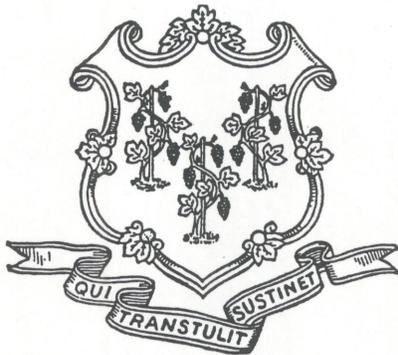


**DEPARTMENT OF
ENVIRONMENTAL
PROTECTION
ENFORCEMENT
POLICIES AND
PRACTICES**

Connecticut

General Assembly



LEGISLATIVE
PROGRAM REVIEW
AND
INVESTIGATIONS
COMMITTEE

December 1998

**CONNECTICUT GENERAL ASSEMBLY
LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMMITTEE**

The Legislative Program Review and Investigations Committee is a joint, bipartisan, statutory committee of the Connecticut General Assembly. It was established in 1972 to evaluate the efficiency, effectiveness, and statutory compliance of selected state agencies and programs, recommending remedies where needed. In 1975, the General Assembly expanded the committee's function to include investigations, and during the 1977 session added responsibility for "sunset" (automatic program termination) performance reviews. The committee was given authority to raise and report bills in 1985.

The program review committee is composed of 12 members. The president pro tempore of the Senate, the Senate minority leader, the speaker of the house, and the House minority leader each appoint three members.

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LEGISLATIVE PROGRAM REVIEW
& INVESTIGATIONS COMMITTEE

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENFORCEMENT POLICIES AND PRACTICES**

DECEMBER 1998

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Key Points

DEPARTMENT OF ENVIRONMENTAL PROTECTION ENFORCEMENT POLICIES AND PRACTICES

- National and state environmental regulatory community in transition about roles of "traditional" enforcement and compliance assistance.
 - DEP "traditional" enforcement mechanisms include informal tools -- warning notices and notices of violation -- and formal tools -- unilateral, consent, and cease and desist orders, as well as referrals to attorney general, chief state's attorney, and federal EPA.
 - DEP increased use of informal enforcement actions in terms of actual number of actions issued and as percentage of workload over past eight years.
 - Rate of formal enforcement actions has remained relatively consistent over past eight years.
 - Formal enforcement actions are more likely to settle in a consensual manner through consent orders.
 - Number of attorney general referrals declined from an average of 91 between 1988 and 1992 to 32 from 1993 through 1997.
 - DEP "user-friendly" approach was a source of confusion and contention for staff and had disruptive impact on enforcement process and cases, and administration was lax in guiding staff in implementing the policy.
 - A former executive assistant to DEP commissioner did not affect final decisions in cases but did impact enforcement process.
 - DEP administration did not fully describe role of former executive assistant in enforcement process and did not take enough action to eliminate perception that professionalism was second to patronage.
 - DEP management has not exerted sufficient leadership to address employee issues.
 - DEP not in compliance with state law to develop civil penalty regulations and administrative civil penalty policy does not assure appropriate or consistent outcomes.
 - Enforcement case documentation is insufficient, and enforcement actions not completed in timely manner consistent with policies.
 - A number of enforcement actions were at variance with stated policies and procedures.
-

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DEP Enforcement Policies and Practices

The Legislative Program Review and Investigations Committee authorized a study of the Department of Environmental Protection's (DEP) enforcement policies and practices in March of 1998. The study centered on two primary areas of concern. One area related to specific circumstances occurring at the department beginning when former Commissioner Sidney J. Holbrook took office in 1995. The other area of concern is the overall operation of the enforcement program and how it is implemented.

Former Commissioner Holbrook adopted "user-friendly" as the catchword for the overall approach to dealing with the regulated community. A key feature of this approach was to seek a consensual resolution to violations where possible. The committee found the administration was lax in providing the necessary guidance to staff in implementing this shift in policy, and was either inattentive or indifferent to staff confusion and concerns and the subsequent effects on enforcement. The department's administration maintains the "user-friendly" posture was never intended to replace traditional enforcement, but to instill a greater degree of professionalism and courtesy among staff.

Complicating the picture is the national trend toward compliance assistance in environmental regulation. Compliance assistance is a structured approach that provides assistance to the regulated community in complying with environmental regulations and promotes a more flexible alternative to traditional enforcement, although not intended to replace it. However, it is unclear whether DEP's "user-friendly" approach was meant, at the time, to refer to any compliance assistance initiatives occurring in Connecticut and nationally.

Further intensifying the concerns about the direction of environmental enforcement during the Holbrook years were the activities of the commissioner's former executive assistant and charges of undue influence. The committee found while this executive assistant was more active in regulatory cases than had been officially described by the department, and was at times a disruptive influence in cases, he did not ultimately affect the outcome of enforcement cases.

In addition to the above findings, the committee focused on general enforcement matters and the overall operation of the enforcement program. The committee found there was some measure of animosity between certain employees at DEP, on the staff and management levels, which has had a negative effect on enforcement efforts at DEP beyond the people directly involved. Further, the committee found DEP management had not exerted sufficient leadership to address these issues effectively.

In its review of DEP, the committee also found problems relating to the department's statutory and administrative civil penalty policies. The Department is required by law to develop regulations to impose civil penalties through the use of unilateral orders. The committee found that DEP has not developed the necessary regulations in the five years since the statute was enacted. Moreover, the committee found the department's administrative civil penalty policy,

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used in developing penalty amounts for consent orders, does not provide adequate guidance to staff to assure outcomes are appropriate or consistent.

Finally, the program review committee found a number of shortcomings related to basic management tools and processes at the department. Specifically, the committee found:

- enforcement case documentation is insufficient;
- DEP has no systematic way of tracking compliance with enforcement actions and there are inconsistent practices among the regulatory bureaus in closing out enforcement actions;
- an inadequate management information system that limits the department's oversight of enforcement actions;
- enforcement actions are not completed in a timely manner; and
- in a number of instances the actions of the department were at variance with the stated policies and usual practices of the department.

The recommendations of this report are aimed at strengthening DEP's management mechanisms to ensure policies and procedures are implemented as envisioned and provide information that presents a clear and accurate picture about enforcement efforts. The committee adopted the following nine recommendations at its December 21, 1998 meeting.

RECOMMENDATIONS

1. DEP shall issue an affirmative policy statement to all its employees that retaliation against employees for statements of employee opinions related to environmental matters will not be tolerated. It shall reinforce that policy with all its managers.
2. The Department of Environmental Protection shall resolve the issue of imposing civil penalties through unilateral orders either by promulgating the regulations and thereby complying with state law or requesting the General Assembly repeal or revise the statutory mandate.
3. The Department of Environmental Protection shall:
 - revise and adopt a civil penalty policy that provides adequate and consistent guidance to staff in calculating penalties. The department shall periodically update the civil penalty policy to ensure that penalties and classifications remain consistent with current environmental practices and concerns;
 - develop and implement a standardized penalty calculation worksheet to be used in every case that imposes a penalty. The worksheet should show the evolution of the final penalty calculation, including any adjustments to the penalty amount and rationale for those adjustments; and
 - provide training to all regulatory bureau enforcement staff and management responsible for calculating penalties.

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4. DEP shall review its existing file management practices and develop a comprehensive file management system to ensure that case files contain the necessary documentation important to a case and those documents required by DEP policy. The files should be maintained in a reasonably consistent and readily accessible format for each of the bureaus. Periodic case review on the part of management, even if on a random sample basis, should be part of the file management system.
5. In order to assist in the reconstruction of a case, DEP shall develop a case log activity sheet for each case file. This sheet would document all activities related to a case. This would include dates of when significant actions occurred, such as the decision to pursue a particular strategy at agenda meetings and the mailing of a consent order, to not so significant events such as documenting each contact with a violator. The activity log would provide a chronology of a case and assist in explaining *what* and *when* actions occurred. This would be a necessary adjunct to the newly developed case conclusion summary to the EAS, which should be an aid in explaining the *why* of what occurred.
6. DEP shall develop and implement a management information system that provides the tools necessary to enable DEP staff and management to track compliance with enforcement actions in a timely manner.
7. DEP shall design and implement a uniform, automated management information system for the regulatory bureaus that captures essential enforcement case information and results in the production of valid and reliable data. The system at a minimum shall include, but not be limited to, the following:
 - critical case processing milestones, such as inspection dates, report completion dates, date of enforcement actions, enforcement action deadlines, etc;
 - case assessment information, such as violator types, types of violations, penalty calculations, revisions to any case information indicating reasons for change, who authorized, and when, etc;
 - case outcome information, such as any environmental benefits that can be identified as the result of an enforcement action, payment of penalties, etc;
 - the ability to generate standard management reports on the timeliness and performance of individual personnel as well as divisions in completing inspections, in assessing inspection reports, and in issuing and monitoring enforcement actions; and
 - the ability to generate customized reports, compliance histories, and standardized enforcement documents.

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8. DEP shall:

- establish in the Enforcement Response Policy timeframes for the completion of significant steps in the informal and formal enforcement process; and
- monitor and measure the time it takes for the completion of each step in the informal and formal enforcement process. The department shall report the average amount of time for each type of action by program and by bureau, and shall report the number of actions that exceed the timelines established in the proposed ERP by program and bureau. Finally, the department shall revise timeframes or make process adjustments, as necessary, to ensure enforcement actions are executed in a timely manner.

Data on the timelines of enforcement actions are to be included in the annual report, *Environmental Compliance in Connecticut*, to the joint standing committee having cognizance of matters relating to the environment beginning with the February 2000 report.

9. In order that management and other decision makers, at all levels, be fully informed about the utility of their own policies in a more systematic way, a policy exception report shall be developed by DEP. This report shall include the number and a brief description of significant exceptions or variances to stated policies that the department pursues by each regulatory program. Significant exceptions would include, but not be limited to:

- multiple NOV's issued for the same violations;
- only a NOV issued for high priority violations. This would require all bureaus to complete an abbreviated Enforcement Action Summary for NOV's, so that all violations are classified;
- when a lower level enforcement action is issued for violations of a previously issued enforcement action. For example, if a unilateral order is violated, the expected course of action is a referral to the attorney general. If a consent order is issued for that violation, that would be considered an exception. Also, violations of a consent order handled through the issuance of another consent order, would be considered an exception;
- multiple modifications to consent orders;
- consent or voluntary "agreements" issued for the resolution of violations;
- Supplemental Environmental Project (SEP) policy exceptions, such as when a SEP totally displaces a monetary penalty; and

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- other actions at variance with stated policies that the department would deem significant.

The exception report is to be included for a five-year period in the annual report, *Environmental Compliance in Connecticut*, to the joint standing committee having cognizance of matters relating to the environment beginning with the February 2001 report. At the conclusion of the five-year period, the committee shall decide whether to continue, alter, or terminate the policy exception reporting.

DEP Enforcement Policies and Procedures

In March 1998, the Legislative Program Review and Investigations Committee approved a study of the Department of Environmental Protection (DEP) enforcement policies and practices, amid concerns about the rigor of environmental enforcement in Connecticut. The primary study focus was the performance of DEP in enforcing environmental protection laws and policies through its procedures and practices. The study was also to identify and assess the nature of any internal or external influences on DEP regulatory staff responsible for implementing those policies and procedures.

The complexities of the enforcement function spanning distinct regulatory programs in the three media—air, water, and waste—would be difficult to overstate even if nothing ever changed. In reality, substantive environmental requirements, operational processes, and agency organization, to name a few central elements, appear almost always to be in transition. For example, the first chapter of the report highlights a current debate in regulatory circles about the appropriate mix of “traditional” enforcement and a less punitive, more assistance-based approach to achieving compliance with environmental laws and regulations. DEP has been working to articulate assistance policies and practices to both its employees and the regulated community, while maintaining a “traditional” enforcement program.

In addition to these issues, the program review study began in the midst of allegations about the activities of Mr. Vito Santarsiero, a former executive assistant to former DEP Commissioner Sidney J. Holbrook, and the lingering impact of a “user friendly” policy adopted by Commissioner Holbrook after his appointment in February 1995 by newly elected Governor John Rowland. In short, the complexities of the enforcement function and the dynamics of certain events overlapped and interacted during the last few years at DEP.

Methodology

Pertinent federal and state statutes, regulations and policies were reviewed to carry out this study. In addition, program review staff interviewed over 90 DEP employees. Specifically, committee staff interviewed all enforcement personnel in the air bureau, in the hazardous and solid waste programs in the waste bureau, and all water enforcement personnel working solely in the industrial and municipal discharge enforcement programs. Numerous other staff were interviewed, including members of the legal counsel’s office, bureau management, the assistant commissioner responsible for enforcement, and the commissioner. Committee staff also met with representatives from the Office of

Attorney General, the federal Environmental Protection Agency (EPA), the Connecticut Business and Industry Association, and the Council on Environmental Quality, and interviewed Mr. Sidney J. Holbrook, former DEP commissioner, and Mr. Vito Santarsiero, former DEP executive assistant. Enforcement cases were also reviewed, including a random sample of informal and formal enforcement cases from 1993, 1995 and 1997.

Report Format

Chapter One sketches an overview of environmental regulation. Department enforcement resources and staffing are described in Chapter Two. Chapter Three summarizes the statutory, regulatory, and administrative policies relevant to enforcement. Chapter Four outlines the actual enforcement process in operation. Chapter Five provides information on who is regulated and how compliance is monitored by DEP. Agency-wide enforcement data are analyzed in Chapter Six. Finally, Chapter Seven presents committee findings and recommendations.

Agency Response

It is the policy of the Legislative Program Review and Investigations Committee to provide agencies subject to a study with an opportunity to review and comment on the recommendations prior to publication of the final report. The response from the Department of Environmental Protection is contained in Appendix A.

Overview of Environmental Regulation

Broadly speaking, environmental regulation encompasses all the tools used by government to control activity potentially or actually harmful to the environment. Three primary functions of environmental regulation are: (1) identifying all activities that should be regulated; (2) authorizing activities performed under certain specific conditions, as done in the permitting process; and (3) ensuring compliance with those authorizations or regulatory requirements.

What has been termed “conventional” or “traditional” enforcement is a primary tool used to ensure compliance—where, after investigation, orders are issued requiring corrective action and in some cases penalties assessed, either administratively or through the judicial process. Obviously, activity authorization and enforcement are interrelated. However, the program review study focuses on the function of enforcement.

Federal environmental laws. Overall, DEP enforcement of environmental laws happens within the context of a multi-level regulatory structure involving both the federal and local governments. The federal role in environmental regulation is significant, setting out the major restrictions against environmental pollution. The Clean Air Act (CAA), the Clean Water Act (CWA), and the Resource Conservation and Recovery Act (RCRA) --dealing mostly with hazardous waste—are all federal laws establishing the federal government as the primary authority for setting minimum requirements and ensuring those requirements are met. Federal preeminence recognizes that pollution problems often cross artificial governmental boundaries and seeks to avoid pitting states against each other for economic growth at the expense of the environment.

Each of these programs provides for state delegation to administer the programs as long as a state performs in an acceptable way. Connecticut received delegation for the Clean Air Act in 1971, the Clean Water Act in 1972, and RCRA in 1990. Descriptions of the main features of each law are contained in Appendix B. Some areas regulated by DEP are solely under state authority, with no federal requirements. An example of this is the water diversion permit program.

Generally, the federal acts establish minimum standards, permitting or other authorization requirements, and state delegation through agreement. In these agreements, the states commit to a certain level of work on an annual basis, including the type and number of inspections conducted, at what types of facilities.

The Environmental Protection Agency (EPA), created in 1970, is the agency responsible for administering most federal laws impacting the environment. EPA monitors state activity in part by reviewing required program activity data required to be submitted in certain programs and by conducting program audits. Additionally, EPA has the authority to take enforcement action in any case it believes state action was not adequate, a procedure called “overfiling”.

Federal law also provides for citizen suits in cases where DEP has taken no action, but private citizens feel action is warranted.¹

Selected Trends in Regulation

Compliance assistance. The environmental regulatory community everywhere is in transition about how enforcement fits into the environmental regulatory mix. The debate centers on the question of how best to achieve compliance with environmental regulations—through cooperative assistance mechanisms (called *compliance assistance*) or via enforcement responses to identified violations (called *traditional enforcement*). The distinction can be likened to the concept of community policing versus traditional law enforcement as tools to regulate criminal behavior. The debate is not so much about the usefulness of either approach, but the appropriate balance between the two.

The issue is raised in part because of the changing environmental scene. In the early days of regulation, traditional enforcement was the method used to bring polluting industries under control as they became familiar with new business requirements. In fact, EPA looks to this approach as evidence that states effectively handle their delegated responsibilities. As big industries over the years have incorporated pollution control into their business planning and reduced pollution as a way to lower costs, the types of problems facing environmental regulators have shifted. Coupled with broader environmental standards, different and smaller businesses have been forced into the regulatory net.

Smaller businesses typically have limited management and financial wherewithal to address regulatory requirements. It is argued technical and educational assistance can best promote the ultimate goal of compliance for smaller, less sophisticated enterprises as opposed to punitive enforcement measures. Also, as regulatory agency resources grow tighter, more cost-effective ways are sought to promote compliance than traditional enforcement, which can be very labor-intensive.

Compliance assistance, as discussed above, refers to formally structured technical, financial, and educational assistance provided to the regulated community. The term means different things to different people, though, demonstrating the need for clear, consistent messages about what it is intended to mean. For instance, a field inspector may identify a minor problem during an inspection and suggest how a company might best fix it. If resolved to the inspector’s satisfaction before any notice of violation is issued, perhaps that minor violation will

¹ A referral to the attorney general is not considered state action that would bar such a suit.

not be cited. To some, that is compliance assistance. Or the term can mean providing other, more general advice by a DEP staff person to a member of the regulated community. (Some DEP staff say the first and second meanings describe what has happened in practice for years, and as such is nothing new.) Finally, to some people, compliance assistance is code for going soft on violators.

In May 1997, Commissioner Holbrook issued a new Compliance Assurance Policy. (See Appendix C) The document declares:

It is the policy of the DEP to achieve the highest level of environmental protection for the citizens of Connecticut by use of traditional enforcement methods together with financial, regulatory and technical compliance assistance, when appropriate.

The policy sets out seven action statements, including these first two: (1) traditional enforcement activities will remain the cornerstone of the department's compliance assurance efforts; and (2) compliance assistance techniques will be considered a counterpart to traditional enforcement.

A compliance assistance guidance document was issued at the same time, which established a framework to implement compliance assistance programs at each bureau. Since then, DEP rethought its approach and now consolidates these activities in a new division within the commissioner's office called the Division of Environmental Assistance and Outreach. The compliance assistance program in the new division is an expansion of the small business program operated by the air bureau. The program is to "take the lead in coordinating a department wide approach to compliance assistance...". A benefit of centralizing compliance assistance administration is to facilitate effective communication throughout the agency about how compliance assistance fits with traditional enforcement in Connecticut.

EPA is involved in this same discussion at the national level, with an emphasis on the importance (and perhaps difficulty) of clear communication about changing compliance tools. A May 1998 report prepared by the General Accounting Office for Congress notes:

While EPA's policy is that compliance assistance should be accompanied by a strong and credible enforcement deterrent, state officials have noted that the inconsistent manner in which this policy has been interpreted and implemented by different EPA offices has led to confusion about the appropriate balance between traditional enforcement and other compliance tools.²

Pollution prevention. Another trend impacting the role of enforcement is emphasis on pollution prevention. According to a report prepared by the Congressional Research Service, "enactment of the Pollution Prevention Act of 1990 marked a turning point in the direction of U.S. environmental protection policy." Pollution prevention is achieved "through reduced generation of pollutants at their point of origin." The report continues:

² *EPA's and States' Efforts to Focus State Enforcement Programs on Results*, U.S. General Accounting Office, May 1998, p. 7 (GAO/RCED-98-113)

Pollution prevention, also referred to as source reduction, is viewed as the first step in a hierarchy of options to reduce risks to human health and the environment. Where prevention is not possible or may not be cost-effective, other options would include recycling, followed next by waste treatment according to environmental standards, and as a last resort, safe disposal of waste residues.³

To the extent this initiative is intended to eliminate pollution sources in the first place, like the compliance assistance programs, emphasis on these initiatives impacts traditional enforcement efforts.

