of the NPDES Permit. Construction Permit [REDACTED]-IW granted Department approval for the construction of a hardpiping condensate treatment system. The system was to convey process condensate through a collection tank to an equalization/anaerobic basin (basin #3).



addition pilot study (Pilot Study). The Pilot Study was for the [REDACTED] in the Aerated Stabilization Basin (ASB) and the addition of [REDACTED] to the No. 1 Holding Pond to improve Dissolved Oxygen in the effluent prior to the Post-Aeration Basin. The LOA description of the [REDACTED] included, but was not limited to, [REDACTED] is to be added to the ASB inlet ditch at the [REDACTED] plant and to the No. 1 Holding pond near the outlet to the Post-Aeration Basin...The [REDACTED] will be fed at each location by up to two adjustable speed chemical metering pumps mounted on a single skid. The metering system is to deliver a dosage between one and four tenths (1.4) and five (5) gallons per minute (gpm) of [REDACTED] to each location.” However, the LOA did not grand approval for [REDACTED] to be added directly to the ASB.

13. On [REDACTED], Department staff conducted a visit at the [REDACTED] facility. It was noted that the contractors removing solids from the ASB had reportedly concluded their work, but vegetated islands of accumulated sludge remained in the ASB. Furthermore, the facility staff indicated that the vegetated islands would not be removed and that a profile was conducted of the ASB which found the average sludge depth to be eighteen (18) feet. The total depth of the ASB is twenty (20) feet. During the visit Department staff also noted that a tanker truck was depositing [REDACTED] directly into the ASB. To this, facility staff explained to the Department that when tankers arrive with [REDACTED] shipments and the permanent tanks are too full to accept the product, the tankers empty directly into the ASB.

From the above findings, the Department alleges that [REDACTED] violated the Pollution Control Act and Water Pollution Control Permits as follows:

[REDACTED] violated the Pollution Control Act, S.C. Code Ann. § 48-1-110 (d) (2008 & Supp. 2018) and Water Pollution Control Permits, S.C. Code Ann Regs. 61-9.122.41 (2011) in that it failed to operate the WWTF in accordance with a permit issued by the Department as follows:

National Pollutant Discharge Elimination System Permit Number [REDACTED] Part II.E.1, the [REDACTED] WWTF appeared to be improperly operated due to excessive solids and foam present in the WWTF, and the [REDACTED] WWTF did not appear to be in good working order as indicated by anaerobic conditions revealed during Department analysis and the presence of sludge accumulation in the Aerated Stabilization Basin to an extent causing significant reduction of its volume and allowing the formation of vegetated islands.

An Overview of the Administrative Enforcement Process

This document is provided as guidance and should not be relied upon as legal advice.

Introduction

This information sheet has been prepared to help you better understand the SC Department of Health and Environmental Control's (Department) enforcement process. Since you received a Notice of Alleged Violation/Notice of Enforcement Conference (NOAV/NOEC), we want you to adequately prepare to meet with staff to resolve this matter of regulatory concern. It is the Department's foremost goal is to assist you in maintaining full compliance. Enforcement is one tool to help ensure that obligations to safeguard the environment are met through strict adherence to regulations and environmental permit requirements, terms, and conditions are fulfilled. The following are answers to questions most frequently asked by people involved in this process.

What is a Notice of Alleged Violation/Notice of Enforcement Conference (NOAV/NOEC)?

The NOAV/NOEC is the first step in the administrative enforcement process. When it is discovered that an environmental law or regulation may have been violated, a NOAV/NOEC may be issued. The notice outlines the Office of Environmental Quality Control's (EQC) findings, identifies the law, regulation, or permit requirement EQC believes was violated, and invites the responsible party (Respondent) to attend an enforcement conference. The Respondent may accept EQC's findings and elect not to attend a conference, in which case an order is drafted, if appropriate, for the Respondent's review and signature.

Why is an enforcement action necessary?

There are different factors considered by EQC staff when deciding to initiate an enforcement action. Most fall within the following: 1) the specific type of alleged violation identified may require EQC to take a formal enforcement action, 2) the alleged violation is serious or a threat to public health or the

environment, or 3) the alleged violation has not been corrected within a reasonable period of time.

What is an enforcement conference and what can I do to prepare for it?

