

RADIATION PROTECTION COMPLIANCE & ENFORCEMENT GUIDANCE

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DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Radiation Protection

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TITLE: Radiation Protection Compliance & Enforcement Guidance

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AUTHORITY: The Radiation Protection Act (35 P.S. §§ 7110.101-7110.703), The Radon Certification Act (63 P.S. §§ 2001-2014), Section 1917-A of the Administrative Code of 1929 (71 P.S. § 510.17), March 31, 2008 Agreement with the Nuclear Regulatory Commission, and 25 *Pa. Code* Chapters 215-240.

POLICY: It is the policy of the Department of Environmental Protection (DEP) that cases requiring enforcement and/or civil penalties should be handled in a similar fashion across all DEP offices. This policy acknowledges that each enforcement case has different circumstances and may require the use of different enforcement actions.

PURPOSE: The purpose of this document is to provide a rational and reasonable basis for tracking violations and initiating enforcement actions to require compliance with the statutes and regulations above.

APPLICABILITY: This guidance is applicable to employees of the DEP Bureau of Radiation Protection and Regional Radiation Protection Programs who are involved in compliance and enforcement determinations.

DISCLAIMER: The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of DEP to give these rules that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

PAGE LENGTH: 7 pages

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I. **DEFINITIONS, TERMS AND ABBREVIATIONS**

The definitions contained in *25 Pa. Code* Chapters 215-240, as well as any definitions contained in the statutes and regulations incorporated by reference in these chapters are incorporated in this Radiation Protection Compliance & Enforcement Guidance. In addition, the following terms apply:

20-Day Letter – A DEP letter identifying a person’s non-compliance of related regulatory requirements or a summary of DEP inspection findings letter sent from DEP to a person via certified mail or equivalent. The letter should provide the license/registration/certification number; inspection location; inspection ID number; inspector name(s); inspection type; regulation citations for areas of non-compliance; description of non-compliance; request for corrective action response; and, the name and address to send the response to. The letter should not include a civil penalty and should not contain the words “shall” or “must.” It should not require the recipient to act or refrain from acting.

Administrative Order (AO) – A DEP directive issued to a person requiring a corrective action(s) to achieve compliance with a statute and/or regulation.

Assessment of Civil Penalty (ACP) – A unilateral civil penalty assessed by DEP against a person, typically after the person has declined to enter into a Consent Order and Agreement or Consent Assessment of Civil Penalty.

Bureau of Radiation Protection (BRP) – This term references the DEP Central Office and Regional Radiation Protection staff as a collective unit.

Certification – Document issued by the DEP authorizing a person to conduct radon testing, radon mitigation, or radon laboratory analysis services.

Civil Penalty Matrix (Matrix) – A method used by the Department to calculate a civil penalty for violations. The matrix provides special considerations for the severity of each violation as well as the degree of culpability of the violator.

Consent Assessment of Civil Penalty (CACP) – An agreement between the DEP and violator, wherein the violator admits to the facts and liability put forth by the DEP and pays a civil penalty.

Consent Order and Agreement (COA) – An agreement between the DEP and violator, wherein the violator admits to the facts and liability as put forth by the DEP, the DEP requires the violator to perform corrective action often under a sanction of stipulated penalties, and wherein the DEP may require the violator to pay a civil penalty.

DEP – Commonwealth of Pennsylvania, Department of Environmental Protection.

Fee Delinquent Letter – DEP correspondence notifying a person of the failure to timely pay annual fees.

Field Order – A DEP order based on conditions observed during an inspection that require immediate corrective action(s).

License – Written DEP-issued permission to possess and/or use radiation source(s).

Notice of Violation (NOV) – A DEP-issued administrative enforcement document used to notify a person of the existence of a violation(s) and in some circumstances to request corrective action(s). An NOV is not an order of the DEP or other final DEP action.

Order – A DEP final action containing the words “shall” or “must,” typically requiring the recipient to implement corrective actions or to refrain from an action. A recipient of a DEP Order may appeal it to the Environmental Hearing Board.