³ *Summaries of Environmental Laws Administered by the Environmental Protection Agency*, Congressional Research Service, January 3, 1995, p. CRS-3

Regulatory Bureaus: Organization and Resources

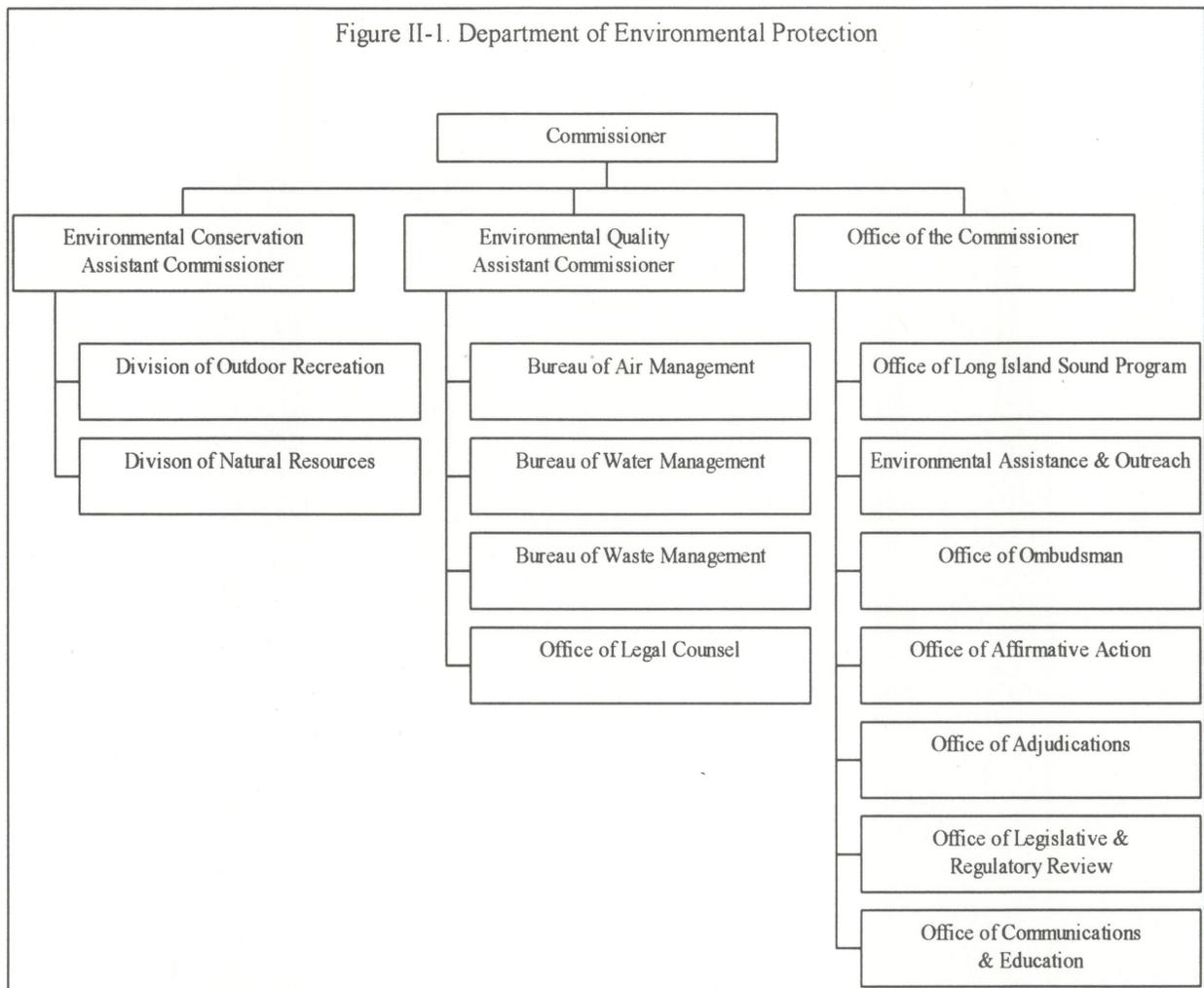
The Department of Environmental Protection is divided into five bureaus, as shown by the agency organizational chart (Figure II-1). Three of these bureaus -- Air Management, Waste Management and Water Management--fall into the general area called Environmental Quality. The permitting and regulatory enforcement responsibilities and activities rest primarily within these three bureaus, assisted by the Office of Legal Counsel. The remaining two bureaus, Natural Resources and Outdoor Recreation, are in the general area called Environmental Conservation. The Office of Long Island Sound Program (OLISP) serves a permitting and enforcement function, but it is not part of any bureau. OLISP is administratively attached to the Office of the Commissioner.

The Department of Environmental Protection is one of the larger state agencies with 1,116 positions at the department in FY 97. The three regulatory bureaus account for 543 positions, 49 percent of the department's total staffing. The air bureau consists of 176 positions; the waste bureau, 153; and the water bureau, 214.

This chapter describes the organization of each bureau with a focus on the enforcement structure in each, and the other supports for enforcement. Since the agency's inception in 1971, numerous reorganizations have occurred due to many factors including the addition of program responsibilities; this has led to shifting program groupings. The individual program detail is provided to demonstrate the administrative differences and similarities between bureaus, as well as the impact of changing priorities on staffing. It is noted DEP has a clear chain of command structure and enforcement actions can involve each level.

Bureau of Air Management

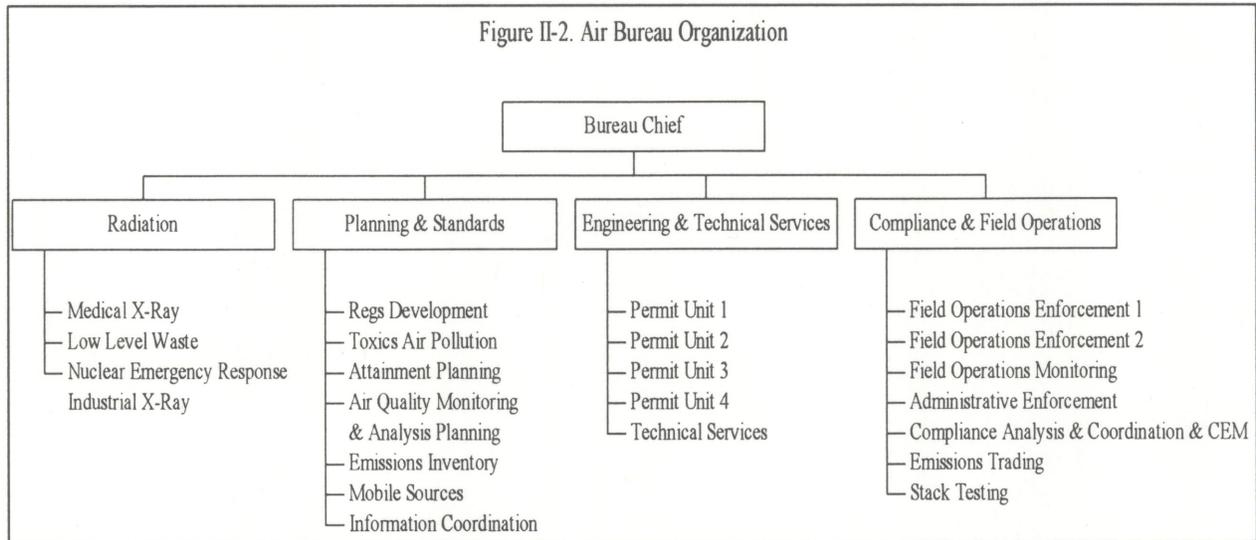
The Bureau of Air Management regulates air quality, radioactive materials, and radiation. Its primary objective is to ensure the quality of the air is protected from the type and quantity of pollutants and emissions harmful to the health of humans, animals, or plants or which may prevent citizens from enjoying their lives and property. The bureau is responsible for: controlling and reducing air pollution; operating a monitoring network to assess air quality; regulating the use, transportation, and storage of radioactive materials; monitoring radioactive accumulations from nuclear power plants; issuing air pollution control permits; and taking enforcement action against sources violating the state's air pollution control laws and regulations.



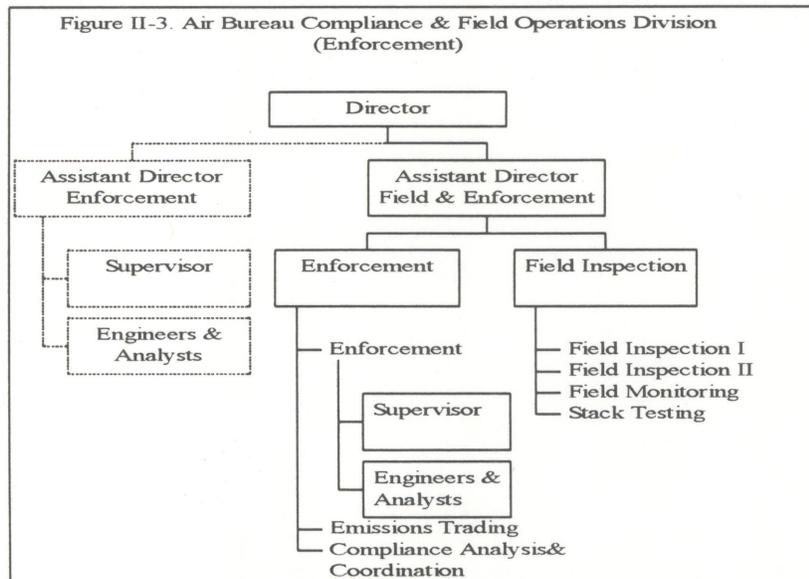
Organization. The air bureau was established in the early 1970s with the creation of DEP. Historically, the bureau was organized into three divisions: (1) Engineering and Enforcement; (2) Planning and Standards; and (3) Monitoring and Radiation. A director who reported to the bureau chief headed each division. The Engineering and Enforcement Division was responsible for permitting, field inspection, and administrative enforcement. The Planning and Standards Division drafted regulations and standards based on federal and state laws, and the Monitoring and Radiation Division collected and analyzed data from the regulated community, tracked environmental indicators, and administered the radiation program.

During 1998, the air bureau underwent a significant reorganization of its divisions and units. The reorganization was in response to several factors, including: significant personnel changes due to the state's 1996 early retirement incentive; the decommissioning of the Connecticut Yankee power plant and issues surrounding the operation of the Millstone nuclear complex; and the 1990 amendments to the federal Clean Air Act, specifically the requirements of the Title V permitting program.

The most significant change to the bureau's organization was the separation of the permit and enforcement divisions, previously a single division reporting to one director. Now, the air bureau consists of four divisions: (1) Engineering and Technical Services (permits); (2) Compliance and Field Operations (enforcement); (3) Planning and Standards; and (4) Radiation. A director, who reports to the bureau chief, heads each division. Figure II-2 shows the reorganization of the air bureau.



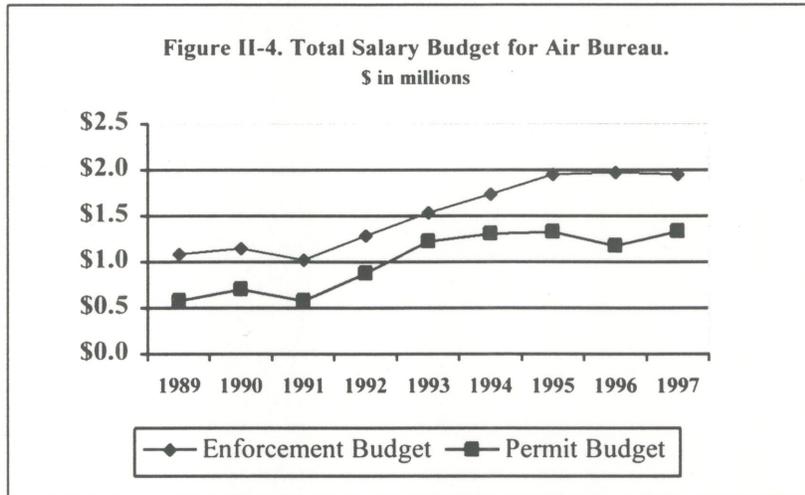
The primary focus of this study is the Compliance and Field Operations Division because it is responsible for the bulk of the environmental enforcement work. Figure II-3 illustrates the organization of the division. As shown, the division is divided into two functional areas: field inspection and administrative enforcement.



inspection and administrative enforcement. Currently, both divisions report to a single assistant director reporting to the director. It is important to note under this reorganization, the administrative unit has been halved from 10 engineers and analysts and one supervisor to five engineers and analysts and one supervisor. Staff previously assigned to this unit were transferred to a newly established Emission Trading Unit.

A proposal submitted by the air bureau would create a second administrative enforcement unit, adding four engineer and analysts positions and an

assistant director. If approved, the field inspection and administrative enforcement units each would report to an assistant director. To date, neither the funding nor positions have been authorized. The proposed positions are indicated by the dotted lines in Figure II-3.



The division's field unit is responsible for conducting inspections of the regulated community, monitoring permitted equipment, and stack testing. The administrative unit is responsible for the case management of violations, including tracking notices of violation, negotiating and drafting unilateral and consent orders, and referring cases to the Office of the Attorney General, Chief State's Attorney, or federal EPA. The division is

also responsible for the administration of the emissions trading program, the Continuous Emissions Monitoring (CEM) program, and compliance analysis and coordination.

Resources. In state FY 90, the air bureau had an operating budget of approximately \$9.2 million and by FY 97 the budget had increased to over \$14 million¹, primarily as a result of new dedicated funding sources. The federal EPA portion of the FY 98 budget was \$3 million, a 20 percent decrease from the previous fiscal year.

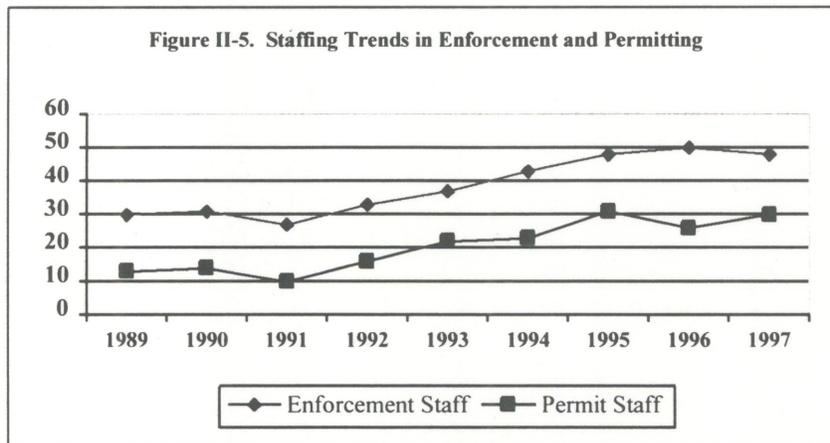
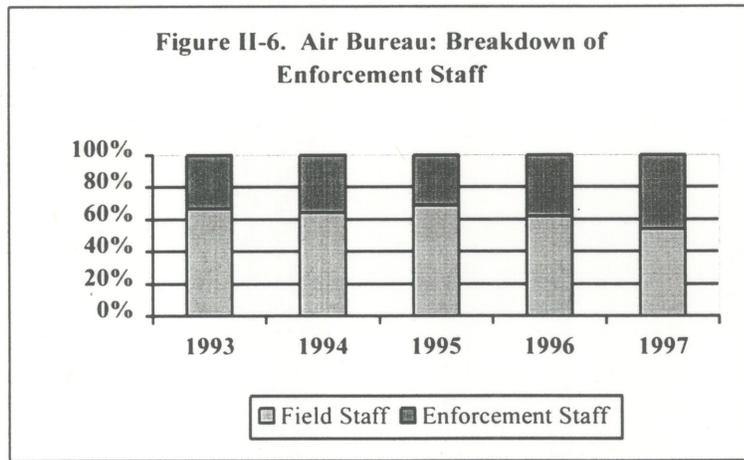


Figure II-4 illustrates the trend in the salary budget without fringe benefits for the air bureau's enforcement and permit activities. The salary budget includes funds from the state general fund, federal sources, and private and special funds, but does not include the programs' administrative costs. As shown, the enforcement budget, which includes field

inspections and administrative enforcement, is larger than that for permitting. Both budgets track together, steadily increasing during the early 1990s. The permit budget stabilized in 1993

¹ Total budget amount excludes funds dedicated for the air bureau's radiation programs.

and shows almost no growth through the next four fiscal years. The enforcement budget, however, did not begin to level off until 1995.

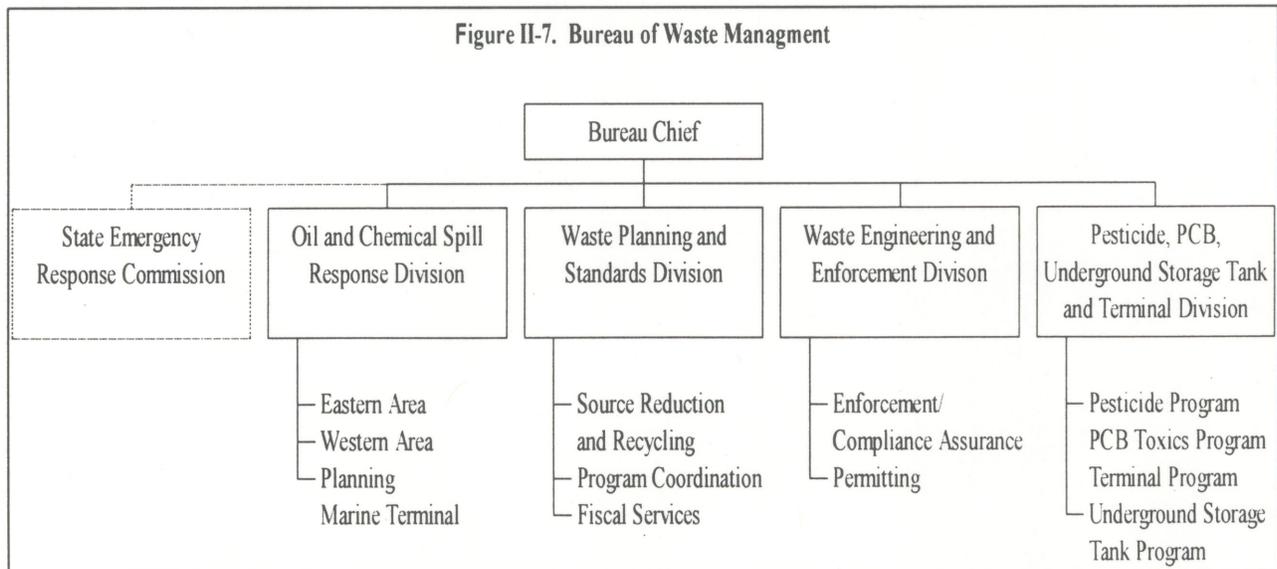


As expected, as shown in Figure II-5, the staffing trends for enforcement and permitting parallel the budget trends.

Figure II-6 shows the breakdown between the two types of enforcement staff in the unit over a five-year period. Field inspectors represented slightly more than half of the total until 1997 when there was an equal number of each type of staff.

Bureau of Waste Management

The Bureau of Waste Management, established in 1991, administers a variety of programs focusing on the management and handling of hazardous and nonhazardous wastes, the minimization and reuse of waste materials, and the clean up of toxic releases.

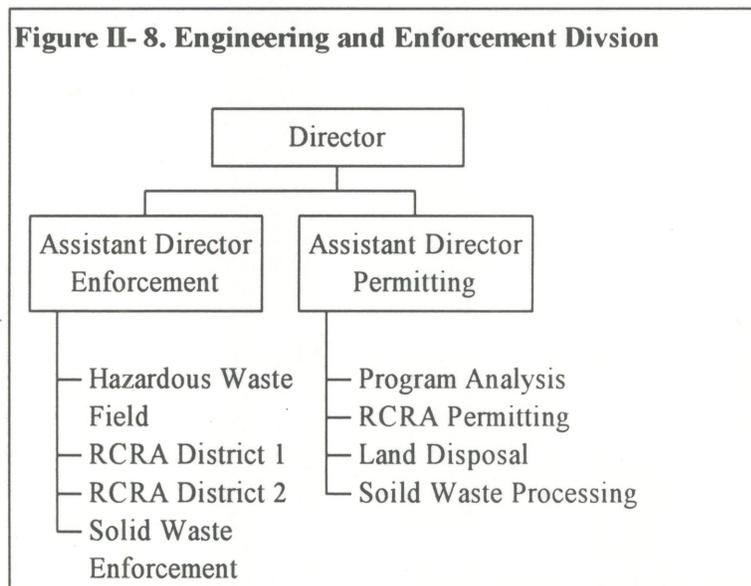


Organization. As shown in Figure II-7, the Bureau of Waste Management is divided into four divisions, headed by directors who report to the bureau chief. The bureau chief provides overall coordination, oversight, and direction to the bureau, and technical and administrative assistance to the State Emergency Response Commission. The Planning and Standards Division oversees the bureau's budget, coordinates the development of regulations,

and encourages pollution prevention and recycling. The Oil and Chemical Spill Response Division maintains 24-hour statewide emergency response capability for hazardous and nonhazardous substance releases, and coordinates clean-up and mitigation activities. The Pesticide, PCB, Underground Storage Tank and Terminal Division is responsible for a variety of activities including regulation of the manufacture, sale, and application of pesticides, regulation of the manufacture, use, and disposal of polychlorinated biphenyls (PCBs), and administration of the Leaking Underground Storage Tank Trust Fund. Finally, the Engineering and Enforcement Division permits and inspects solid and hazardous waste handlers, and takes enforcement actions when warranted.