The enforcement conference is a voluntary, informal meeting between EQC staff and the Respondent. The NOAV/NOEC you received contains a summary of known issues of regulatory concern and provides the basis for discussion. It is important to be fully prepared to present any information that will enable staff to make a fair and sound decision concerning the allegations. You should also be prepared to report any corrective action(s) taken or planned.

Who should I bring to the conference and who from EQC will be present?

People who are most familiar with the issues and who have decision-making authority on behalf of the Respondent should plan to attend. You may have legal and/or technical representation if you choose. An enforcement project manager, regional staff, technical support, and other compliance personnel involved with the matter will represent the Department. A staff attorney representing EQC is generally not in attendance. However, if you choose to have legal counsel present, you are asked to notify the Department at least five days prior to the conference and the Department may decide to have agency legal counsel attend. Also, if the Department determines it is necessary for legal counsel to be present you will be notified at least five days prior to the conference. The enforcement conference is closed to the public and media per a DHEC Board approved policy.

What can I expect to happen at the enforcement conference and what may result?

As the Respondent, you can expect a fair evaluation of the circumstances surrounding the issues of concern. Staff will ask questions and determine a reasonable response based upon consideration of the facts. After the conference, staff will review the information gathered and decide on one of four possible outcomes: 1) the Department determines that the event is not a violation and is dismissed; 2) the Department determines the violation is properly alleged, but there is justification to resolve the matter without the issuance of an order; 3) the Department determines the violation is properly alleged, and you are given the opportunity to resolve the issue by entering into a Consent Order with the Department; or 4) the Department determines the violation is properly alleged and an Administrative (unilateral) Order is issued.

What is a consent order?

A Consent Order is a legally binding, enforceable document, with terms and conditions agreed upon by you and the Department. In signing a Consent Order, you waive your right to an administrative appeal, but the additional time and costs associated with an administrative hearing and other potential court-related costs are avoided.

What is the purpose of a civil penalty; how is the penalty amount determined; and who gets the money?

Civil penalties are issued for the violation of federal and state environmental laws. The decision to assess a penalty depends upon the type of violation alleged and other factors. Among other factors, civil penalties are intended to deter future noncompliance and eliminate any economic incentive for noncompliance. The penalty is calculated in accordance with the Department's Uniform Enforcement Policy. The amount of the civil penalty is designed to reflect the frequency, duration, and severity of the violation(s). Some other factors may be considered, such as compliance history, degree of negligence or willfulness, and economic benefit

gained through noncompliance. The money collected is either sent to the State's General Fund, or a portion to the county in which the violation occurred, or otherwise dispersed as required by state law.

If I have corrected the noted violations, why would a civil penalty still be assessed?

To promote fairness and consistency within the administrative enforcement process, civil penalties are typically assessed for certain violations. However, if you demonstrate good faith efforts to promptly correct the alleged violation, staff will favorably consider these actions when calculating any penalty. Other factors that may affect the penalty amount include measures taken to prevent recurrence and other mitigating factors.

Why should I attempt to resolve the enforcement action with a consent order?

There are often significant savings in time and money when the parties in an enforcement action can reach an agreed upon resolution. If, however, an agreement to the terms, conditions and/or any civil penalty proposed in a Consent Order cannot be reached, the Department may issue an Administrative Order (unilateral) without your consent. The Administrative Order would include findings of fact, conclusions of law, and contain specific requirements addressing the violation(s) and the civil penalty may be higher based on factors under consideration.

If an agreed upon resolution is not reached and an order is issued without my consent, what are my options?

A Respondent may seek further review as set forth in the Notice of Appeal procedure, which is on the Department's Website at: http://www.scdhec.gov/environment/baq/docs/DepartmentDecisions/Notice_of_Appeal_Procedure.pdf South Carolina Department of Health and Environmental Control.