Person – An individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency or political subdivision of this Commonwealth; another state or political subdivision or agency thereof; and a legal successor, representative, agent or agency of the entities listed in this paragraph. The term does not include federal government agencies.

Registration – The act of registering with the DEP in accordance with the Radiation Protection Act.

Summary Citation – A non-traffic criminal citation issued by the DEP to a violator of a license, registration, certification, regulation, order or statute.

II. DOCUMENTATION AND NOTIFICATION

All violations determined by the DEP during inspections should be documented by DEP in writing in an inspection report. Preliminary findings should be presented to the facility’s authorized representative before ending the inspection, whenever possible. However, inspection findings are not final until approved by management.

If the violation(s) cannot be determined on the date of the inspection because further information is necessary, the "Inspection Results" field may be marked by DEP as "Not Determined" or "Pending." DEP’s determination of the violation(s) and the completion of the inspection report should be done typically within 30 calendar days after receiving this necessary further information. DEP may establish an alternate time frame, if necessary. Verbal notification of the violation(s) should be given to the person on the date of the inspection followed by DEP written documentation typically within 30 calendar days after the DEP has received any further information necessary to determine the existence of the violation(s). DEP’s options to notify a person about the existence of violations include: a fee delinquent letter; a 20-day letter; an application deficiency letter; a deficiency letter; an Intent to Deny letter; a Notice of Violation (NOV); or a Field Order.

If a civil penalty has been calculated, but an enforcement action has not yet been taken, DEP staff may elect to issue a Notice of Proposed Civil Penalty and Call to Conference. This notice will state the amount of the proposed civil penalty and will also suggest that the person contact DEP within 15 calendar days of receipt to request a conference to discuss the violation(s) and proposed civil penalty. The proposed civil penalty amount will fall within a range based on statutory and regulatory criteria and the appropriate matrix.

All obligations, corrective actions or milestones for the resolution of a violation(s) that are contained in a final license/registration/certification, Consent Assessment of Civil Penalty (CACP), Consent Order & Agreement (COA), or other enforceable document are monitored by DEP staff and tracked in eFACTS. Whenever possible, eFACTS will be updated within 10 business days of compliance with each obligation. Resolved violations should also be “closed out” in eFACTS by DEP within 10 business days of final compliance with the enforceable document.

II. ENFORCEMENT ACTIONS

The DEP may decide to proceed with an enforcement action on the basis of the following factors, among others:

- the extent or seriousness of the violation(s);
- the ability of the person to correct the violation(s);
- the time frame in which the violation(s) could be corrected;
- the prior violation history of the person and the need for an enforcement action.

In deciding which type of enforcement action should be taken, the DEP should consider, among other factors:

- the most efficient method of resolving the violation(s);
- the immediacy of the need to resolve the violation(s);
- the nature of the violation(s) (i.e., administrative or operational);
- the need for a substantial change in behavior;
- the extent of the violation’s effects;
- the severity of the violation(s);
- the threat to human health or environmental harm; and
- previous violation history of the person.

Except for Field Orders and Summary Citations, all enforcement actions must be approved by program counsel. If the enforcement action includes the assessment of or request for payment of a civil penalty, DEP staff should refer to statutory and regulatory criteria, as well as the guidance of the appropriate program penalty matrix.

NOTICE OF VIOLATION (NOV)

An NOV is a DEP document used to notify a person of the existence of a violation(s) and, in some circumstances, to request corrective action(s). An NOV is not an Order and is not an appealable action. Specific instances of DEP’s use of an NOV may include: if a violation is not resolved within 30 calendar days after the notification of DEP inspection findings; expiration of a license/registration/certification where no renewal application has been timely received by the DEP; non-compliance with an obligation under a license/registration/certification, consent order and agreement, final order, and/or other enforcement document; and/or any DEP notification to a person of the existence of a violation, an NOV with a request, but not requirement, for response may be issued in writing to the violator unless an extended time frame for issuing the NOV is acceptable in the specific case.