The Bureau of Waste's Engineering and Enforcement Division (WEED) is responsible for the enforcement of solid and hazardous waste laws and regulations and the permitting of waste handlers. The structure of this division has been reorganized in 1996, 1997, and 1998.

Prior to 1996, the division was organized around its two primary regulatory areas -- solid and hazardous waste. In 1996, the bureau reorganized the hazardous waste program to a layout based on the permitting and enforcement functions, establishing two assistant director positions in 1997 to oversee them. Most recently, the permitting section was reduced in 1998 to four units by collapsing the Land Disposal and Closure/Post-closure and Corrective Action groups together. Each unit has a supervisor reporting to the assistant director for permitting. Due to the reduction of one of the units, the remaining unit has one former supervisor reporting to another supervisor. Figure II-8 shows the current organization of WEED.



The WEED permitting section processes various permits for solid and hazardous waste facilities, coordinates voluntary clean-ups of contaminated sites, and provides overall program support to the division. Prior to 1998, the permitting section had five functional areas: Program Support; Closure/Post-closure and Corrective Action; RCRA and CRW (Connecticut regulated wastes) Permitting; Land Disposal; and Solid Waste Processing.

The WEED enforcement section, called the enforcement and compliance assurance program, selects inspection targets, performs inspections, initiates enforcement actions, and ensures compliance with those actions. This section was also reorganized in 1998. Previously, the enforcement section was organized around three hazardous waste districts and two solid waste districts. Each hazardous waste

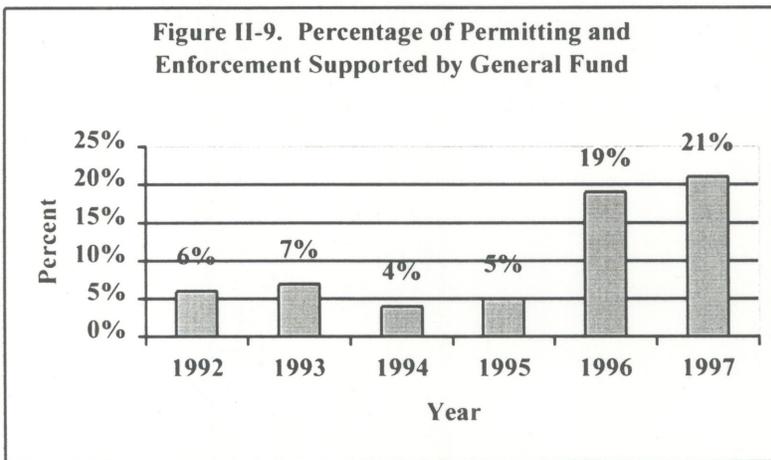
district had a supervisor that reported to the assistant director. The districts each had three inspectors and three enforcement lead staff. As a result of the reorganization, the three districts were combined into two, and now geographically match the solid waste districts. The two new hazardous waste districts, each headed by a supervisor, have five enforcement lead staff. However, the inspection function was separated from the districts and now seven inspectors are grouped together under one supervisor. One enforcement lead staff and one inspector are not full-time employees. As a result of the reorganization the inspection function lost two positions and the enforcement function lost one.

The two solid waste districts were not affected by the recent reorganization. One supervisor, who reports to an assistant director, heads the two districts. The solid waste unit contains four enforcement lead staff and one field inspector. Within the solid waste unit the enforcement leads also perform inspections. However, a realignment is contemplated for the future that would separate the inspection function from the enforcement function.

	1992	1993	1994	1995	1996	1997
Enforcement	\$1,336,189	\$1,731,731	\$1,610,358	\$1,566,366	\$1,774,562	\$1,801,144
Permitting	904,171	1,151,664	1,392,846	1,314,467	1,544,236	1,496,469
Total	2,240,360	2,883,395	3,003,204	2,880,833	3,318,798	3,297,613

Source of Data: DEP

Resources. Table II-1 breaks out by year waste bureau spending on enforcement and permitting for hazardous and solid waste since 1992. The bureau's first full fiscal year was 1991, but General Fund data were not available for that year. The total spent on both activities increased from approximately \$2.2 million in 1992 to \$3.3 million in 1997. Since 1993, however, the total expenditures remained fairly consistent. Enforcement represents the greater share of expenses in each of the years.

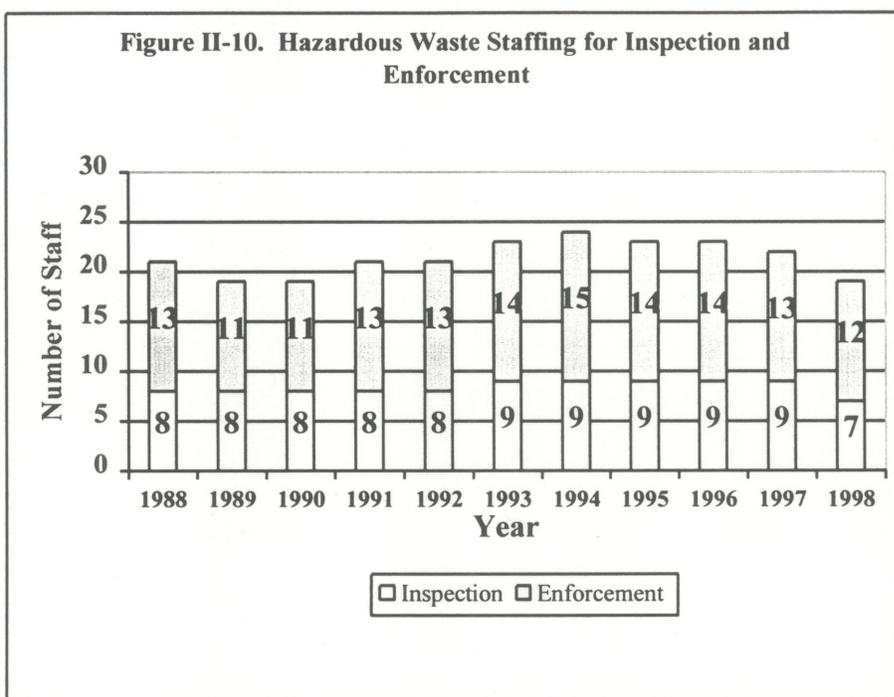


The waste bureau's enforcement and permitting functions are supported by three sources of revenue-- state general fund, federal funds, and funds supported by fee or permit revenue. Figure II-9 illustrates the percentage of the permitting and enforcement expenditure supported by the state's General Fund. From 1992 through 1997, an increasing share of both of

those functions has been supported by the state. In 1992, 6 percent of permitting and

enforcement activities were borne by the general fund; by 1997, the percentage rose to 21 percent.

Staffing. Figure II-10 shows the staffing trend for inspection and enforcement personnel in the hazardous waste section. Inspectors perform various types of field evaluations, while enforcement personnel receive the inspection reports and determine if an enforcement action is warranted. This division of labor is not absolute. Occasionally, enforcement personnel may perform inspections, and some inspectors may issue notice of violations. In addition, some supervisors (i.e., two currently and three prior to the 1998 reorganization) carry an enforcement caseload and have been included in the count. Management, administrative, and support personnel have not been included.



The average staffing for the 11-year period is 21 positions. Until the 1998 reorganization, the number of inspection staff has been fairly consistent throughout the period, between eight to nine positions. The number of enforcement staff ranged from a low of 11 in 1989 and 1990, to a high of 15 in 1994. The total number of staff fluctuated from a high in 1994 of 24, to a low of 19 in years 1989, 1990, and 1998.

Recently there has been a downward trend in the number of staffing overall from a high in 1994 of 24 to a low of 19 in 1998.

Staffing in the solid waste section remained constant over the last 11 years, with five positions dedicated to both inspection and enforcement. As discussed above, one supervisor oversees the unit and has at times had an enforcement caseload.

Bureau of Water Management

The Bureau of Water Management manages a wide and distinct range of programs and activities tied together because of potential or actual impact on the state's surface and ground waters. The bureau develops the state's water quality standards, monitors water quality and

enforces the various federal and state water pollution control statutes related to discharges to the state's surface and ground waters, as well as discharges to sewage treatment plants through sanitary sewer systems. The bureau administers the municipal sewage treatment plant construction fund, and also permits and monitors certain large land disposal systems (septic systems). The bureau also is responsible for various site remediation programs to address the problem of site contamination, including the administration of the Property Transfer Act, the urban site remediation program, and the potable water program, among others. The bureau also administers the state's dam safety, flood control, and wetlands management programs, as well as the water diversion permit program.

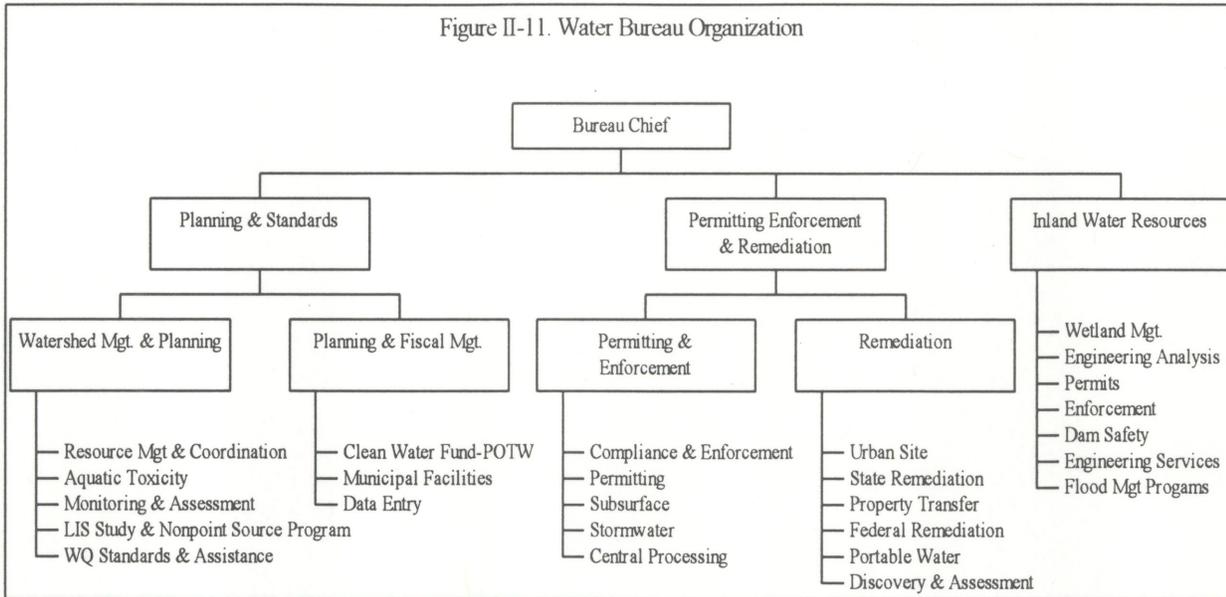
Organization. Prior to 1992, the water bureau was organized into three divisions: Engineering and Enforcement; Planning and Standards; and Inland Water Resources. The Planning and Standards and Inland Water Resources Divisions have remained basically the same, but the Engineering and Enforcement Division has changed. Prior to 1992, that unit handled all industrial and municipal discharge permitting and enforcement, with engineers doing both permitting and enforcement work.

In response to the agency-wide permit backlog problem that reached a head in 1992, and was particularly troublesome in the water area, the engineering and enforcement division was split in two, creating two different entities: compliance and enforcement, and permitting. In 1992, all but one of the former engineering and enforcement engineers were assigned to work primarily on permitting on a temporary basis to eliminate the permit backlog problem for what was anticipated to be a one-year period.

Also added to the water bureau's responsibilities in 1992 was the Site Remediation Division, formerly within the waste bureau, in order to consolidate groundwater programs and to provide staffing flexibility to address the permit backlog problem. The new compliance and enforcement, permitting, and remediation units, were combined into the current Permit, Enforcement, and Remediation Division (PERD). As shown in Figure II-11, PERD is divided into two sections, with remediation on its own and permitting and enforcement as the other section. Both sections are headed by an assistant director.

The Compliance and Enforcement unit is made up of inspectors and enforcement engineers. Generally, compliance monitoring and enforcement of the National Pollutant Discharge Elimination System (NPDES) and pretreatment discharge permit programs, including discharges that should be permitted but are not, are carried out by this unit. The inspectors conduct the various inspections required to be done under EPA agreement, document the results in inspection reports, and respond to complaints. Since 1992, the inspectors have been responsible for drafting notices of violation based on violations found during their inspections.

Figure II-11. Water Bureau Organization



Each inspector is assigned to a geographical area within the state, coincident with the eight major drainage basins in Connecticut. They are the Housatonic River Basin, Southwest Coastal Basin, Connecticut River Basin, Thames River Basin, Southeast Coastal Basin, Pawcatuck River Basin, South Central Coastal Basin, and Quinnipiac River Basin.

The enforcement engineers in the compliance and enforcement unit are responsible for developing and carrying out formal enforcement action against violators where warranted. As will be discussed later, dedicated resources to water discharge enforcement has been a problem in recent years.

The permit section issues new and renewal permits for wastewater discharge permits for both industry and municipal and other publicly owned sewage treatment plants. There are two specialized units under permitting and enforcement that handle stormwater permits and land disposal permit issues (e.g., large septic systems). These two specialty groups administer both permitting and any necessary enforcement activity related to their specific programs.

The permit engineers also handle some enforcement cases, although their primary responsibility is permitting. According to DEP, reasons why a permit engineer might handle an enforcement case instead of the full-time enforcement engineers include:

- the violation prompting the enforcement case was discovered during the permitting process;
- the knowledge the permit engineer has about a violator is seen as beneficial to the enforcement process; and
- recognition of the tight resources dedicated solely to enforcement.

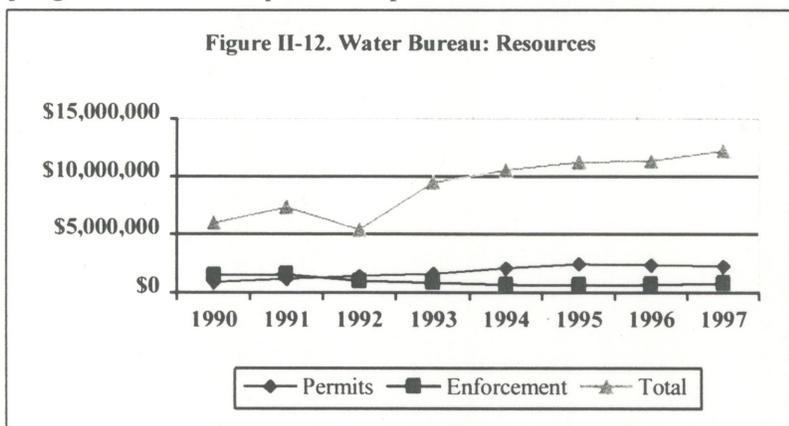
Assisting in the permitting process is the central processing unit, which reviews the permit applications for sufficiency, and also handles temporary and emergency authorizations. The same assistant director oversees both the enforcement and permitting staff.

Planning and Standards Division. The water bureau's Planning and Standards Division has seven different sections. These include: (1) Clean Water Fund-POTW; (2) the municipal facilities section; (3) water quality standards and assistance; (4) Long Island Sound (LIS) study and nonpoint source program; (5) aquatic toxicity; (6) resource management and coordination; and (7) monitoring and assessment. Much of the work of this division forms the underlying standards against which enforcement is taken and generally supports the enforcement process. The municipal facilities section, however, also performs an enforcement function.

The municipal facilities are required to submit monthly monitoring reports to the municipal facilities group. Municipal enforcement may be divided between violations that occur because of inadequate operation and maintenance, and those due to the age or obsolescence of the facility. DEP can order a town to improve its sewage treatment plant, enabling the town to be eligible for state grants and low-interest loans, using the unilateral order mechanism. In some cases, these are considered "friendly orders". How municipal violations are being handled is in transition in the water bureau, with a move toward consolidating enforcement activity under the compliance and enforcement unit.

Finally, although program review is not focusing on the bureau's Inland Water Resources Division, this division also has enforcement duties. It enforces statutes related to water diversion, dam safety, and flood control, as well as maintaining an oversight role over wetlands issues.

Resources. Figure II-12 shows the eight-year trend for water bureau resources overall and for the permitting and enforcement functions related to municipal and industrial discharge programs. The top line represents total bureau resources, while the bottom two are for



permitting and enforcement (these figures include fringe benefits). As the figure shows, in 1992, the expenditures for permitting and enforcement began diverging, with permitting resources increasing and enforcement's decreasing. This is due to the emphasis placed on eliminating the permit backlog existing at the water bureau at that time.

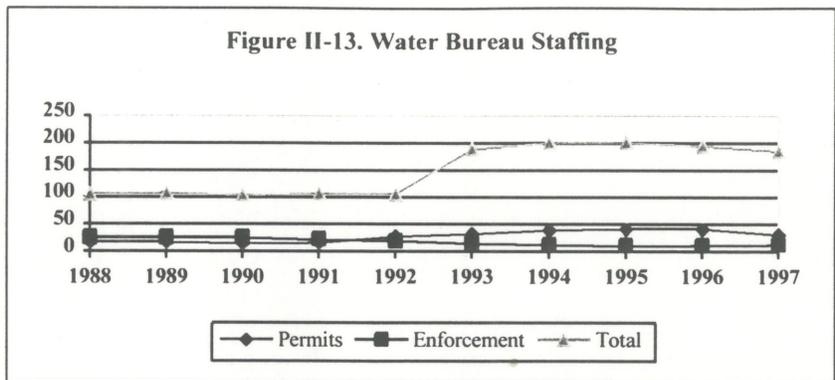


Figure II-13 presents staffing trends for permitting and enforcement. As expected, the staffing trends show the same divergence in 1992 as the above expenditures graphic. In these figures, enforcement staff and resources combine inspectors and enforcement engineers who actually handle the

enforcement cases. If those were separated, it would show that for several months, only one enforcement engineer was dedicated full-time to industrial enforcement. In 1993, one additional engineer was added with an additional staff person in 1995. During 1998, two more enforcement engineers were added, bringing the total to four (one engineer resigned in 1998.)

Office of Legal Counsel

The current Office of Legal Counsel was established in 1988, to provide DEP with in-house legal advice. It is understood that DEP in-house counsel do not represent the department in any kind of formal proceeding, which includes administrative adjudications as well as judicial proceedings. The attorney general represents the department by statute.

During the 1970s, Governor Ella Grasso disbanded the legal counsel office. When Leslie Carothers became commissioner in 1988, the function of in-house legal counsel was restored. Currently, there are five attorneys. Their general duties include: researching and advising on pertinent areas of law; drafting regulations; handling the legal aspects of requests under the state's freedom of information law; and assisting hearing officers and final decision-makers in the adjudications process. Specifically with respect to enforcement matters, they review enforcement-related documents, assure compliance with the department's supplemental environmental policy, provide legal guidance when needed, and advise on strategy.

Generally, the attorneys are assigned to specific bureaus and since June 1998 are co-located with bureau staff. Previously, they were centralized in one area. They report to the chief counsel, who currently reports to the assistant commissioner for the regulatory bureaus.

