

**Wisconsin Department of Natural Resources
Natural Resources Board Agenda Item**

SUBJECT: Environmental Enforcement Guidance.

FOR: December 2012 Board meeting

TO BE PRESENTED BY: Steve Sisbach

SUMMARY:

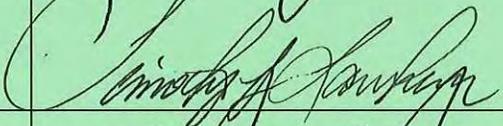
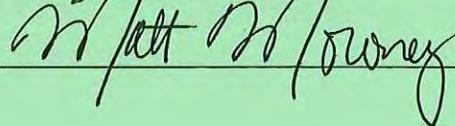
Environmental Enforcement Guidance has been updated and Chairman Clausen requested review and discussion of the draft document with the Natural Resources Board before it is routed for final approval. The guidance describes the agency perspective on compliance and enforcement, Stepped Enforcement options & procedures, enforcement decision making factors and of particular note, includes new procedures for procedures for addressing potential conflicts of interest and clarifies the agency position on attendance at Enforcement Conferences..

RECOMMENDATION: Information only.

LIST OF ATTACHED MATERIALS (check all that are applicable):

- Background memo
- Draft Guidance Document.

- Type name of attachment or type N/A if not applicable
- Type name of attachment or type N/A if not applicable

Approved by	Signature	Date
Randy Stark, Bureau Director		11/29/12
Tim Lawhern, Administrator		11/29/12
Cathy Stepp, Secretary		11/29/12

Wisconsin Department of Natural Resources

Bureau of Law Enforcement

ENVIRONMENTAL ENFORCEMENT HANDBOOK

Introduction and Statement on Compliance and Enforcement

This document describes the Wisconsin Department of Natural Resources (DNR) Environmental Enforcement process and guidance for addressing violations.

Compliance monitoring, education and enforcement are essential components of successful environmental protection programs. The DNR uses a Stepped Enforcement process to resolve violations at the lowest level appropriate for the circumstances. Environmental Enforcement actions are initiated to:

- Protect public health and welfare
- Protect the quality and health of the environment
- Eliminate competitive advantages achieved through noncompliance.
- Ensure compliance with State laws and administrative codes
- Maintain the integrity and credibility of regulatory programs
- Serve as a deterrent

Employees are expected to investigate violations encountered during the course of their duties and address them in a timely manner, in alignment with priorities, through the Stepped Enforcement process. **The first and highest priority is to address and halt violations that pose actual or potential threats to public health or the environment.**

Historical data shows that most violations are resolved at the Notice of Noncompliance, Notice of Violation and Enforcement Conference level, which supports an emphasis on timely notification and response actions following the detection of violations. **Clear and timely communication with the people responsible for violations often results in a voluntary return to compliance, which minimizes the potential for adverse health or environmental impacts and levels the playing field for the many businesses that operate in compliance with the law.**

DNR staff will strive to halt violations as quickly as possible and necessary for protection of public health and the environment. In situations where additional corrective measures and/or penalties are warranted, staff will also strive to issue citations or refer cases to the Wisconsin Department of Justice or United States Environmental Protection Agency within 12 months of the discovery of the most recent violation. While there will be valid reasons to extend penalty actions beyond 12 months, staff shall make all reasonable efforts to achieve this timeline.

Responding to Violations

Violations are discovered through citizen complaints, compliance inspections, self-reporting, or routine field observations. Violations received through the DNR Hotline are relayed to Conservation Wardens, who may request the assistance of DNR Environmental Protection staff to conduct an investigation, assist with court action, handle regulatory follow-up, etc. DNR employees who discover violations are responsible for initiating an appropriate response, such as further investigation, initiation of enforcement actions, or forwarding the information to other DNR staff with jurisdiction/expertise in the violated program.

Information received from a complainant could be a public record unless it is received by the Department's Hotline or a law enforcement officer. If the complainant requests confidentiality, refer them to the Department's Violation Hotline at 1-800-TIP-WDNR, 1-800-847-9367, or #367 via cellular phone, by emailing LawEnf@dnr.state.wi.us or by texting the key word TIPWDNR to TIP411 7 days per week from 7 am to 10 pm. The statute authorizing the Hotline, s. 23.38 (2), Wis. Stats., also authorizes the Department to maintain confidential files on information related to the identity of the informant. The complainant can also be referred to a Conservation or Environmental Warden.