DEP may also use an NOV to address the following scenarios:

1. Some RP inspections may result in the identification of a repeated violation(s) or a more significant violation(s) that a person immediately resolves. The RP Program may elect to issue an NOV to document that the violation(s) occurred. The NOV should provide the specific regulatory citation(s) violated, as well as a detailed description of the violation(s). In this case, the NOV should acknowledge that corrective action has been taken and that no additional action is required from the person. The NOV should be immediately closed out in DEP's data system.
2. Some RP inspections reveal a violation(s) that cannot immediately be resolved, include a violation(s) that has not been resolved or may involve a person that does not respond timely to a non-compliance letter. In such situations, the RP Program may elect to issue an NOV that requests a response within 15 calendar days. In this type of NOV, DEP staff should cite and quote the regulation violated, provide a detailed description of the violation(s), and request (not require) a response within 15 calendar days of receipt of the NOV.
3. For repeat or significant violations, an NOV could include a Call to Conference. The conference is to discuss the violation(s) and possible settlement options. The person and their counsel are invited to meet with the program and the date, time, and location of the conference will be included in the notice.

The NOV should clearly and concisely identify each violation, the basis for each violation, the requested actions (including a meeting, if applicable) to resolve each violation, the requested due date(s) for those corrective actions, and to comport with the DEP's policies and procedures. The NOV should be closed out in the data system (default is eFACTS) when the violation(s) identified in the NOV have been resolved and the violator should be notified in writing that the DEP considers the violation(s) resolved. An NOV is not appealable.

DEP may forego the issuance of an NOV at its discretion in cases where the regulated entity has established a history of compliance and/or cooperation in addressing items of non-compliance in a timely manner.

NOTICE OF PROPOSED CIVIL PENALTY AND CALL TO CONFERENCE

DEP Civil enforcement efforts may follow the issuance of an NOV. Following the DEP's review of a person's response to an NOV, if any, DEP may decide to issue a Notice of Proposed Civil Penalty and Call to Conference. This letter informs a person of the proposed civil penalty amount and reaffirms the violation(s) noted in the NOV. The Notice of Proposed Civil Penalty and Call to Conference also advises the person of their option to contact DEP within 15 calendar days to request a conference and to discuss the violation(s) and proposed civil penalty. The Notice of Proposed Civil Penalty and Call to Conference is not a DEP final action and should not include the words "shall" or "must," or require the person to act or refrain from acting. This document should not be written in a manner that indicates the DEP has taken a final action.

ADMINISTRATIVE ORDER

DEP may elect to issue unilateral enforcement against a person in the form of an Administrative Order (AO). An AO is an appealable action that directs a person to return to statutory and regulatory compliance within a specified timeframe. As noted with a Field Order, an appeal of an AO does not alleviate the obligation of a person to comply with its terms unless the AO is superseded (stayed) by the Environmental Hearing Board or a court. An AO requires the signature of the DEP Program Manager, Regional Director, Assistant Regional Director, or Bureau Director and consultation with program counsel. The DEP may issue a letter to the person to notify when the AO's obligations have been satisfied.

The RP Program has the discretion to determine if an AO will include a civil penalty. An AO that does not include a civil penalty may be followed by an ACP, CACP, or COA. An AO is an appealable action.

ATTORNEY GENERAL REFERRALS

If DEP has evidence of behavior or actions by a person that has or potentially could have a serious direct adverse effect on health, safety or the environment, or constitutes fraudulent behavior, DEP has the right to refer such violations to the Pennsylvania Attorney General's Office for criminal enforcement. A criminal enforcement referral does not prevent DEP from initiating a parallel civil enforcement action with civil penalty. The RP Program Manager, Director, and Regulatory Counsel should confer to determine whether Attorney General referral is appropriate before any referral is made.