Office of Commissioner

The Office of the Commissioner, as shown in Figure II-1 on page 8, consists of several units and programs. They are: environmental assistance and outreach; Long Island Sound program (OLISP); ombudsman; affirmative action; adjudication unit; legislative and regulatory review; and communications and education. The Office of Environmental Assistance and Outreach and its role in overseeing the department's compliance assistance program will be discussed later in the report.

State Environmental Enforcement Policies

This chapter summarizes the statutory, regulatory, and administrative policies relevant to enforcement. The final section of the chapter focuses on a related topic—the avenues available to any DEP staff who might believe DEP is improperly carry out its enforcement responsibilities in all or certain instances.

State environmental policy is guided by a mix of statutory, regulatory, and administrative requirements. The state adopted its core environmental policy in statute in 1971, when the Department of Environmental Protection was created. The policy is "to conserve, improve, and protect its natural resources and environment and to control air, land, and water pollution in order to enhance the health, safety and welfare of the people of the state." Restated by the legislature in 1973 with a slightly broader context:

...[T]he continuing policy of the state government [is]... to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Connecticut residents.

To carry out the policy, unchanged since 1971, the commissioner of DEP has the generic power to:

- require, issue, renew, revoke, modify or deny permits regulating all sources of pollution in the state;
- initiate and receive complaints regarding any actual or suspected violation of any statute, regulation, permit or order; and
- enforce any statute, regulation, order or permit.

Interspersed throughout Title 22a of the general statutes are also program specific authorities, for example, the commissioner's authority to issue a water pollution abatement order. Although there are a few statutory requirements about enforcement operations, most focus on environmental quality standards, defining pollutants and their allowable levels and uses, and establishing federal standards and requirements in state law. Almost all DEP enforcement operations policy is found in administrative rules. Since 1992, there has been a marked effort by the agency to adopt agency-wide guidelines as opposed to having each bureau operate on its own as had been the case. These policies include: a notice of violation

directive; enforcement response policy; enforcement coordination plan; civil penalty policy; and supplemental environmental project policy.

Informal Enforcement

The department uses what is referred to as “informal” and “formal” enforcement tools to achieve compliance by violators. The most common informal enforcement tool used is the issuance of a notice of violation (NOV). The NOV is an administrative mechanism, not found in statute. In early 1992, the department issued a new agency-wide policy by memo requiring notices of violation issued in any case where a violation was cited and when formal enforcement action could not occur within a month of inspection. It also established a standardized NOV format.

The policy appeared to formalize a practice of informal enforcement already being used by some regulatory bureaus (e.g., air and waste). The directive did not address the potential use of the NOV as the only enforcement response to the violation, unlike the administrative Enforcement Response Policy established later in 1992 and discussed later in this chapter.

In 1996, a commissioner's directive modified the NOV format and required a guidance sheet, entitled *Advice to Recipients*, be included with the notice sent to violators. In addition, the bureaus were directed to send any source that had returned to compliance a NOV "closure" letter indicating the enforcement action had been concluded.

In 1995, the legislature adopted a provision for a “warning notice”. Originally applicable only to hazardous waste violations, the law was amended in 1996 to allow the tool used with other types of violations.

The warning notice must: (1) describe the minor violation and specify the date such minor violation occurred; (2) specify alternatives to correct the minor violation; (3) provide a projected timeframe for compliance; and (4) advise the violator of its responsibilities under the law. A minor violation is defined as any violation under the various enforcement chapters, except for one that:

- was intentionally committed;
- enabled the violator to avoid costs either by a reduction in cost or by gaining a competitive advantage;
- was a repeat violation or was committed by a violator with an environmental compliance history determined by DEP to require more serious enforcement action;
- has caused actual exposure of any person to hazardous waste or poses a significant risk to human health or the environment;
- cannot be corrected within 30 calendar days or for which a plan for compliance cannot be completed and agreed to within 30 days of the violator's receipt of the notice; or

-
- was one of several potentially minor violations detected in the course of an inspection.

The law provides if the violator fails to respond in a compliant manner, DEP can seek other enforcement action. Probably the most significant part of the law is the mandate that a warning notice *cannot* be considered during the permit review process. In practice, only the waste bureau uses warning notices; the air and water bureaus do not.

Neither an NOV or warning notice are enforceable on their own, which is why they are considered informal. If the alleged violator did not comply with the notice, further action would have to be taken to develop a formal order, including establishing actual evidence that what was found by DEP was in fact a violation. These formal actions are described next.

Formal Enforcement

General authority to issue orders is set out in statute. DEP uses three types of formal enforcement orders: unilateral; consent; and cease and desist. The unilateral order is, as its name suggests, imposed by the department without the formal consent of the other party. The violator has the right to request a hearing before the commissioner within 30 days after the order is sent. The hearing is conducted under the Uniform Administrative Procedure Act (UAPA), and the decision of the hearing officer may be appealed. If a hearing is not requested, the order becomes final and enforceable after the 30 days. Currently, DEP cannot seek administrative penalties with a unilateral order because it has not drafted regulations as required by state statute.

A consent order requires the formal agreement by both DEP and the violator to execute. By its agreement, the violator gives up its right to appeal the order. At this time, a consent order is the only enforcement action through which DEP seeks administrative penalties.

The cease and desist order, like the unilateral order, does not require formal consent of the other party and the source must immediately comply with order. The specific requirements for this rarely used tool are statutory. One of three conditions must exist for the commissioner, without prior hearing, to issue a cease and desist order to discontinue, abate, or alleviate a condition or activity in violation of environmental laws and regulations. The conditions are:

- a source is engaging in or about to engage in any condition or activity which will result in or is likely to result in *imminent and substantial damage to the environment, or to public health*; or
- after investigation, there is a violation of the terms and conditions of a permit that is *substantial and continuous and appears prejudicial to the interests of the people of the state to delay action* until an opportunity for a hearing can be provided; or
- a source is conducting an activity that is or will result in *imminent and substantial damage to the environment or to public health*, for which a permit (license) is required and the permit has not been obtained.

The department must conduct a hearing within 10 days of order receipt. The cease and desist order will remain in effect for 15 days after the hearing, during which time a decision by the hearing officer will be issued. If needed, the attorney general, upon DEP request, may institute a civil action in superior court to enjoin a person from violating the cease and desist order and to compel compliance with the order.

Another option for formal enforcement available to the department is civil or criminal action taken against a violator. This action escalates the enforcement process to its most severe response. The department, however, must refer the case to the attorney general, chief state's attorney (CSA), or federal EPA for litigation in the state Superior Court or federal courts.

As part of the state Environmental Protection Act of 1971, the attorney general was statutorily authorized to file a civil suit in Superior Court on behalf of DEP against any source cited for an environmental violation. The attorney general may seek an injunction and/or penalty against the violator. The department may also seek civil action through a referral to the federal EPA and may refer a case for criminal prosecution to the chief state's attorney or EPA. However, referral to the chief state's attorney and EPA are not specifically established in statute.

Enforcement Response Policy

Developed in 1992, DEP's enforcement response policy (ERP) is the primary administrative document guiding enforcement decisions and actions, including the use of the various tools -- formal and informal -- discussed above. The ERP details the department's violation classification system and enforcement response procedures. The goals of the ERP are manifold and include: prevention and prompt cleanup of pollution; prompt compliance with legal requirements; deterrence to the specific violator and the regulated community as a whole; removal of economic advantage; punishment of violators; satisfaction of federal authorization requirements; and improvement of public awareness.

One of the striking aspects of the ERP is that it is intended solely as a guidance document. Staff may take actions that differ from the policy if it is considered appropriate in a given case. In addition, there is a great deal of discretion given to staff in the classification of certain actions of a violator. For example, the ERP asks the enforcement staff to determine if a violation constitutes a "substantial deviation" from a statute or regulation, without defining substantial. In addition, the ERP states that "every high priority case *should* result in a formal enforcement action which will result in an enforceable order, consent order or judgement, each of which would include a penalty" (emphasis added). What the ERP does not clearly state is which high priority cases might not result in a formal enforcement action, or might not face a penalty.

The 1992 ERP has been the foundation for the department's enforcement work for the past six years. It is currently under review and being revised.

Process. The ERP outlines a four-step process for determining the appropriate enforcement action, as shown in Figure III-1. The first three steps involve classifying the

violations and the violator to get to the fourth step of selecting and implementing an enforcement response. The specific steps are:

- classify violations individually;
- classify violations collectively;
- evaluate violator; and
- determine appropriate enforcement action.

As stated, the first step in the evaluation of an enforcement case is to classify each violation into one of three categories: (1) high priority violation (HPV); (2) Class 1; or (3) Class 2. The categories are:

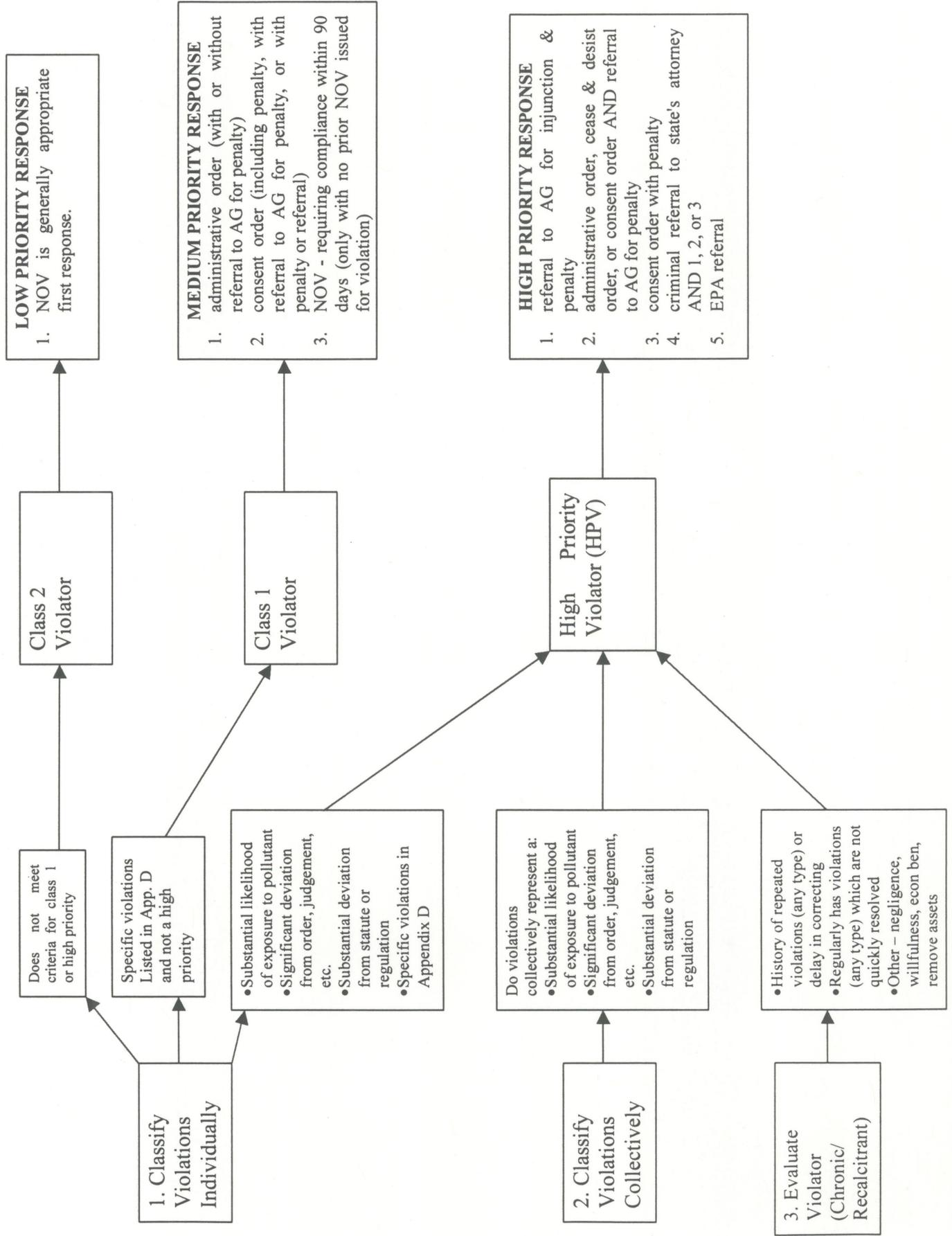
- *High priority violations*, the most serious violations -- The ERP lists certain specific violations automatically considered high priority. Aside from those, a high priority violation is one that: (1) has caused an actual or substantial likelihood of exposure to pollutants that pose a potential threat to public health or significant risk to the environment; (2) represent a significant deviation from the terms of an administrative order, consent order, judgment or permit; and/or (3) is a substantial deviation from a statute or regulation.
- *Class 1 violations*, violations that are specifically listed in the ERP and do not meet the standard of a HPV.
- *Class 2 violations*, those violations that do not meet the criteria for HPV or Class 1 violations.

If the case involves more than one violation, the violations are evaluated collectively. A collective evaluation recognizes the fact that individual violations by themselves may not be considered as harmful or serious as when they are considered together. The violations are collectively evaluated to see if they fall into the three high priority categories described above: (1) substantial likelihood of exposure; (2) significant deviation from the terms of an order or permit; or (3) substantial deviation from statutes or regulations.

After the violations are categorized, the violator (i.e., source) is evaluated. A high priority response in some cases may be warranted due to the type of violator even if the violations either individually or collectively would indicate a low-level response. Enforcement personnel are directed to consider whether the violator is chronic and recalcitrant, and to evaluate other information about the violator that would require a high priority response. In determining a chronic or recalcitrant violator the following factors are considered:

- history of repeat violations of any type or of delay in correcting the violations; and

Figure III-1. Enforcement Response Policy Flow Chart



-
- a pattern of violations which have not been resolved in a timely manner or repeated violations of the same laws or regulations.

Other factors may also be considered that would raise the level of response by the DEP, including: information about the degree of negligence involved; the economic benefit derived from noncompliance; or the risk that the violator may shield or remove assets from the state. Substantiation of any of these factors may classify the violator as a high priority, necessitating high priority response.

Enforcement response. The ERP establishes three responses based on the classification of the violator and/or violation. Each response has a number of enforcement options -- both formal and informal actions. The types of responses and associated enforcement options areas follows:

- *A High Priority Response (HPR)* is indicated in those cases where the violations and/or violator are classified as high priority. These are the most serious cases and should result in a formal enforcement action and include a penalty. The enforcement options available to DEP are: referral to the attorney general; unilateral order, consent order, or cease and desist order and subsequent referral to the attorney general; consent order with penalty; or referral to the chief state's attorney for criminal prosecution in addition to one of the other options;
- *A Medium Priority Response (MPR)* is appropriate in those cases where the violations are only Class 1 or Class 2 and the violator is not a high priority violator. The enforcement options include: unilateral order with or without referral to the attorney general for penalty; consent order with a penalty *or* with referral to the attorney general *or* without penalty or referral; or a notice of violation that requires compliance within 90 days; or
- *A Low Priority Response (LPR)* is indicated in those cases that have only the lowest priority violations (Class 2) and the violator is not a high-priority violator. The enforcement options include a notice of violation or warning notice.

In practice, the issuance of a notice of violation is encouraged for all types of violations but generally not required by the policy. The policy notes notices of violation are especially beneficial to the enforcement process when a formal enforcement action cannot be issued quickly. A NOV notifies the violator in a shorter period of time and may result in prompt compliance. Finally, issuance of a NOV establishes a case record.

The ERP addresses situations in which a violator has corrected cited violations and has documented compliance with the department before the issuance of any informal or formal enforcement action. In such cases, the policy allows no further enforcement action, with a few exceptions. The exceptions are in cases where a high priority response is warranted because a

penalty will be assessed and where the violator has a history of noncompliance or does not appear to understand the importance of maintaining compliance. Further, the ERP makes an explicit exception for the air bureau and the waste bureau's pesticide management division, which are *required* to issue a NOV even when the violator has returned to compliance before the enforcement action is issued.

Response time frames. The ERP establishes specific time frames for enforcement actions depending on the priority of responses. Ordinarily, the priorities should follow the obvious order of high priority, medium priority, and low priority. If public health or the environment is in danger of imminent harm, the department is expected to take immediate action through a cease and desist order and/or the use of the Oil and Chemicals Spills Response Division¹ to stabilize or correct a situation. Other factors may raise the necessity of responding more quickly to a case, including the potential pollution of a drinking water supply, the location of a violation in a residential neighborhood, the prominence of a violation, or the substantial economic benefit gained by a violator from noncompliance.

The response policy also anticipates situations where time frames may not be met due to the complexity of a case, the need for coordination among the bureaus, or unusual constraints on the department's resources. Aside from those situations, the established time frames are calculated from the date the violation was cited and are set out in Table III-1.

Table III-1. ERP Time Frames for Enforcement Responses			
Time frame is calculated in days from date violation is cited.			
	High Priority Response	Medium Priority Response	Low Priority Response
NOV		30 days *	30 days **
Consent Order	90 days	120 days	
Unilateral Order	60 days	90 days	
Referral to AG	60 days	90 days	
*If compliance with NOV not achieved within 90 days, order or referral issued within 60 days.			
**If compliance with NOV not achieved within 60 days, an order or referral may be considered. If enforcement escalated, unilateral order or referral issued within 90 days and consent order within 120 days.			
Source of Data: DEP Enforcement Response Policy (1992)			

¹ The Oil and Chemical Spills Response Division is part of the Bureau of Waste Management.

Enforcement coordination plan. The department has promulgated a plan to assist the regulatory bureaus in coordinating their inspection and enforcement actions. A coordinated effort by more than one bureau is typically referred to as a multimedia case. The multimedia plan encourages coordination when:

- violations are found that are within the responsibility of more than one program;
- the inspection universe of one program significantly overlaps another;
- corrective actions are ordered that are regulated by more than one program; and
- EPA or other outside agencies are involved in an enforcement action.

A primary concern in a multimedia evaluation is that actions be coordinated between programs when one program finds violations that are the responsibility of another program and when one program commences an enforcement action at the same time as another program. The coordination plan directs the bureaus to notify the others when violations are found by completing a standardized multimedia checklist. Of course if the matter is urgent, more informal and direct contact (e.g., telephone contact or staff meeting) between the bureaus may occur.

An enforcement lead is generally appointed in a multimedia enforcement case and is typically the staff in the bureau in which the most serious media violation has occurred. For example, if the most serious violations involve infractions against air pollution laws and regulations, then the air bureau will take the lead. The plan establishes contact between the bureaus when enforcement action is issued and it is anticipated that another media may be involved or another bureau has a pending action against the source. The contact is first done informally and is then documented on an enforcement coordination form, which becomes part of the case file. If the bureau receiving notice wishes to join a proposed action, it must notify the other program within 10 days; otherwise, the proposed action will proceed.

Penalties

Since 1971, the department has had the authority to enact regulations to impose civil penalties, subject to statutory limits, through a unilateral order. In 1993, the legislature mandated rather than authorized the promulgation of such regulations. Under the mandate, the department is to prepare regulations to establish a schedule setting forth the amounts, or the ranges of amounts, or a method for calculating the amount of civil penalties. The statute requires the civil penalties for each violation be sufficient to insure immediate and continued compliance with applicable laws, regulations, orders, and permits. Penalty limits, however, are imposed. To date, the department has not promulgated the regulations and, therefore, cannot impose civil penalties in unilateral orders.

Civil penalty policy. For use with consent orders, in 1993, the department developed a draft civil penalty policy. (Because the violator agrees to the penalty in a consent order, the absence of regulations is not a problem). Penalty determinations are based on a four-part formula

that considers: (1) the gravity or seriousness of the violation(s); (2) the length of time the violation continued; (3) equitable or financial factors based on violator circumstances that suggest penalty adjustments; and (4) whether the violator gained economic benefit by the noncompliance. Commonly, cases involve more than one violation. Penalties are calculated for each violation, which are then added together for a final penalty total.

To figure the gravity or seriousness component of the penalty formula, DEP staff is provided what is called the penalty matrix. (See Appendix D for the penalty matrix). As reflected by the matrix, the gravity component looks at two factors: (1) the potential for harm to the environment or public health; and (2) the extent the violation deviates from the law or regulation. For each factor, a decision must be made as to whether the potential or deviation is major, moderate, or minor. The potential for harm-- environmental and regulatory-- is weighted more heavily than actual deviance. As the policy explains, the purpose of all environmental requirements is to prevent harm and so "noncompliance with any requirement could result in a potential for environmental of health impacts." Thus, the potential for harm is emphasized, not whether harm did or did not occur.