ENFORCEMENT CONFERENCE



- > Inspector
- > Enforcement Personnel
- > Enforcement Person's Boss
- > Compliance?
- > Lawyers?
- > Process?
 - Read NOV
 - Read procedure
 - Ask you to speak – make your case

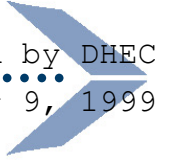
POST-CONFERENCE

- > No Violation – Letter Resolving Issue
- > Consent Order
- > Administrative Order without Consent



UNIFORM ENFORCEMENT POLICY

Policy Approved by DHEC
Board September 9, 1999



SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

UNIFORM ENFORCEMENT POLICY FOR THE OFFICE OF ENVIRONMENTAL QUALITY CONTROL

I. GENERAL PURPOSE

1. This policy shall govern enforcement procedures for the environmental programs within the Office of Environmental Quality Control.
2. This policy is intended to provide uniform procedures for the conduct of enforcement actions and to provide uniform criteria for the assessment of civil penalties.

II. CIVIL ENFORCEMENT PROCEDURES

1. When, based upon available information, it is determined that there is a violation of any applicable statute, regulation, standard, or permit, and the violation can be adequately documented, a **Notice of Violation** will be forwarded by certified mail to the responsible party ("party").
2. The Notice of Violation will specify the alleged violation(s) and require that the party **respond** within a specified period of time **as to the measure(s) he has taken or will take to address the same.** If the Department determines that a response to the Notice of Violation is nonessential and that a conference to discuss the violation(s) is desirable, a consolidated Notice of Violation and Notice of Enforcement Conference may be transmitted; the Notice of Enforcement Conference will be in accordance with item 4 (a) below.
3. **If the party fails to take the appropriate action(s) or fails to respond adequately to the Notice of Violation,** the Department may:
 - (a) Seek relief through the courts by referral of the matter to the Legal Office; or,
 - (b) Pursue the matter administratively.

EQC UNIFORM ENFORCEMENT POLICY - CONFERENCE



4. (a) A Notice of Enforcement Conference will be forwarded by certified mail to the party. This Notice will require that the party attend a conference on a specified date, time, and location to "demonstrate" why the Department should not pursue further enforcement action.

POST-ORDER (EQC UNIFORM ENFORCEMENT POLICY)



5. Upon a determination that conditions or provisions of a previous order have not been met, the Department will forward a Notice of Violation, ascertain the reasons for noncompliance, and initiate one or more of the following actions:

(a) Amend the original order to include a revised schedule of compliance, necessary modifications, and assessment of civil penalties; such orders may be issued and contested as in 4 (c) above;

(b) Issue a new order to include a revised schedule, necessary modifications, and assessment of civil penalties; such orders may be issued and contested as in 4 (c), above; or

(c) Refer the matter to the Legal Office for action as deemed appropriate.

III.A. CIVIL PENALTY ASSESSMENT GUIDELINES



3. Any one or combination of factors shall be considered in the assessment of civil penalties:

(a) Degree of harm or potential for harm to the public health, safety or environment;

(b) Extent of deviation from the requirements of the statute, regulation, standard or permit;

(c) Frequency or duration of the violation. This may include multiple or multi-day violations;

(d) Economic benefit as a result of noncompliance.

FACTORS (CONT'D)



- (e) Cost of restoration of the environment or abatement of the environmental harm;
- (f) Past performance record or past history of violations;
- (g) Degree of willfulness and/or negligence;
- (h) Other pertinent factors that measure the seriousness or frequency of the violation, or the conduct of the party.

MITIGATING FACTORS FOR PENALTY



- (a) The degree of cooperation by the party in remedying the violation or resolving the problem;
- (b) Any measures taken to avoid repetition of the violation.
- (c) Good faith efforts to comply with requirements.
- (d) Ability to pay.
- (e) Other pertinent factors.

The total civil penalty settlement amount is based upon the following formula:

Civil Penalty = Gravity Component + Violation Recurrence Component + Recalcitrance Component +/- Adjustments.

POST CONSENT ORDER OR ORDER WITHOUT CONSENT



APPEALS

- > 15 Days to Appeal to Board (this will go away when DHEC EQC becomes DES)
- > 30 Days to Appeal Board Decision to Administrative Law Judge
- > 30 Days to Appeal Decision of ALJ to Court of Appeals
- > 30 Days to Appeal Court of Appeals decision to Supreme Court of S.C.

Compliance with Order

- > Meet deadlines in consent order
- > Pay penalties
- > Force Majeure Events
- > No Further Action – resolutions
- > BUT: Repeat Violator...?



QUESTIONS?

Please note: This presentation contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.