Stepped Enforcement

Stepped Enforcement is a series of incremental actions designed to resolve violations at the lowest level appropriate for the circumstances and to judiciously use agency resources to achieve compliance. The process often results in compliance being achieved at lower levels of enforcement. If not, it builds a strong foundation for prosecuting cases to achieve court ordered compliance, restoration or remediation of the effects of the violation and appropriate penalties.

While most cases will follow the typical progression of Stepped Enforcement actions, the Department may tailor its response to fit the circumstances of each situation and there are times when it is appropriate to proceed directly to prosecution, for example where violations cause or pose significant harm to health or the environment or involve potential criminal violations.

Compliance and enforcement steps include:

- **Inspection and/or Compliance Contacts.** DNR Environmental Protection staff conducts routine inspections or otherwise communicates with individuals or businesses to determine compliance and answer compliance related questions.
- **Notice of Noncompliance.** A letter authored by DNR Environmental Protection staff which is typically used to document minor violations and request correction within a specified period of time.
- **Notice of Violation (NOV).** A formal letter authored by an Environmental Enforcement Specialist which provides specific notice of alleged violations and the potential consequences (orders for corrective action, fines, forfeitures, etc.) allowed by statute. The NOV will most often schedule an Enforcement Conference. The NOV should be issued as soon as practical to provide timely notice and motivate corrective action(s) to minimize the risk of harm to health or

the environment. Unless circumstances require more immediate action, Environmental Enforcement staff have a goal of issuing a NOV within 14 days of receipt of a completed Environmental Enforcement Request

- **Enforcement Conference (EC).** A formal meeting between the DNR and the person or business alleged to be in violation. The purpose of the meeting is to discuss legal and/or technical aspects of the violation, the circumstances surrounding the violation and reach agreement on solutions and a schedule for completing any necessary actions.
 - To ensure a productive, candid discussion, participation in the EC is limited to the person or business involved and others with the legal or technical expertise necessary to understand, evaluate, mitigate and correct the violation. The EC is not an open meeting under state law and the Department can limit participation to those who will be directly involved in the resolution of the matter.
 - The outcome may lead to a compliance agreement, Consent or Administrative Order, issuance of environmental citation(s) or referral for prosecution. Environmental Enforcement staff has a goal of holding the EC within 30 days of the date of the NOV.
- **Compliance Orders.** Orders are legally enforceable documents that establish a schedule for the completion of activities necessary to achieve compliance with laws and regulations including investigating and remediating contamination or restoring affected resources. Authority to issue compliance orders varies between environmental programs. Most orders are negotiated as Consent Orders but the Department has authority under some statutes to unilaterally issue a compliance or penalty order.

Administrative Order vs. Consent Order

1. Administrative Order – an order that is unilaterally issued by the Department which requires actions to be taken within a specified timeframe. The recipient can appeal the Order through administrative review under ch. 227, Stats.
 2. Administrative Penalty Order – an order that is unilaterally issued by the Department which requires actions to be taken within a specified timeframe and payment of a penalty. This authority only exists for the Drinking Water program at this time.
 3. Consent Order – formalizes a negotiated agreement between the Department and the entity to take actions within a specified timeframe. Appeal rights are waived because the agreement is negotiated between the parties.
- **Environmental Citations.** Citation authority exists for certain violations and use of this enforcement option should be considered for first time, minor violations where a penalty may nonetheless be warranted due to evidence of knowledge or intent, competitive advantage over others complying with the law or prior compliance history. Conservation Wardens and Environmental Protection staff

are encouraged to review options with Environmental Enforcement staff before citations are issued.

In addition to monetary penalties, the state can seek court orders for remedial action, restoration, etc. The order must be approved by the court. It's best for the Warden and District Attorney to know if an order is being sought prior to issuance of the citation(s). The Warden can ask for a mandatory court appearance, explain to the defendant that the state will be seeking an order and often provide a draft copy of the order when the citation is delivered. Environmental Enforcement staff can help draft orders.

- **Referral.** A referral is a request for prosecution, typically by the Wisconsin Department of Justice, but some cases may also be referred to US DOJ, US EPA or the District Attorney for the County in which the violations occurred. The Referral is a document which describes; the alleged violation(s), the evidence available to prove the violation(s), potential penalties, the need for injunctive relief protect public health or the environment, remedial actions to restore affected resources or compensation for damages. All referrals require final approval by the Secretary or the Secretary's designee. The referral recommendation is routed for approval by enforcement and program managers at the Regional level. If approved, the recommendation is routed for review by Central Office program, enforcement and legal staff before a final decision is made by the Secretary or designee. Decisions to deny recommendations will be discussed with staff.