The penalty amounts range from a low of \$100 for minor potential for harm and minor deviation to a high of \$25,000 for a major potential for harm and extent of deviation. Altogether the matrix lays out 27 different gravity assessments for any violation.

The penalty amounts in the matrix assume a violation occurred once. In reality, violations can occur over a period of time. There is another matrix to account for this multi-day issue, which turns on the seriousness of the two factors noted above to determine whether multi-day penalties are mandatory, necessary, or discretionary. The actual multiday penalty amounts can add 10 to 25 percent to the penalty based on the initial seriousness calculation.

Once the gravity-based penalty has been calculated, along with any multi-day additions, adjustments may be made upward or downward to reflect who the violator is and the particular circumstances surrounding the violation. The policy requires all upward adjustment factors be considered before the penalty is proposed to the violator. The violator bears the burden of showing that any downward adjustments apply. The six factors allowed to adjust the penalty amount are:

- the violator's good faith efforts to comply or lack of good faith;
- the violator's degree of willfulness and/or negligence;
- the violator's history of noncompliance;
- the violator's ability to pay;
- the violator's willingness to undertake a supplemental environmental project;
- and
- other unique factors, including the risk and cost of litigation.

Finally, any economic benefit the violator gained because of noncompliance is calculated. Removal of economic advantage is one of the core goals of the department's enforcement response policy and is one of the factors to be considered by DEP when it drafts civil penalty regulations. Economic benefit consists of avoided or delayed costs as well as any

profit based on the noncompliance. An EPA computer model called BEN is used to calculate avoided or delayed costs. The profit determination is to be based “on whatever information is available to staff”. Under the policy, it is only in rare circumstances that less than the full economic benefit amount is to be recouped, and only a bureau chief is authorized to approve a lesser penalty amount.

The consent order may also contain what are called future stipulated penalties, which are imposed for future violations of the order or environmental laws and regulations. For example, in the case where the consent order requires a report be submitted by a certain date, stipulated penalties could be established in the order and automatically activated if the violator fails to submit a report due by a specific date. Stipulated penalties generally accrue on a daily basis.

Supplemental environmental projects. Since 1995, the courts have been authorized by statute to impose an alternative sanction instead of civil penalties in a judgment resulting from a suit filed by the attorney general for violations of environmental laws. The alternative sanction is called a supplemental environmental project (SEP). In imposing the SEP, the courts can order a violator to:

- restore natural resources or remediate pollution at a site unconnected to the violation;
- provide for any environmental protection or conservation project approved by the department; or
- contribute to an academic or government-funded research project related to environmental protection or conservation.

While the statutes do not specifically authorize the department to impose a SEP or negotiate one with a violator, DEP has administratively adopted this practice for use in consent orders. The administrative SEP policy was established in 1993 and revised in 1996. The purpose of a SEP is to substitute the value of a penalty or any part thereof to fund an “environmentally beneficial project.” Typically, the SEP is negotiated as part of a consent order and is developed between the enforcement staff and violator. However, the SEP must be initially approved by bureau management before it can be offered to a violator and, in major cases, the bureau chief must authorize the plan. A SEP, like any order, is not final until it is approved by the commissioner.

There are eight categories of SEPs, including: pollution prevention; pollution reduction; public health; environmental restoration; environmental assessment; public awareness; emergency planning; and indirect nexus projects. Pollution prevention is the preferred and most common type of SEP, and means a project that reduces or prevents the generation of pollutants.

DEP has developed a set of standards to determine the appropriateness of a particular project. They include:

- no further damage to the environment may occur as a result of the SEP;
- projects required by law, already completed, or being planned for will generally not be allowed;

-
- except in limited circumstances, a SEP will not totally replace a punitive monetary penalty;
 - the amount of resources needed by DEP to execute and monitor a SEP and the technical and economic ability of respondent to complete a SEP are considered;
 - all violations must be corrected and pollution abated in a timely manner before a SEP is considered as part of a settlement;
 - a SEP should have a direct relationship to a violation or must further the department's statutory mission or reduce further violations;
 - SEPs can be initiated by either the department or the source;
 - repeat violators are "less appropriate" candidates for a SEP;
 - third party (e.g., consultant, engineer, attorney, etc.) oversight may be required with the costs paid by the source;
 - completion and stipulated penalty schedules are to be included in the consent order; and
 - the main beneficiary of SEPs should be the public, not the source or DEP.

The chapter so far has related to how DEP carries out its enforcement responsibilities, highlighting significant agency policies. Another area of concern in the committee study was the recourse for any DEP employee who believed the department was improperly implementing its enforcement responsibilities. The next section describes what is currently available to employees.

DEP Employee Options for Addressing Concerns About Enforcement Matters

Current avenues available to DEP employees concerned about enforcement operations carried out in compliance with law and policy was an review area of the committee scope of study. At the outset, it is important to distinguish this area of employee concern from issues related to the work environment. For the most part at DEP, the working environment between staff and management is structured by the terms of collective bargaining agreements. These agreements contain specific grievance processes to settle disputes involving the application or interpretation of a specific provision of the contract. Non-unionized employees, typically managers, may appeal certain work-related actions to the Employees' Review Board (C.G.S. § 5-201—202)

In general, how an agency operates is within the province of management prerogative. Collective bargaining agreements set out certain management rights. For example, management:

- establishes standards of productivity and performance of its employees;
- determines the mission of an agency and the methods and means necessary to fulfill that mission, including the contracting out of or the discontinuation of services, positions, or programs;
- determines the content of job classification;

-
- appoints, promotes, assigns, directs and transfers personnel;
 - suspends, demotes, discharges or takes any other appropriate action against its employees; and
 - establishes reasonable work rules.

The question is what should an employee do when he or she believes agency action goes beyond reasonable discretion into violations of law, policy, or regulation? How can that employee be assured he or she will not be punished for any expressions made or actions taken? In theory, agency management, out of enlightened self-interest if nothing else, should encourage internal feedback from and dialogue with its staff. However, when this is not encouraged or when this does not resolve employee concerns, and the employee chooses to go outside the agency to reporting employer abuses, he or she is commonly called a “whistleblower”.

An advocate for whistleblowers notes:

The responsibility of public disclosure is a thorny ethical question. If an employee has evidence of an employer’s illegal or dangerous activities and does not take action, is he or she acting in complicity? To what extent does the silent employee bear some of the guilt? The responsibility of taking on the system is a grave one – the outcome is not guaranteed to rectify the situation, and the whistleblower may suffer personal consequences” (A Whistleblower’s Check List, Governmental Accountability Project)

Three state statutes relate to whistleblower protection, although only one explicitly sets out a provision for an independent review of the alleged wrongdoing. Connecticut General Statutes §4-61d is the statute commonly thought of as the state whistleblower law. The review process provides:

- any person with knowledge of corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority, or danger to the public safety may report the information to the Auditors’ of Public Accounts;
- the auditors review the matter and report their findings and any recommendations to the attorney general;
- after receiving the report, the attorney general investigates “as he deems proper”. In this investigation, the attorney general may subpoena witnesses and documents, and take testimony under oath; and
- after the investigation concludes, the attorney general reports his findings to either the governor or the chief state’s attorney’s office where necessary.

The whistleblower law further protects the identity of the person providing information from disclosure by either the auditors or the attorney general without the person’s consent, unless either one determines disclosure is unavoidable during the investigation. No personnel action can be taken against any state employee in retaliation for the employee’s disclosure of information. An employee alleging retaliation may file an appeal within 30 days after the incident with the Employee Review Board or with the contract grievance procedure, depending

on the employee's status. Finally, any employee who knowingly and maliciously makes false charges under the statute may be dismissed or otherwise disciplined.

It was under this statute in June 1998 that the auditors received a complaint regarding "ongoing practices at the Department of Environmental Protection that have undercut the enforcement of our environmental protection laws and threatened public health and safety" from then-gubernatorial candidate Congresswoman Barbara Kennelly. The auditors submitted their report to the attorney general in October 1998.

Unlike the previous statute, C.G.S. §31-51m contains no explicit provision for an *investigation* of alleged misconduct. Instead, it focuses solely on the treatment of the employee providing information. It contains a more narrow statement of the nature of actions to be reported, with a broader statement about to whom the information is provided—a public body. The remedies are also different, providing for a damage suit. The main elements are:

- no employer may discharge, discipline or otherwise penalize any employee because the employee reports, verbally or in writing, a violation or suspected violation of any state or federal law or regulation.... to a public body (the state is included in the definition of employer);
- no employer may discharge, discipline or otherwise penalize any employee because the employee is requested by a public body to participate in an investigation, hearing or inquiry held by the public body or a court;
- however, if the employee knows his or her report is false, the employee may be dismissed or otherwise disciplined;
- if an employee is subjected to prohibited actions, after exhausting all available administrative remedies, the employee may bring a civil action to the superior court for job reinstatement, payment of back wages, and benefit reestablishment; and
- any contract rights are not affected by this section.

The third statute (C.G.S. §31-51q) addresses employee protection in the exercise of certain constitutional rights. The statute provides:

- any employer who subjects any employee to discipline and discharge on account of the exercise by the employee of first amendment rights under the U.S. Constitution or sections 3, 4, or 14 of Article one of the State constitution is liable to the employee for damages caused by the discipline or discharge, including punitive damages; and
- the exception to the above is if the exercise substantially or materially interferes with the employer's bona fide job performance or the working relationship between the employee and the employer.

Federal law also provides retaliation protection for state employees. (Title 42 U.S.Code Section 1983).

Court cases interpreting the first amendment rights of public employees, most often free speech rights, find: “it is well settled that persons do not relinquish their first amendment rights to comment on matters of public interest by becoming government employees.”² Cases also note: “It also has been recognized that the government has a legitimate interest in regulating the speech of its employees that differs significantly from its interest in regulating the speech of people in general”³

These competing interests are to be resolved in a balancing test that includes four parts, and looks at the particular facts and circumstances of each case. The employee and employer split the burden of proof in the test. These questions represent the four parts:

1. Can the speech be fairly characterized as constituting speech on a matter of public concern (as opposed to a private matter)? (employee burden of proof)
2. Was the speech at least a substantial or motivating factor in the discharge? (employee burden of proof)
3. Would the employer have made the same decision in the absence of the protected conduct? (employer burden of proof)
4. Did the employee’s conduct/speech interfere with the agency’s effective and efficient fulfillment of its responsibilities to the public? (employer burden of proof).

Relevant to the fourth question are the following factors:

...whether the [speech] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.⁴

One witness at the program review committee’s public hearing in December 1998 noted the whistleblower statute did not protect employees for statements they made to their supervisors. It is true the C.G.S. §4-61d protection is triggered by a report to the Auditors of Public Accounts. However, under C.G.S. §31-51q, it does not matter to whom the speech is made. The Connecticut Supreme Court has said:

...Nor does the private nature of [the speech] undermine the employee’s claim that his speech involved a matter of public concern....Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.⁵

The utility of these employee options is discussed further in Chapter Seven.

² Schnabel v. Taylor, 230 Conn. 735, 749 (1994) (citing several U.S. Supreme Court cases)

³ Id.

⁴ Id. at 758

⁵ Id. at 755

Overview of Enforcement Process

How the various policies described in Chapter Three operate in practice is the focus of this chapter. Overall, the three bureaus follow the same process for each type of enforcement action. Any significant differences will be noted. The flowchart presented in Figure IV-1 illustrates the typical progression of an enforcement case and also shows the many options available to the department during the formal enforcement phase.

Though regulatory staff is guided in the enforcement process by several policies, they have wide discretion. This can result in similar violations being processed differently, due to case-specific circumstances. According to DEP staff, factors that may affect case disposition include:

- the violator's past compliance history and willingness to respond appropriately to a violation;
- past practices and precedents within the bureau;
- the ability and expertise of a violator's legal counsel and technical staff;
- negotiation skills of DEP staff involved;
- economic impact of an enforcement action on a violator particularly if jobs will be affected; and
- community or media attention to a violation.

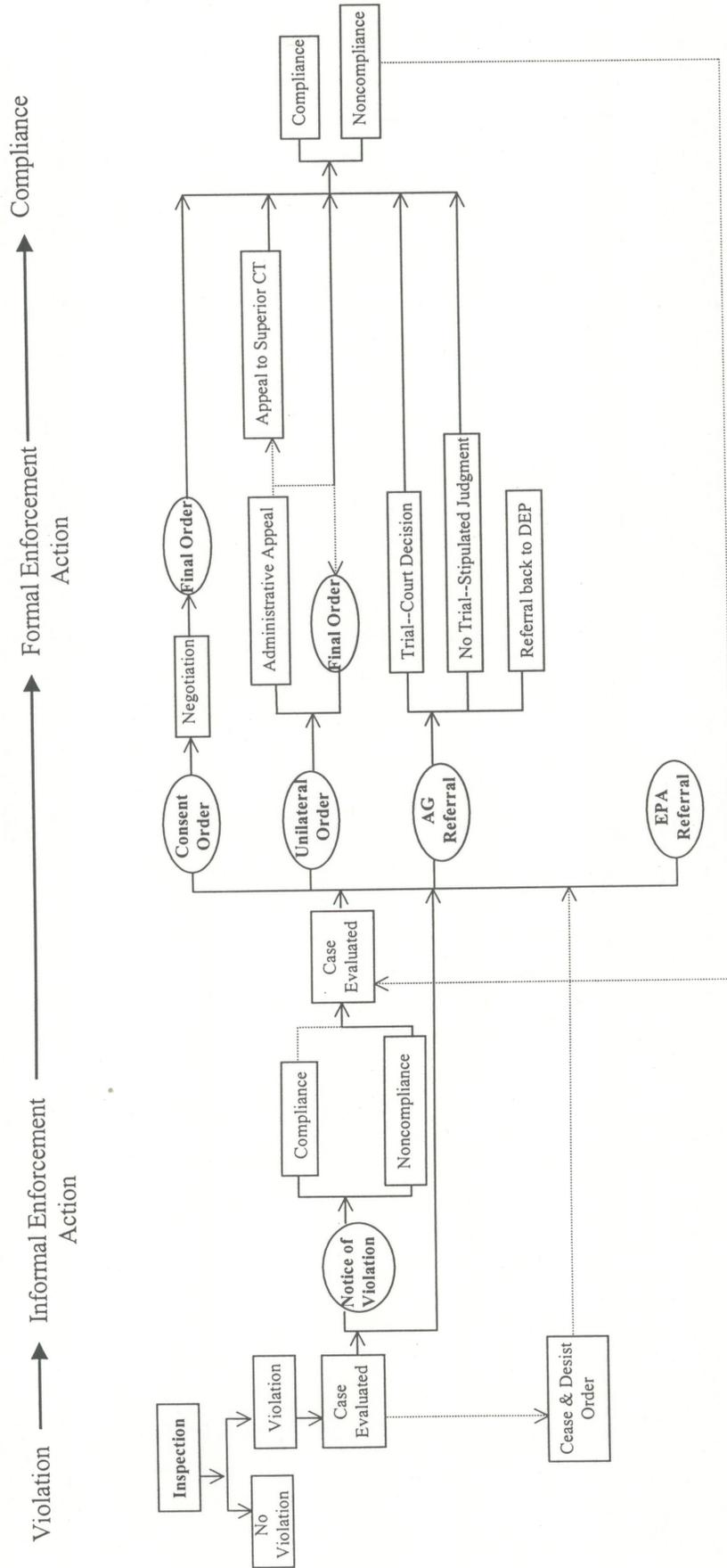
The flowchart shows the process typically begins with detection of a violation and is followed by an informal enforcement response from DEP. If the informal response fails to achieve compliance by the violator, or the violation requires a more formal response and/or penalty, the department escalates its activity. The final phase is compliance, which is the primary intent of any enforcement action.

Inspection

Non-compliance with environmental laws and DEP regulations is detected primarily through an inspection of a site and/or equipment. The inspection process is often the regulatory bureaus' first line of communication with a violator in identifying and stopping the violation and facilitating compliance.

The types of inspection vary among regulatory bureaus and are discussed in greater detail in Chapter Five. However, in general, inspections are scheduled with the source in advance or occur unannounced with the DEP inspector simply arriving at a site. Unannounced inspections are the most common and preferred

Figure IV-1. DEP Environmental Enforcement Process



method. Inspections are prompted: by complaints; in response to a specific type of pollution or industry; to meet federal EPA requirements; to ensure proper implementation of an environmental program, such as the air bureau's Title V or waste bureau's RCRA programs; or to verify a source's compliance with a previously issued enforcement action.

The field inspector and field engineer are the DEP staff responsible for conducting inspections and detecting and reporting violations. Upon completion of an inspection, the field inspector produces a detailed report citing the conditions of the site, all violations discovered, and any analysis, sampling or calculations done to document and verify the violations. If a violation is found, the report typically contains a recommendation for informal enforcement action (e.g., NOV). An inspection report is also filed if no violations are found.

Enforcement

Informal action. The flowchart shows the informal enforcement process begins when the inspector recommends a notice of violation be issued. The NOV is drafted by a field inspector or engineer, reviewed by bureau management (e.g., a supervisor and an assistant director), and ultimately authorized and issued by the bureau's enforcement director. In complex or high profile cases, the bureau chief may be included in the review process and authorize the notice of violation.

A significant difference in practice exists in the air bureau in that the field inspectors and engineers are authorized to issue a field (or instant) notice of violation directly to the source at the time of inspection. A field notice can only be issued for certain specific violations of odor, fugitive dust, or visible emissions. The source must agree to accept the field notice by signing the document. If the source refuses, the field notice may not be issued and the bureau will issue a regular notice of violation.

Another difference in practice exists in the waste bureau. Beginning in 1996, the waste bureau began issuing warning letters, pursuant to state statute, for 30 specific types of low priority solid or hazardous waste violations. The warning letter allows the violator 30 days in which to return to compliance status. If the violator remains in noncompliance, the waste bureau may escalate the enforcement action. The air and water bureaus do not issue warning letters.

A notice of violation typically allows 30 days for the source to report to the department its return to compliance or its plan and schedule for achieving compliance. However, as little as 14 days or as long as 90 days may be allowed for compliance. The air bureau generally allows 14 days for compliance with a field notice.

An informal enforcement case is closed once compliance is reported to and verified by the regulatory bureau initiating the action. The air and waste bureaus verify compliance through closeout (or follow-up) inspections and based on a certified statement of compliance from the source in lieu of an inspection. The water bureau accepts certified statements of compliance and also letters explaining any compliance action taken by the source. The water bureau rarely

reinspects at the time, but will review compliance during the next regularly scheduled inspection. Since 1996, department policy requires NOV recipients be informed by letter of the closure of the informal enforcement case once compliance has been achieved. Both the air and waste bureaus follow the procedure, while the water bureau does not at this time.

Formal action. Formal enforcement escalates the department's response to a violation. Usually, formal enforcement is taken after an informal enforcement action has been issued. However, formal enforcement action may be initiated without any informal response. This heightened activity is generally reserved for very serious violations or complex issues that pose an imminent danger to the environment.

The department initiates formal enforcement primarily for two reasons: (1) the violator failed or refused to return to compliance as required by informal enforcement action; or (2) informal enforcement is insufficient to resolve the case and, in accordance with the ERP, the imposition of a penalty or other restrictions on the violator are necessary.

The preliminary work in the development of an enforcement case is basically the same and is not dependent on the type of action. As discussed previously, a case is evaluated based on the requirements of the enforcement response policy. The evaluation determines: (1) the specific type of action to be taken; (2) the necessary corrective actions needed to return the source to compliance status; and (3) if appropriate, the punitive penalty amount to be imposed. The evaluation is based on review and assessment of:

- the type and severity of the violation cited in the inspection report;
- any informal enforcement action taken and violator's response;
- enforcement action taken or pending in the other regulatory bureaus;
- the source's permit requirements; and
- the source's compliance history.

The case evaluation requirements of the ERP are documented by staff in a document called the enforcement action summary (EAS). The EAS summarizes the important information on the case and is a decision-making tool in determining the appropriate enforcement action to take against a violator. The EAS is also used to develop enforcement strategy for future negotiations or contact with the violator and is a confidential document, not available to the source or the public.

The EAS is a working document and may be revised or updated during the course of the case. The program review committee found each bureau has different approaches to developing and using the EAS. In some cases it is used as a starting point to help determine the course and type of the enforcement action and is also used as a summary of completed casework, in which case the decision regarding the type of enforcement action and strategy has already been made.