ASSESSMENT OF CIVIL PENALTY (ACP)

If a CACP or COA cannot be entered into, DEP may draft an assessment of civil penalty (ACP). An ACP follows a standardized format developed by the Office of Chief Counsel and the contents must be approved by program counsel. The issuance of an ACP does not require agreement by the person. An ACP must be a separate document from an AO. An ACP often follows an AO or may be issued at the same time. An ACP is always calculated using statutory and regulatory criteria, as well as with the guidance of the appropriate program penalty matrix.

CONSENT ASSESSMENT OF CIVIL PENALTY (CACP)

The DEP and a person may agree upon a CACP if the person agrees to the penalty amount, the existence of the violation(s) or facts underlying the violation(s) and waives their right to an appeal. The CACP follows a standardized format developed by the Office of Chief Counsel. The penalty amount is often based on the appropriate program penalty matrix. A CACP will not be signed by the DEP unless the person agrees to the facts underlying the violation(s) and the violation(s) have been corrected. The issuance of a CACP is not an appealable action. A CACP may need to be reviewed by program counsel and the Director if the amount of the penalty is in excess of a predetermined amount.

CONSENT ORDER & AGREEMENT (COA)

The DEP may enter into a COA with a person if the person agrees to the existence of the violation(s) or the facts underlying the violation(s) and the need to correct the violation(s). The COA follows a standardized format developed by the Office of Chief Counsel. The COA will contain agreed upon corrections of violation(s) and an agreed upon timeframe for the corrections and may contain an agreed upon penalty amount. Generally, the DEP only waives its rights in a COA to seek civil penalties above the amount already specified in the document, if an amount is specified. The DEP reserves all other rights to institute equitable, administrative, civil and criminal actions with respect to any matter addressed in the COA, including the right to require additional compliance measures. The order section of the document enumerates the actions that must be taken by the person to correct the violation(s). The schedule to abate the violation(s) and penalties contained in a COA are entered into eFACTS and tracked by program staff responsible for tracking the milestones in the COA. A COA is mutually agreed to by the person and DEP and is non-appealable by the person. Because it is a settlement of claims that DEP has against a responsible person, a COA may be reviewed in advance by an attorney.

FIELD ORDER

A Field Order may only be issued pursuant to specific procedures and on a specific form reviewed by the Office of Chief Counsel for enforcement actions taken by DEP. Under the approved procedures and form, DEP should coordinate with management and counsel and obtain concurrence prior to issuing the Field Order.

A Field Order is appropriate when there is an immediate threat to the public's health and safety or the environment and could include an order to cease and desist. While a Field Order is an appealable action, an appeal does not allow a person to avoid complying with its terms unless the Field Order is superseded (stayed) by the Environmental Hearing Board or a court. The Field Order should include the violator's name and address; location of the violation(s); license/registration/certification number; inspection date; date violation(s) was observed; regulatory citation; violation(s) description; detailed description of the activity the person is being directed to perform or cease; and, the required completion date for the corrective action(s).

DEP will notify the person in writing when the terms of the Field Order have been satisfied.

SUMMARY CITATION

A summary offense is a criminal offense that imposes the lowest level of fines and potential imprisonment term and is initiated by issuing a non-traffic summary citation. Magisterial district judges (Judge) have original jurisdiction over summary citations. The Summary Citations request that the Judge impose a penalty for the violations. The person receiving the Citation has the right to defend against it before the Judge at the Magisterial District Office for the area in which the alleged violation occurred. A Summary Citation is appealable. The procedure will follow 234 Pa. Code Chapter 4 (relating to Procedures for Summary Cases).

II. PROGRAM PENALTY MATRIX GUIDANCE

In accordance with Section 308 of the Radiation Protection Act, 35 P.S. § 7110.308, DEP may assess a civil penalty against a person who commits a violation. The civil penalty may be up to \$25,000 per offense plus up to \$5,000 per day of continued violation. Furthermore, each day of continued violation is a separate offense.

The civil penalty matrix takes into consideration the severity of the violation, the culpability of the person, level of cooperation exhibited, compliance history, impact on security, contamination and abatement costs, cost incurred by the Commonwealth and savings realized by the person.