As noted in the Introduction, staff will strive to issue citations or refer cases for prosecution within 12 months of the discovery of the most recent violation. While there will be valid reasons to extend penalty actions beyond 12 months, staff shall make all reasonable efforts to achieve this timeline.

Violation Evaluation and Enforcement Decision Making

When a violation is identified and properly documented, the next step is to determine an appropriate response within the stepped enforcement process. The scale and severity of violations varies widely. Enforcement decisions are made on a case-by-case basis, taking into account the totality of circumstances surrounding the violation(s) and the legal options available for addressing the violation. Enforcement decisions should reflect a reasoned consideration of all relevant issues, including the use of enforcement discretion where circumstances warrant. Factors include but are not limited to the:

- Actual or potential impact to public health, welfare or the environment
- Nature or toxicity of the pollutant
- Number and duration of violation(s)
- Compliance History
- Responsiveness to correct and minimize the impact of the violation(s)
- Mitigating or aggravating circumstances
- Extent of monetary or other gain
- Impact on program implementation or integrity
- Consistency with prior enforcement decisions
- Alignment with Agency priorities
- Legal sufficiency
- Enforcement goal or desired outcome

Civil vs. Criminal

Some environmental laws have civil and criminal enforcement options. Criminal violations typically involve proving willful or negligent behavior but Environmental Protection staff should focus on collecting thorough and complete documentation and then consult with Environmental Enforcement staff if criminal conduct is suspected.

Potential Conflicts of Interest

To promote public confidence in the integrity and impartiality of the Department's enforcement decisions, employees involved in the review and approval of enforcement decisions will excuse themselves from the decision making process if their role in the decision constitutes an actual or potential conflict of interest or could result in the appearance of impropriety.

Various forms of conflicts of interest are expressly prohibited by the Wisconsin statutes. Employees holding a "state public office" and who are thus ""State public officials," as those terms are defined in Wis. Stat. §§ 19.42(13),(14) must refrain from certain specified activities, such as taking action in a matter in which he or she or a family member has a substantial financial interest, or using his or her position to obtain a substantial benefit. Any DNR employees involved with Environmental Enforcement matters who are "State Public Officials" should acquaint themselves with the details of the listed prohibited actions and conform their conduct accordingly.

To promote and maintain public confidence in the integrity and impartiality of the Department's Environmental Enforcement program, it is furthermore the department's policy that employees involved in the environmental enforcement decision making process avoid even the appearance of impropriety. A DNR employee shall excuse himself or herself from that process when the facts and circumstances of the matter which he or she knows, or which he or she should know, reasonably raise questions about the official's ability to be impartial in the matter. Situations in which an appearance of impropriety may arise include, but are not limited to, the following:

- a. The employee has a personal bias or prejudice concerning the matter; or
- b. The employee, or a member of the employees family, has an economic interest in the matter or any other more than minimal personal interest that could be substantially affected by the Department's handling of the matter; or
- c. A person (including a corporation, its owners, or its principals) who is the subject of the potential Environmental Enforcement action has ever made a campaign contribution to a campaign committee formed to support the election of the DNR employee to an elective office.

DNR employees involved in the Environmental Enforcement process shall keep informed of their personal and fiduciary interests and excuse themselves from situations that may constitute a conflict of interest or result in the appearance of impropriety.

As a consequence of these considerations, employees should excuse themselves from enforcement decisions that involve a family member, close friend or person with whom the person involved in the decision making process has had prior business or other significant working relationships. Likewise, they should excuse themselves if the subject of potential enforcement action, or someone closely associated with the subject of the potential

enforcement action, ever contributed to a campaign committee supporting the official's election to an elective office.

If the Secretary or the designee assigned to provide final approval has a conflict of interest, or their involvement in the decision could result in the appearance of impropriety, the final decision will be delegated to an appropriate Division Administrator, Bureau Director or other Department Manager with no potential conflicts in the matter. Supervisors and field staff should discuss potential conflicts of interest with their immediate supervisor to evaluate whether it is appropriate to be excused from the enforcement case.

(Placeholder) Procedures for complying with Act 46

(Placeholder) Distressed company procedures

Compliance and Enforcement Resources [\(Links\)](#)

- Completing an Enforcement Request
- Preparing for an Inspection
- Inspection Authority and Warrants
- Sampling
- Photography
- Interviewing
- Testimony
- Air, Waste & Water Enforcement Guidance