During the case evaluation, an inspection may be conducted to provide updated information on the status of the violation or the source may be asked to provide documentation

or information regarding the nature of the violation and equipment or process used at the site. The case evaluation may also include an analysis of testing data routinely collected by DEP from regulated sources (e.g., stack testing, continuous emissions monitoring, or water discharge monitoring).

As discussed previously, the enforcement actions available to DEP include: consent orders; unilateral orders; referrals to the Office of Attorney General; referrals to the federal EPA or the chief state's attorney; and cease and desist orders. These enforcement actions are distinct, but in practice a single case can involve more than one type of action, especially in those cases when an enforcement action fails to achieve compliance and the response toward the violator must be escalated. For example, a case that starts out with a unilateral order may end up with a consent order, as the parties negotiate under the pressure of an pending administrative hearing. Cases in which consent order negotiations are attempted may end up as referrals to the attorney general because agreement could not be reached.

Consent order. A consent order requires both parties (DEP and the violator) to agree to the requirements, schedule, and penalty, if any, set out in the order. A consent order is a final and enforceable order, once signed by both parties.

The steps used in issuing a consent order include the following:

- Enforcement staff evaluates the case, and completes the enforcement action summary and, if appropriate, a preliminary civil penalty calculation.
- Enforcement staff contacts the violator to determine if the source is willing to negotiate a settlement. Negotiations are conducted between the enforcement staff and/or management and violator. The length of negotiation varies, and can span several weeks to a few years. Typically, the process encompasses several months, although the actual negotiation work doesn't take up all that time.
- Negotiations are conducted through written correspondence, phone calls, and meetings between the parties. DEP presents the starting point to open negotiations, and past practice and the ERP guide the process. A violator may be represented by legal counsel as well as technical advisers during the negotiation process. (DEP does not have a written negotiations policy.)
- If an agreement is reached between the parties, a final consent order proposal is drafted by DEP enforcement staff. Prior to this stage, the violator has reviewed, commented on, and negotiated order drafts. The order contains the agreed-upon compliance requirements, schedule, and, if any, penalty amount.
- Once drafted, enforcement management and legal counsel review the consent order. Management has the authority to deny issuance of the order. However, in most cases, management has worked closely with the enforcement staff and was

apprised of the case strategy and outcome during routine enforcement meetings and generally does not make substantive changes to the order.

- After the bureau chief has approved the order, it is sent to the violator for signature. The violator then returns the signed consent order to the department. The signed consent order is reviewed by the assistant commissioner for environmental enforcement and signed by the commissioner, becoming a final and enforceable state order. The final consent order is not appealable.
- The violator must comply with the schedule and specifics in the consent order, including payment of any penalty. The source's compliance is tracked and verified by enforcement staff, and compliance documentation is contained in the enforcement case file. The compliance schedule can range from short periods of several weeks to longer time periods of several years depending on the complexity of the requirements and technology. DEP may also continue to monitor a source to ensure that compliance status is maintained and to evaluate environmental outcomes.
- A source may request an extension from the department to complete a consent order requirement. If granted, the bureau typically issues a consent order modification, which follows the same process as the first consent order but is completed much more quickly. There appears to be no limit to the number of consent order extensions the department may grant to a violator.

Typically, failure to return to full compliance results in referral of the violator to the Office of Attorney General for civil action (e.g., injunction and/or penalty). However, not all referrals will result in civil action. The referral itself may serve as an incentive for the violator to return to meeting the compliance schedule or to enter into re-negotiations with the department to achieve compliance.

If the negotiations fail to produce consensus, DEP must take another approach. The department may issue a unilateral order and/or refer the case to the Office of the Attorney General. A previously reluctant violator may be induced to reopen negotiations in response to the threat of an administrative hearing decision or civil action filed by the attorney general.

Unilateral order. A unilateral order is issued to require immediate compliance by a violator or in those cases in which the violator has refused to negotiate or has not shown good faith during the negotiation process of a consent order. The benefit of the unilateral order is the department can quickly notify a source of a violation and the response needed to return to compliance. This also serves to establish a case record. A disincentive to DEP is that violators may request an administrative hearing on the order, which may stall any efforts to return the source to compliance until the disposition of the hearing and consume agency resources. In addition, the department cannot impose penalties through an unilateral order and must refer the case to the Office of Attorney General for a penalty.

The steps to issue a unilateral order include the following:

- Enforcement staff evaluates the case and completes the enforcement action summary. The department does not generally negotiate unilateral orders.¹
- Enforcement staff drafts the unilateral order, which mandates the source stop the violation and contains specific requirements and schedule to achieve compliance.
- Once drafted, bureau management and legal counsel review the unilateral order. Management has the authority to deny issuance of the order. However, because of the severity of an unilateral order, the staff has conferred with management regarding the strategy of the enforcement action and the specific requirements have been discussed at routine enforcement meetings. Management, therefore, does not usually make substantive changes to the order.
- The unilateral order is reviewed by the assistant commissioner for environmental enforcement and is signed by the commissioner. The order is then issued to the violator.
- The violator may request an administrative review of the order by the DEP adjudication unit within 30 days of receiving the order. If no review is requested, the unilateral order becomes a final and enforceable state order and is not appealable.
- If a hearing is requested, the adjudication unit schedules the administrative hearing (held in accordance with the Uniform Administrative Procedure Act). Typically, at this point, the hearing officer will request both parties to attempt to settle the case. If negotiations are successful, a stipulated agreement may be drafted and signed by the hearing officer and the violator. The agreement, which is usually considered a consent order, becomes the final and enforceable state order and is not appealable. If no agreement is reached, the hearing is conducted and the hearing officer issues a proposed decision. The proposed decision is reviewed for legal sufficiency by the department's legal counsel and returned to the adjudication unit. The final decision is issued by a final decision-maker, appointed by the commissioner.
- The violator may appeal the final decision to Superior Court, though the violator must meet the requirements of the order pending the appeal, unless it petitions for a stay of the order.

¹ There are certain orders considered “friendly orders” where the party is consulted somewhat. For example, municipal sewage treatment plant upgrades are processed as unilateral orders to facilitate funding, but the water bureau works with willing municipalities where possible on the specifics of the order, for example on setting deadlines.

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- Once a final decision is reached either through the administrative or judicial process, the violator must comply with the schedule and specifics in the final order. The source's compliance is tracked and verified by enforcement staff and compliance documentation is contained in the enforcement case file.
 - Failure to fully comply results in referral of the violator to the attorney general for civil action.

Referral. Referrals to the Office of Attorney General for civil action, the Office of Chief State's Attorney for criminal action, or the federal Environmental Protection Agency for civil or criminal action are the most severe enforcement actions the department can take against a violator. DEP of course does not have criminal jurisdiction and must refer suspected criminal violations. Typically, DEP attempts to achieve civil compliance from a violator through agency orders. However, a civil referral is made:

- as the initial enforcement response by the department in high priority cases to seek an civil injunction and/or penalty against a violator;
- in addition to an issued unilateral order to seek a penalty; or
- as an escalation in the enforcement response in the event of failed negotiations for a consent order or the violator has failed to comply with a final state order.

The department refers most cases to the Office of the Attorney General and a lesser number to the EPA. Since the early 1990s, there have been no referrals to the Chief State's Attorney for criminal prosecution and, in fact, the CSA's environmental prosecution unit was disbanded until very recently.

The following is the process to refer a case to the attorney general for civil action (the process to refer a case to the EPA or Chief State's Attorney is similar). The steps are as follows:

- Enforcement staff evaluates the case and the enforcement action summary is completed and, if appropriate, contains a penalty recommendation.
- Enforcement staff prepares a referral package. The package includes: complete information on the violation and any compliance attempts by the source; the case evidence; a case history; summary of prior enforcement action; the source's past compliance history; and any other information needed to prepare a civil suit. Enforcement staff will typically contact the assistant attorneys general assigned to environmental cases to discuss the case and to seek advice on compiling the case and collecting evidence. There will usually have been discussions about these cases during monthly bureau enforcement agenda meetings, which assistant attorneys general attend.

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- Bureau management and legal counsel review the referral package. Like consent and unilateral orders, the bureau management is involved in the strategy and decision to propose a referral to the attorney general. The bureau chief is responsible for forwarding the referral package to the commissioner's office for final approval.
 - The assistant commissioner for environmental enforcement reviews the package. The commissioner then makes a formal referral to the attorney general. The DEP commissioner and the attorney general may have had prior discussions about the case before the formal referral is made.
 - If the attorney general retains the case, a civil suit is filed against the violator in superior court, and preliminary trial work is begun.² DEP enforcement staff assist in case preparation and must be prepared to be called as witnesses during depositions or trial.
 - The case may be settled by agreement between the attorney general and the violator without trial (called a stipulated judgment) or by court judgment following a trial. Both type of judgments are sanctioned by the court and become final and enforceable against the violator. The court judgment is appealable by either party.
 - The violator is required to comply with the schedule and specifics in the final court order. The source's compliance is tracked and verified by DEP enforcement staff and compliance documentation is contained in the enforcement case file. The Office of the Attorney General tracks the payment of any penalty.
 - Failure by the violator to fully comply, including paying a penalty, is addressed through two means: (1) a motion for contempt of court filed by the attorney general against the violator; or (2) the attorney general can recommend the department initiate a new administrative enforcement action against the source.

Cease and desist. As shown on the flowchart, a cease and desist order is another enforcement action available to the department. As discussed previously, a cease and desist order is issued for actions that will result in or are likely to result in imminent and substantial damage to the environment or to public health.

Compliance assurance. The department is required to track and verify the source's return to full compliance status after any kind of formal resolution. Full compliance is achieved when the violation is no longer occurring, all corrective requirements in the state or court order have been met, and any penalty is paid in accordance with the order. The bureau initiating the enforcement action is responsible for tracking the violator's compliance progress and maintaining a record in the case file. The case is closed once full compliance has been verified by DEP.

² The assistant attorneys general assigned to the case could refer it back to DEP for lack of evidence or because a determination was made that the case would be better served by an administrative action, an infrequent occurrence.

Violators who fail to comply with an administrative final order are referred to the attorney general for more formal civil action. Those sources under a court order or stipulated judgment that fail to comply can be cited for contempt of court or subjected to new enforcement action by the department.

Regulated Communities and Inspections

Who and what is regulated in the air, waste, and water programs reviewed in this study are described in this chapter. Also explained is how inspection targets and schedules are determined and the different types of inspections used by the bureaus. The chapter goes into some detail to show the breadth, complexity, and changing priorities of the regulatory universes for the bureaus, which obviously will impact enforcement activities.

Bureau of Air Management

Regulated community. Air pollution comes from many different sources, with four general source classifications: stationary; mobile; area; and biogenic. *Stationary* (or point) sources include factories, manufacturing industries, and power plants. *Mobile* sources are broken down into on- and off-road sources. On-road mobile sources include cars, buses, trucks, and motorcycles, while off-road sources encompass recreational vehicles, construction equipment, planes, ships, boats, and trains. *Area* sources include sources that are too small and numerous to quantify individually, such as small dry cleaners, gas stations, and paint applications. *Biogenic* (or natural) sources are sources such as wildfires, windblown dust, and lightening. Air pollution is also transported into Connecticut from the south and west, significantly contributing to the state's air quality problem.

The federal Clean Air Act (CAA) provides the principal framework for the national and state effort to protect and improve air quality. Under the federal CAA, states have the responsibility for:

- monitoring ambient (outside) air quality;
- developing and implementing enforceable regulations and plans known as the State Implementation Plans, or SIPs, to meet national air quality standards;
- developing emission inventories;
- administering permitting programs; and
- enforcing applicable requirements.

Prior to 1990, the DEP air regulatory program centered on the largest smokestack industries by requiring these sources to either obtain permits or register with the department. Mobile sources were subject to basic emissions inspections conducted by the Department of Motor Vehicles, and area sources were largely unregulated.

Subsequent to the CAA amendments of 1990, the air program was greatly expanded. Connecticut was required to adopt and implement new programs because of the statewide designation as "nonattainment" (noncompliance) for the national ozone standard, and because portions of the state were in nonattainment with the carbon monoxide and particulate standards. These programs included federally-driven air pollution control programs on new and existing stationary sources and new regulations on mobile and area sources. For example, in 1992, the Stage II vapor recovery program applied control requirements to more than 1,600 gas stations in the state. The stations were required to install vapor recovery systems and make improvements to underground gasoline storage tanks.

Inspection. The bureau may perform an inspection of any potential sources of air pollution, but none (except gas stations) are subject to a regular inspection schedule. The bureau's inspection workload is determined by: targets established in the Performance Partnership Agreements established between EPA and DEP; complaints received; administrative enforcement caseload; and any pollution prevention initiative or program established by the department.

The air bureau conducts several types of inspections, including pre-inspection questionnaire (PIQ), Stage II, Title V, autobody, multimedia, follow-up or compliance inspections, and complaint investigations. The PIQ is the most comprehensive inspection conducted by the air bureau and is a scheduled inspection. The company first completes a questionnaire related to the source's permit requirements. A field engineer then conducts an inspection to verify the information provided in the PIQ. This is a very technical process and it can take several days to complete the inspection and required analysis. The department commits to a specific number of PIQ inspections each year and publishes that intent in its annual strategic plan (Performance Partnership Agreement) submitted to EPA.

The Stage II vapor recovery program requires: the gasoline vapor recovery system at each gas station be inspected twice a year; underground gasoline storage tanks inspected every five years; each system inspected at installation and after any change; and tanks tested any time the source breaks ground on site. The program is very labor intensive and the department entered into an agreement in 1993 with the Department of Consumer Protection (DCP) for DCP inspectors to conduct the majority of the Stage II inspections. The primary incentive for the agreement was DCP's authority to immediately shut down ("red tag") any gas pump or station found to be in violation, an authority DEP inspectors do not have. The DCP enforcement response is used in lieu of DEP's notice of violation because it can be imposed immediately on site and requires the source to return to compliance before operation may begin again.

Title V inspections are not currently being conducted by the air bureau. Title V is a federally mandated permitting program that was developed, in part, to streamline air emission permits and simplify the inspection process. The bureau is developing the new permits but has yet to issue one. DEP has been focusing on smaller sources, such as autobody shops, as part of its compliance assistance initiative. As a result, the air bureau has been conducting inspections

of autobody shops for the purpose of educating the sources, identifying potential or existing violations, and returning the shop to compliance.

Complaint investigations are conducted in response to public complaints alleging a violation of law or regulation and/or a nuisance activity, such as odor or dust. The bureau must respond to and investigate every credible complaint received.

Finally, compliance or follow-up inspections are done at facilities previously cited for a violation or nuisance activity and subject to informal or formal enforcement action. The purpose of the follow-up inspection is to: (1) ensure the source has returned to and has maintained compliance after an enforcement action; and/or (2) update the status of a cited violation for the purposes of escalating enforcement action or calculating a penalty.

Committee staff analyzed inspection activity trends from 1988 to 1997. For analysis purposes the bureau's various inspections have been collapsed into three categories: (1) field inspections (includes PIQs, Title V, multimedia, autobody, and other types of inspections); (2) complaint investigations; and (3) compliance (or follow-up) inspections. The Stage II vapor recovery inspection data are not included in the overall analysis of the inspection and enforcement workload to ensure the analysis is consistent and comparable over the 10-year period. The air bureau reported conducting all 550 scheduled Stage II inspections in 1993. However, since then consumer protection inspectors have conducted most (75 percent) of all Stage II inspections.

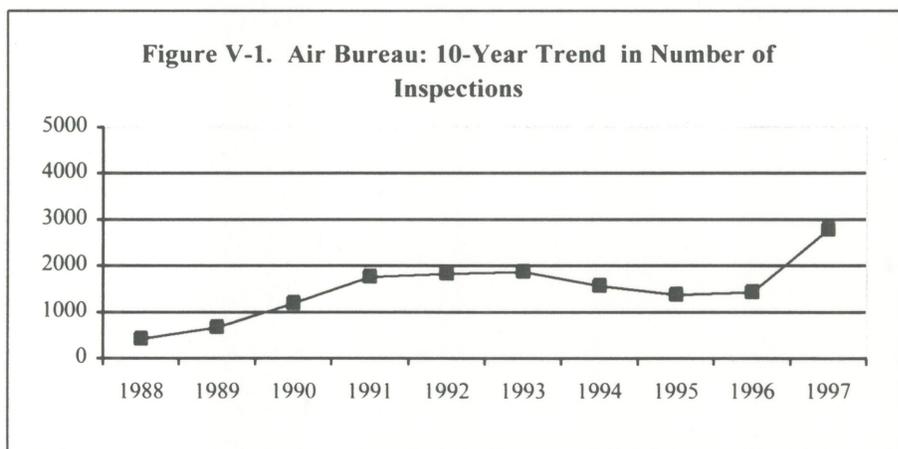
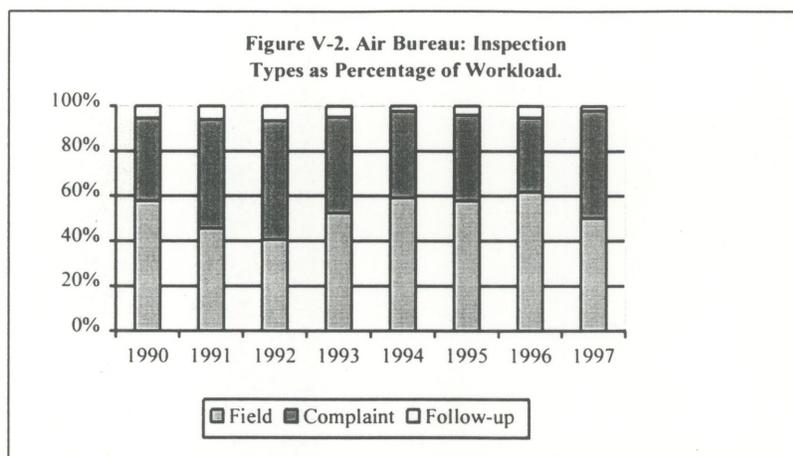


Figure V-1 shows the trend in the number of all inspections conducted by the air bureau over a 10-year period (minus Stage II inspections). As shown, the overall trend is increasing. The bureau has experienced two periods of increased inspection workload. In 1990, the number of

inspections conducted increased 78 percent from the previous year (from 672 to 1,199) and recently, in 1997, inspections increased 94 percent (1,442 to 2,796). The total number of inspections declined in 1994 and 1995 but did not reach the lows of the late 1980s.

Figure V-2 illustrates, over the past 10 years, that the air bureau's inspection workload has focused on the investigation of public complaints¹ and field inspections (again excluding

¹ The data report the number of complaint investigations conducted. The total number of public complaints received by the DEP air bureau during the 10-year period is not known.



Stage II inspections). Compliance or follow-up inspections are not a significant part of the workload. In recent years, field inspections have comprised a larger percentage of the workload. This can be attributed, in part, to the implementation of new programs mandated by the 1990 amendments to the Clean Air Act.

In the early 1990s, the number of complaint investigations handled by the air bureau increased. Interestingly, this occurred after the program review committee conducted a performance audit of the air bureau (*Bureau of Air Management*, January 1990), in which the recommendations focused on improving the handling of and response to public complaints. In 1997, the workload is almost evenly divided among complaint and field inspections.

Bureau of Waste Management

Regulatory universe and inspection process. For both hazardous and solid waste, the Bureau of Waste Management's Engineering and Enforcement Division (WEED) is responsible for selecting inspection targets, conducting inspections, initiating enforcement actions, and ensuring compliance with those enforcement actions. The two waste areas involve different regulatory universes and are treated separately, which results in some differences in the inspection and enforcement processes. The hazardous waste section engages in a negotiated process, now called a Performance Partnership, with the federal Environmental Protection Agency to identify inspection priorities, while the solid waste section relies on a more informal, internal process. These processes are discussed in detail below.

Hazardous waste. The regulated universe in this area is determined by the federal Resource Conservation and Recovery Act and by state statute (CGS §22a-454), referred to generally as Connecticut regulated wastes (CRW). RCRA, enacted in 1976 and effective in 1980, forms the legal basis for most of Connecticut's hazardous waste management regulatory program. The act established stringent requirements for the management of hazardous waste from generation to ultimate disposal, or from "cradle to grave." The focus of CRW statutes is those wastes that are harmful to the environment but not covered under RCRA. These wastes include Polychlorinated Biphenyl (PCBs), waste oils, and certain industrial chemicals. Under Connecticut statute, permits are required for treatment, storage, and disposal facilities that handle these wastes. (A more complete discussion of RCRA and CRW can be found in Appendix B). Most of the businesses that handle CRW also fall under the jurisdiction of RCRA.

The provisions of RCRA and its associated regulations define what wastes are considered hazardous, describe the types of generators and handlers, and specify how the waste must be managed. The regulated community includes generators, transporters, and treatment, storage, and disposal facilities. There are four major types of facilities defined by RCRA that are important in determining inspection priorities. Three are different types of generators and the fourth refers to facilities that treat, store, and dispose of hazardous wastes (TSDFs). Transporters are also regulated, under RCRA and by Connecticut statute; however, they are not inspected on a regular basis.

A generator is a business whose processes create a hazardous waste. There are three categories of generators based on the amount of waste produced, and include: large quantity generators (LQGs); small quantity generators (SQGs); and conditionally exempt small quantity generators (CESQGs). The regulations to which a generator is subject vary depending on its classification.

TSDFs are facilities that alter the toxicity of a waste, hold a waste for specified periods of time, and/or handle that waste in a way that brings it into contact with the environment (e.g., landfill or incinerator). These facilities are the only ones that must obtain an operating permit under RCRA. These requirements apply to commercial establishments that treat, store, and dispose of waste generated by others as well as to generators that treat, store, and dispose of their own waste.

As mentioned earlier, WEED's selection of inspection targets is the result of a negotiated effort with EPA. The major steps in determining inspection priorities for the hazardous waste section include:

- receipt of a RCRA Implementation Plan guidance package from EPA that specifies EPA's objectives for the RCRA program for the year;
- internal review by WEED of EPA's objectives;
- negotiation by the bureau chief and the commissioner with EPA over these enforcement priorities; and
- development of a final grant application that usually commits the division to inspecting a specific percentage of its regulated universe.

In addition, EPA conducts mid-year and end-of-year reviews for compliance with the grant commitment and periodically determines adequacy of enforcement responses through case reviews.

Inspection. DEP's hazardous waste section conducts seven types of inspections. Given the varied nature of the regulated hazardous waste universe, inspections differ based on a number of considerations. Some inspections are tailored to the type of generator or facility and others are tailored to a specific purpose, such as compliance inspections whose focus is limited to areas of past noncompliance. All inspections are unannounced, except in very limited circumstances,

such as when access to a facility cannot be obtained without calling ahead. Listed below are the types of inspections conducted:

- *compliance evaluation inspections* (CEI) are comprehensive RCRA inspections. They cover all areas of compliance for a facility and usually take between six to 16 days to complete, depending on the facility;
- *compliance schedule evaluations* (CSE) are abbreviated inspections and are conducted for the purpose of evaluating compliance with a previous enforcement action – that is, they are focused on particular violations. A CSE may become a full inspection if the inspector feels that the facility is grossly out of compliance. Often these types of inspections are conducted in anticipation of closing out a formal enforcement action, such as a consent order or a stipulated judgement;
- *comprehensive monitoring evaluations* (CME) and *operating and maintenance inspections* (O&M) are both directed at land disposal facilities. Land disposal facilities are those areas where hazardous waste was historically disposed of and are now outlawed. However, the legacy of these past practices, which may jeopardize the quality of groundwater and may have other deleterious environmental effects, requires that these facilities be constantly monitored. A CME is a detailed evaluation of the groundwater monitoring program, while an O&M is a less detailed CME. A CEI may also be conducted at a land disposal facility;
- *focus inspections* evaluate a specific element or process in a facility of concern to DEP. The trigger may be that a manufacturing or treatment process has changed or that DEP wishes to maintain greater presence in the field without having to do a full RCRA inspection;
- *Connecticut regulated waste inspections* (CRWI) are directed at facilities that treat, store, and dispose of Connecticut regulated wastes (i.e., waste oils, petroleum, chemical liquids). The focus of the inspection is permit compliance, as these facilities are required to be permitted. A full compliance inspection may be triggered if significant noncompliance is found; and
- *complaint inspections* are usually more informal and are focused on the particular complaint areas. A full compliance inspection may be triggered if significant noncompliance is found.

Table V-1 shows the size of the known hazardous waste regulated universe by type of facility, the number of facilities the bureau intended to inspect, and the number of facilities that DEP actually inspected for FY 1992 through FY 1996, the most recent years data were available.

Table V-1. Waste Bureau: Hazardous Waste Regulated Universe and Inspections					
	TSDF	LQG	SQG	Other	Total
1992					
Facilities	214	1,356	Not reported		
Planned	97	61		60	218
Inspected	91	68		94	253
1993					
Facilities	204	848	2,109		
Planned	111	55		50	216
Inspected	112	60		98	270
1994					
Facilities	206	1,051	Not reported		
Planned	88	71		62	221
Inspected	86	75		100	261
1995					
Facilities	201	1,015	2,054		
Planned	47	66		219	332
Inspected	50	71		323	444
1996					
Facilities	196	808	Not reported		
Planned	44	63		166	273
Inspected	43	61		235	339
SQG information only available for odd years due to reporting requirements. No universe numbers are provided for the Other category, as this is a mixture of facility types.					
Source of Data: DEP					

The chart demonstrates that the hazardous waste section generally met its total inspection commitments for the five years depicted. In fact, a comparison between the planned versus actual inspections by facility type reveals the goals are usually exceeded, although DEP did not meet its intended target in four instances.

In addition, the chart illustrates that the waste bureau, as required by EPA, has largely been focused on TSDFs and LQGs. Small quantity generators have not received as much attention. Traditionally, the unit inspects about 50 percent of the TSDF universe and 8 percent of the LQG universe every year. While some small efforts focusing on SQGs were completed on an occasional basis in the past 10 years, none have significantly impacted the large SQG population. It has been suggested that the SQG population may be even greater than the numbers in the above chart indicate because not all SQGs may be identifying themselves to the department as required by law. The department's attempt to include more SQGs in its inspection commitment with EPA is discussed further below.

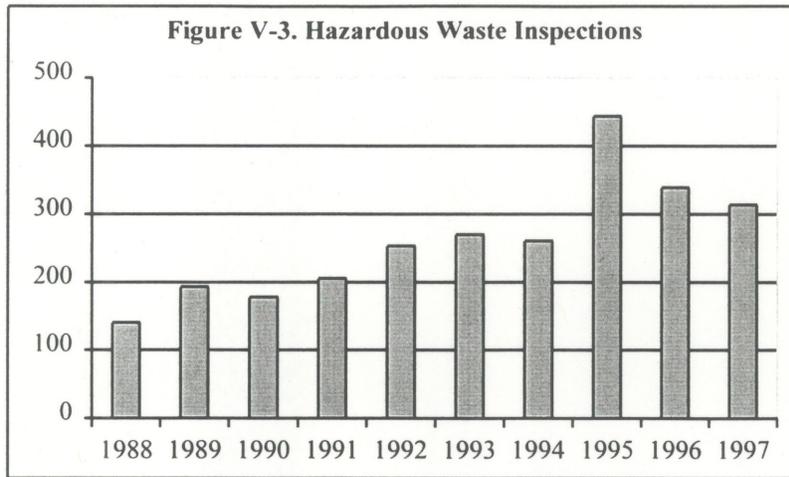


Figure V-3 shows the total number of hazardous waste inspections conducted by the hazardous waste section for the last 10 years. The hazardous waste section has been performing an increasing number of inspections over this time period. The number of average inspections has increased dramatically. The average number of inspections for the first five years depicted in the figure is 194. For the last five years it is 326.

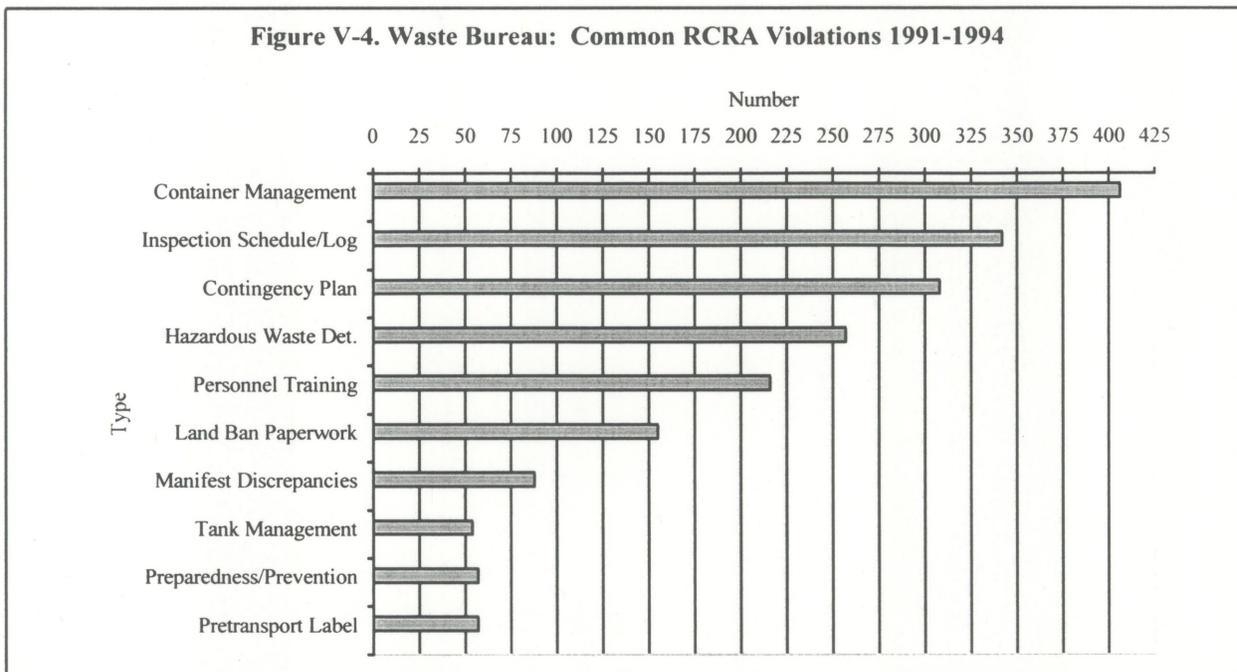
Part of the explanation for this increase has to do with the selection of inspection targets. DEP has been successful in negotiating with EPA to substitute special inspection initiatives for traditional, facility-wide inspections. These special initiatives are part of what DEP believes are a priority for Connecticut and may identify problem industries (e.g., auto body shops), geographical areas (e.g., Thames River), or the current compliance status of companies with outstanding enforcement actions.

Except for compliance inspections, discussed below, the focus of the waste bureau's inspection efforts has usually been on large quantity generators and treatment, storage, and disposal facilities. However, in 1997, WEED conducted a number of initiatives that focused on other parts of the regulated community. For example, 32 small quantity generators were targeted along the Quinnipiac River as well as six junkyards in an attempt evaluate generators that, while small, impact the river basin.

Backlogs. The hazardous waste section has focused on reducing its backlogs twice in recent years. In 1995, 400 enforcement actions taken over the previous 12 years remained open. The department asked for and received permission from EPA to commence an initiative to focus on reducing this backlog. DEP reviewed the case files, the nature of the violations, and the extent of each facility's response. Compliance schedule evaluations (CSE) were conducted at certain facilities to determine if in fact compliance had been achieved. Due to the age of the enforcement cases many facilities were not in operation or had moved. The CSE inspection focuses on areas of noncompliance previously found, unless the on-site conditions observed by the inspector indicate that a full inspection is warranted. Between 1995 and 1997, 351 CSEs were performed.

The process followed by DEP in this effort has been the subject of some public note and controversy. After determining which companies would be inspected, DEP sent letters to the violators indicating DEP would be conducting unannounced inspections "within the upcoming

months.” The intent was to remind companies they had violations and warn companies that DEP would be back to check on compliance. One engineer took this warning a step further. In at least four instances the engineer revealed to the company the exact date of the inspection, and in at least nine instances the engineer asked inspectors to push back the dates of inspection. As a result, the inspector would be denied observing the typical operating conditions of the facility. Announced inspections are contrary to the usual practices of the waste bureau.



In 1997, another backlog initiative was undertaken focusing on cases where inspections had been conducted, but enforcement actions had not been issued. In June 1997, 120 cases were identified as backlogged. In response, the waste bureau took a number of inspectors out of the field and reassigned them to the office to issue enforcement actions from about June 1997 through January 1998. As of October 1998, 103 of the 120 cases were processed.

As of September 1998, the number of cases awaiting an enforcement action was 78. The oldest was a case from 1991. There are 43 cases over a year old. The waste bureau could not provide the number of cases awaiting closure.

Common violations. Figure V-4 identifies the most common RCRA violations by category based on DEP inspections conducted from 1991 through 1994 (the latest years for which this data was compiled). The most common violations have to do with container management. Generally, this has to do with keeping containers in good condition, closed when not in use, and in storage areas that have secondary containment in case of a spill. The next most common violations have to do with maintaining appropriate inspection schedules of storage areas, and contingency planning, which is essentially an emergency action plan. Rounding out the top four is hazardous waste determinations. Appropriate management and disposal of wastes

require that they be properly tested and characterized. Failure to properly determine waste types can lead to explosions, dangerous reactions, or the release of toxic chemicals into the air.

Solid waste. As environmental concerns have mounted over the effects and methods of the disposal of solid waste, federal and state regulation regarding solid waste planning, siting, and enforcement has increased. Solid waste management has been a responsibility of DEP since its creation in 1971. State regulations were first developed in 1974 requiring the issuance of a permit for the construction and operation of a solid waste facility, which usually meant landfills. RCRA Subtitle D establishes criteria for the regulation and control of municipal solid waste landfills. Connecticut's DEP was "authorized" by EPA in December 1993, meaning that the state's municipal solid waste landfill program was adequate to ensure compliance with criteria established by EPA.

The RCRA requirements for the siting, operation, and closure of landfills were more stringent and costly. Consequently, most of Connecticut's landfills decided to close in order to avoid the new requirements. Since the early 1990's the focus of solid waste management has evolved from the oversight of landfills to the creation of a system that focuses on recycling, re-use, and resource recovery. As the number of municipal landfills has declined, there has been an increase in other types of solid waste processing facilities, such as resource recovery facilities, which convert waste to energy, and intermediate processing centers, which remove recyclable materials from the waste stream. Similarly, a shift in emphasis has occurred in the solid waste inspection program.

Inspection targets. Unlike the hazardous waste section, the solid waste unit does not have a contract with EPA to perform a certain number or type of inspections per year. Nor does the unit currently have any other regulatory or statutory obligation to perform a set number of inspections. Rather, the unit relies on an internal, informal process to select inspection targets.

The unit is divided into two geographically distinct districts consistent with the hazardous waste districts. The supervisor will periodically meet with the enforcement analysts to determine inspection priorities. Generally, the informal guidelines followed by the solid waste unit are:

- the unit participates in quarterly multimedia inspections of resource recovery facilities due to the volume of waste handled and complexity of the plants;
- transfer stations and volume reduction facilities are targeted for at least annual inspections with well run facilities visited less often;
- active landfills are inspected on an annual basis and closed landfills are not inspected at all unless they are still undergoing closure activities;
- intermediate processing centers are a low priority due to the low environmental impact of these operations; and
- general permit sites are not inspected except at time of permit issuance, permit renewal, or if a complaint is lodged.

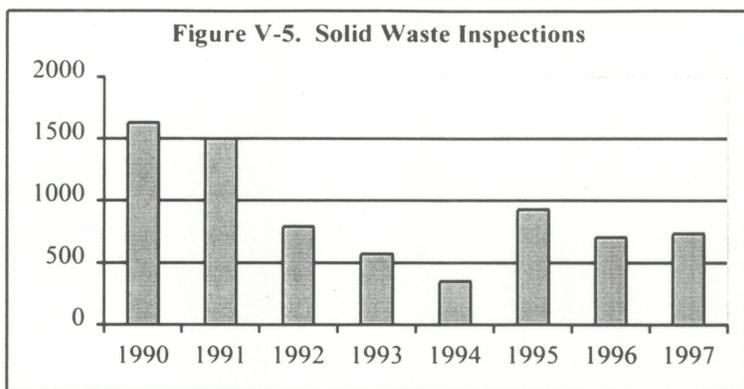


Figure V-5 shows the number of inspections conducted by the solid waste section of the waste bureau from 1990 through 1997. In 1990 and 1991, when the numbers are by far the highest, what was counted as an inspection was different and more liberal than in succeeding years. Due to the usually obvious nature of solid waste violations, inspectors often do a “drive-by”

or “windshield” inspection of certain facilities or areas. This type of activity was counted in 1990 and 1991. In three of the remaining years the number of inspections is around 700. The other three years range from a low of 346 in 1994 to a high of 927 in 1995. In 1994, a limited number of inspections was conducted because the solid waste unit was involved in the closure of a large number of landfills throughout the state due to the new requirements imposed by RCRA.

Table V-2 on the following page shows the number and type of facilities contained in the solid waste universe and the number of inspections performed by type of facility for the last five years. The chart shows that the majority, from 73 percent to 79 percent, of the solid waste inspections were conducted at transfer stations, bulky waste landfills, inactive landfills undergoing closure, or at unpermitted illegal facilities. This appears to be appropriate as the largest number of facilities in the solid waste universe are transfer stations and bulky waste landfills. Due to data limitations it could not be determined how many inspections were repeat inspections at the same facility.

Bureau of Water Management

The water bureau programs highlighted here relate to industrial and municipal water discharges. The federal Clean Water Act essentially prohibits discharges into the nation’s waters unless authorized by a permit. A discharge means the emission of any water, substance or material into the waters of the state, whether or not the substance causes pollution. The concern is that such discharges can upset the chemical, physical, and biological characteristics of water.

Regulated community. The National Pollution Discharge Elimination System (NPDES) is the discharge program delegated to Connecticut and 41 other states to operate. The NPDES program covers all discharges to state surface waters. The Clean Water Act also has a pretreatment program that covers facilities (nondomestic) that discharge to municipal or otherwise publicly owned sanitary sewer treatment systems, as opposed to directly to surface waters. (These sewage treatment plants ultimately discharge treated water to surface waters). States as well as local governments can be authorized to administer the pretreatment permit program. Connecticut and federal law cover groundwater discharges.

Type of Facility	1993		1994		1995		1996		1997	
	Fac	Insp								
Compost Facility	N/A	N/A	N/A	25	2	22	2	13	2	8
Intermediate Processing Facility (IPC)	6	N/A	6	4	6	37	6	5	6	6
Recycling Facility	5	N/A	6	2	7	26	7	30	7	11
Resource Recovery Facility (RRF)	3	N/A	4	5	7	24	7	27	7	36
Transfer Station	48	N/A	67	118	83	299	83	157	98	156
Volume Reduction Facility (VRF)	4	N/A	7	23	10	19	15	38	18	54
Municipal Solid Landfills	26	N/A	11	15	7	58	6	39	3	18
Bulky Waste Landfills	45	N/A	43	50	43	188	41	132	40	80
Special Landfills	9	N/A	9	12	8	20	7	23	5	11
Ash Landfills	6	N/A	5	5	4	13	3	10	3	4
Biomedical Transporters	N/A	N/A	N/A	2	N/A	0	N/A	0	N/A	5
Inactive/Pending		N/A		46		94		45		69
Unpermitted Facilities		N/A		39		127		186		276
TOTAL	152	571	158	346	177	927	177	705	189	734

Fac = number of facilities
Insp = number of inspections conducted for that facility type
Inactive/pending refer to landfills undergoing closure
Unpermitted landfills are illegal landfills
N/A = Data not available
Source of Data: DEP

Altogether, the NPDES, pretreatment, and groundwater programs account for 859 individual permits. As Table V-3 shows, the NPDES and pretreatment permits are broken down into different types. The distinctions are based on size and type of discharge, and have import for EPA reporting and monitoring requirements. NPDES major and significant minor permits are subject to commitments for permitting, inspection, data collection, and reporting requirements between DEP and EPA. For example, DEP is required to inspect 100 percent of the NPDES majors each year while the minors are not subject to such requirements. Under agreement with EPA, DEP also must inspect 80 percent of the significant industrial users. A significant industrial user is an industrial entity engaged in one of a list of certain types of production known to create potentially harmful wastewater as a byproduct of its production processes. Metal finishing manufacturers are an example of a significant industrial user. Specific pollutant criteria apply to these discharges.

Table V-3. Individual Permits By Type	
Individual Permits	Number
NPDES-Major	53
NPDES- Significant Minor	31
NPDES- Minor	153
NPDES – Total	237
Pretreatment – Major (Significant Industrial Users)	81
Pretreatment- Significant Minor (Significant Industrial Users)	132
Pretreatment – Minor	227
Pretreatment – Total	440
Groundwater- Septic System	158
Groundwater- Landfill	16
Groundwater- Agricultural	8
Groundwater-Total	182
TOTAL	859
Source of Data: DEP	

Table V-4 displays the current number of activities authorized under the general permit program. General permits were developed as a way to streamline the permitting process. Generic requirements are established that any entity seeking a general permit must meet and, if so, may be authorized to conduct certain activities without going through the individual permit process. Under the 13 different general permits currently available from the water bureau, there are 3,711 registered entities.

Table V-4. General Permit Registrations	
General Permits	Number of Registrations
Stormwater	1915
Vehicle Service	538
Photographic processing	292
Vehicle washing	203
Non-contact Cooling water	168
Groundwater Remediation	137
Tumbling and Cleaning	132
Domestic Sewage	120
Wastewater Treatment	96
Printing and Publishing	43
Natural Gas	3
Hydrostatic Testing	23
Food Processing	13
TOTAL	3711
Source of Data: DEP	

The number of permits issued does not represent the number of individual entities regulated by the water discharge programs. For example, a business may, and frequently does, have more than one type of permit. While a facility will only have one individual NPDES permit allowing it to discharge to surface water, a business with an NPDES permit may also have a pretreatment permit, because it separately discharges treated wastewater to a municipal sewer system. That same business may also have a general permit listed in Table V-4, such as a general stormwater permit to manage and monitor stormwater discharge impacted by stored industrial materials.

Inspections. As with all delegated programs, the agreement between EPA and DEP requires a certain number of inspections. Over the years, the industrial and municipal water discharge program has utilized different types of inspections. These include: (1) EPA compliance inspections (to fulfill EPA inspection requirements for NPDES and pretreatment permits); (2) so-called “DEP” inspections (which review in more detail the actual operations and systems used relative to a discharge); and (3) reconnaissance inspections (a spot check and follow-up type inspection). DEP also conducts industrial surveys, often targeted to a particular area, where an inspector will visit a facility (or group of facilities) to collect information relevant to the facilities’ uses and potential water discharges. In part the surveys are done to identify activities that should be permitted, but are not. The water bureau also receives complaints that are investigated by inspectors. According to DEP staff, at one time there was a goal to visit a site about four times a year using different types of inspections, but that frequency dropped due to staff constraints. The recently developed watershed initiative, in recognition of the significant problem of non-point source pollution for water, is and will continue to change the nature and content of inspecting in targeted areas.

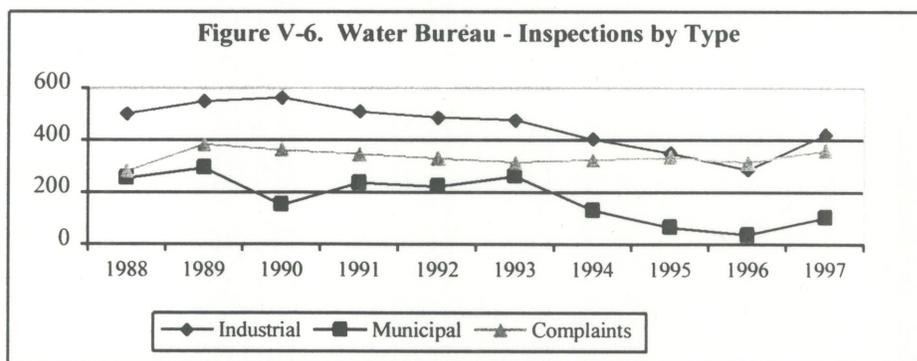


Figure V-6 displays a 10-year trend in inspections for industrial and municipal facilities, and those based on complaints, which are not distinguished by type of facility. The municipal and industrial inspections

include all the various types of inspections described earlier. As the figure shows, both the industrial and municipal inspection trends are downward. Complaint inspections maintain an even level during most of the 10-year period, an indication that the number of complaints is fairly constant.

A primary way water discharge permits are monitored for compliance does not involve inspections. A major discharge permit requirement is the submission of discharge monitoring

reports (DMRs) on a periodic basis (most often monthly) that measure the effluents or discharge. Each permit has limits, called parameters, for certain types of substances discharged from any given facility.

The discharge monitoring reports are handled differently depending on the type of permit. DMRs from facilities with permits designated as NPDES majors are entered by DEP employees into a federal data system called the Permit Compliance System (PCS), from which a quarterly noncompliance report is prepared. Under federal regulations, noncompliance is defined in two ways. One is when certain effluent parameters are 1.2 or 1.4 times the permit limit, depending on the substance monitored. The other is when there are chronic limit violations of any amount four times during a six-month period.

Discharge monitoring information from all other types of permits is entered into a state data system called the Connecticut Permit and Order Compliance System (CPOCS). Until very recently, the CPOCS system has been virtually unuseable due to technical problems. The water bureau has been working on fixing the system so it can also provide quarterly noncompliance reports, using the same two factors used in the federal data base, but with some additional compliance indicators. These include: insufficient reporting; late report submission; failure to submit; and untimely permit renewals, (which create violations of discharging without a permit.) DEP staff is currently working out policies on how to address a new influx of violations resulting from a working discharge monitoring reporting system. Previously, DMR information was only reviewed by DEP as part of a compliance inspection, in response to a complaint, or as part of the permitting process.

In addition to DMRs, publicly owned sewage treatment plants also send in monthly operating reports to the municipal facilities section. These reports contain more detailed information that is averaged for the DMRs.

Another compliance monitoring tool in use for general permit authorizations is auditing, where written information is required to be submitted by permittees.

Common violations. The water bureau identifies six common areas of noncompliance: (1) effluent violations; (2) improper sample collection, preservation, handling or analytical techniques; (3) not maintaining or maintaining incomplete monitoring records and not submitting or submitting incomplete discharge monitoring reports; (4) discharging wastewater without a permit; (5) improper operation and maintenance of monitoring equipment and alarms; and (6) not maintaining an operation and maintenance manual.

Enforcement Data Analysis

As part of the committee review of trends in environmental enforcement, the air, water, and waste bureaus provided specific enforcement data for the past 10 years (1988 through 1997). The data include the number of inspections, administrative orders (consent and unilateral), and referrals issued and the amount of assessed penalties. The bureaus' responses varied in terms of completeness and reliability due to bureau differences in types of databases, methods used to collect data, and the use of databases by enforcement staff. Appendix E contains the completed data responses from each of the three regulatory bureaus.

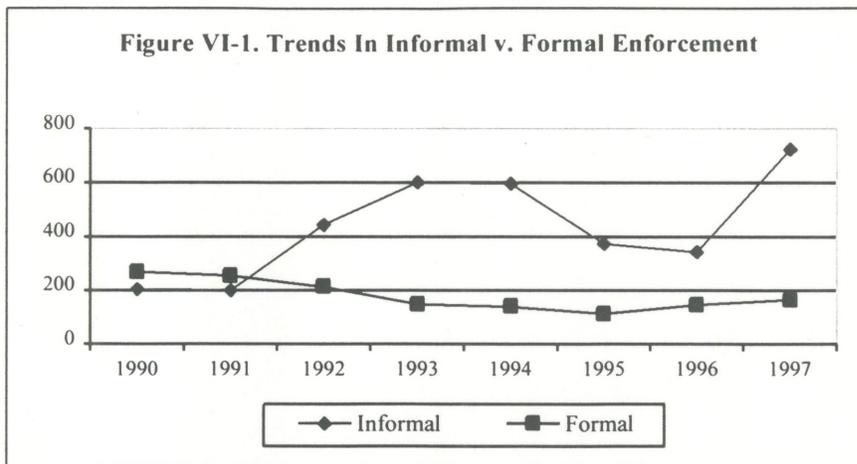
It should be noted that not all DEP programs that do inspections and issue enforcement actions were included in this analysis. The areas not covered include the Office of Long Island Sound Program, the pesticide program in the waste bureau, and the inland water resources division of the water bureau. While these are important regulatory areas, they do not represent a significant amount of the enforcement activity conducted by DEP.

Provided below is an analysis of data from the three bureaus combined that presents a picture of the department's overall enforcement activity. Next, an analysis of data provided by each regulatory bureau follows. In some cases, different information is analyzed in the individual bureau analyses due to variances in the availability of data.

Overall, the combined data indicate the department in the last eight years has increased its reliance on informal enforcement actions, and when formal actions are issued they are most likely to be settled in a consensual manner. However, when the total number of formal enforcement actions issued are considered in relationship to the number of inspections conducted in a given year, the overall trend indicates the rate of formal actions issued has remained fairly consistent.

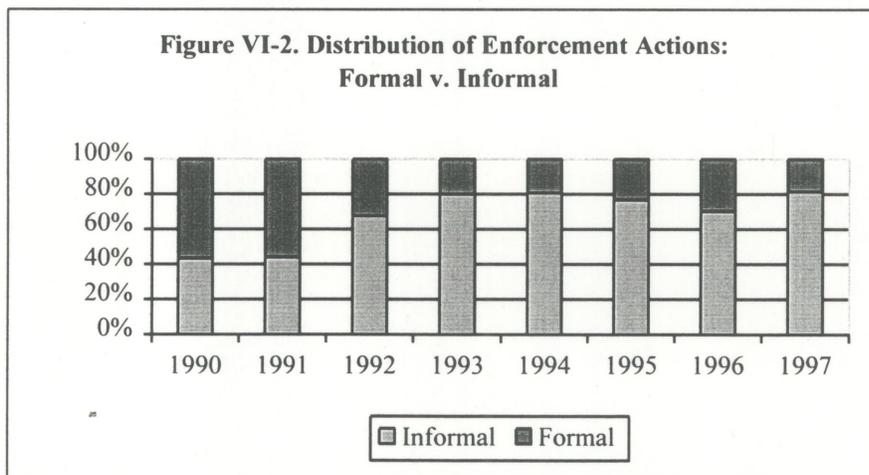
DEP Enforcement Data Analysis

As discussed earlier, enforcement actions (cases) can be separated into two types: informal and formal. Informal actions include notices of violation and warning notices. Formal actions include the issuance of a unilateral administrative order, an administrative consent order (with or without a penalty), or DEP referral to the Office of the Attorney General. Figure VI-1 shows the trend in terms of the total number of enforcement cases. (Data for 1988 and 1989 were either not reliable or complete and thus not included in the analysis). In this graphic, the decrease in informal cases from 1994 through 1996 appears most significant, dropping from 603 cases to 344 cases. In 1997, the total number of



informal enforcement actions reached a high of 726 actions. The number of formal enforcement cases declined from 1990 to 1995 but the change in the total number of cases was not as significant as for informal enforcement. The department issued the fewest (113) number of formal enforcement actions in 1995.

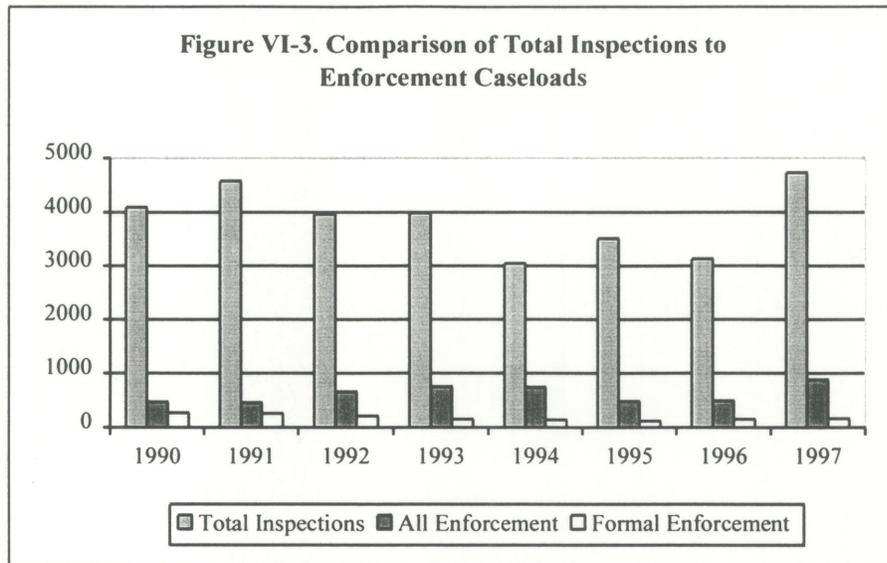
Figure VI-2 shows the percentage distribution of the department's enforcement activity between formal and informal actions over the same eight-year period, and demonstrates the department is steadily increasing its reliance on informal enforcement actions as a percentage of workload. Overall, the number of informal enforcement cases has increased 2 ½ times since 1990. Each year, the percentage of informal actions as part of the total workload has increased, except in 1995 and 1996 when it decreased by 4 percent and 7 percent respectively.



The percentage of formal enforcement cases decreased to a 1994 low of 19 percent. In 1995 and 1996, the percentage increased to 23 percent and 30 percent respectively and in 1997 was back to 19 percent. Over the entire eight-year period the number of formal enforcement cases has decreased 39 percent.

Figure VI-3 shows a comparison of the total number of inspections, all enforcement actions (informal and formal) and formal enforcement actions taken by the department from 1990 to 1997. This shows the relationship between inspections and enforcement actions. The graphic shows the rate of enforcement actions is consistently much lower than the number of inspections conducted. The trend in the number of inspections conducted, as shown in the figure, may be divided into three periods. In the first time period, from 1990 through 1993, the number of inspections averaged around 4,000. From 1994 through 1996 the average decreased about 20 percent to 3,225, before increasing again to 4,700 inspections in 1997. The number of

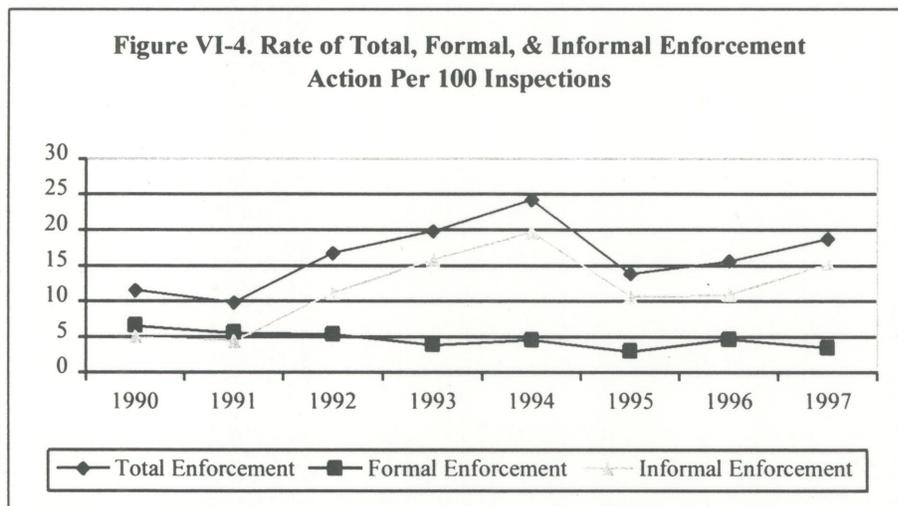
inspections was at its lowest point in 1994 when the three regulatory bureaus combined conducted slightly more than 3,000 inspections.



Much of the bureaus' workload consists of inspections but, as indicated by Figure VI-3, most inspections do not directly result in enforcement actions. The bureaus give three primary reasons for this: (1) inspections reveal compliance with no existing violations; (2) compliance or follow-up inspections of entities already under enforcement generally do

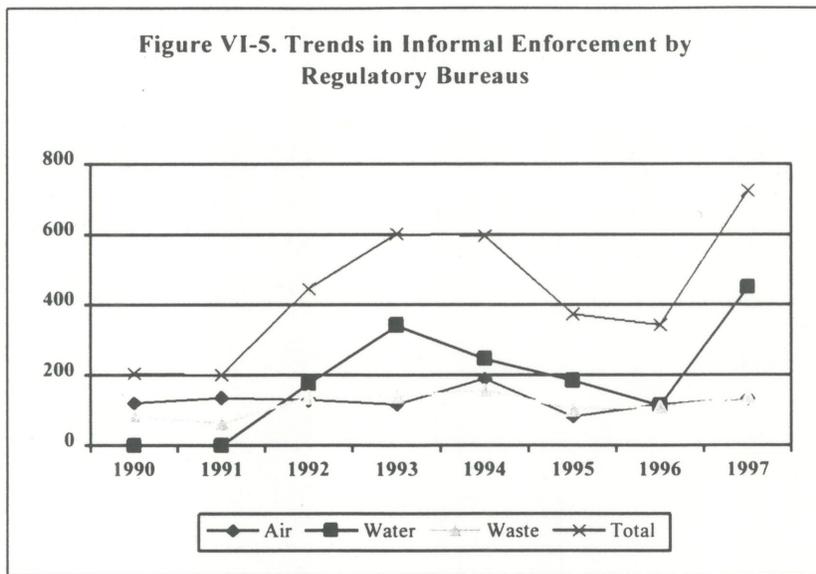
not result in new violations or actions; and (3) after further review and analysis of the cited violation, the regulated entity was found to be in compliance.

Another way to review the relationship between inspections and enforcement actions is shown in Figure VI-4. This graph compares the rate of total, formal, and informal enforcement actions per 100 inspections.



The overall trend shows the rate of total enforcement actions, on a per 100 inspections basis, steadily increased from a low of 10 enforcement actions per 100 inspections in 1991 to a high of 24 actions per 100 inspections in 1994. In 1995, however, there was a significant (46 percent) decline in the rate of total enforcement

actions issued by the department. Since then the rate had been climbing but has not reached the level prior to the decrease. In 1997, there were approximately 18 enforcement actions per 100 inspections.



The trend in total enforcement actions parallels that of informal enforcement actions, while the trend in formal enforcement has remained consistently lower over the eight-year period. Based on this trend, it can be concluded that the number of informal enforcement actions is the driving factor in the department's overall enforcement activity. In 1997, the department issued 15 informal enforcement actions and three formal enforcement actions per 100 inspections.

Figure VI-5 shows the trends in the overall informal enforcement actions issued by DEP and also individually by bureau. This graph highlights that informal enforcement actions issued by the water bureau are driving the overall trend. As shown, the two trends (total and water bureau) reflect the same increases and decreases, more closely than the other two bureau trends. The air and waste bureaus show a more consistent pattern in the number of informal actions issued since 1990. The two bureaus do show a decrease in actions in 1995, similar to water; however, the changes are not as significant as in the water bureau.¹

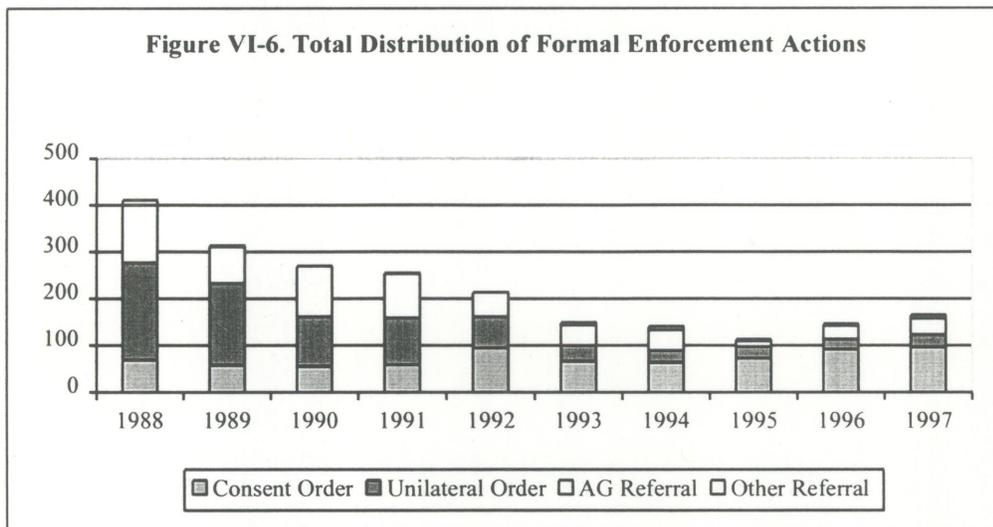


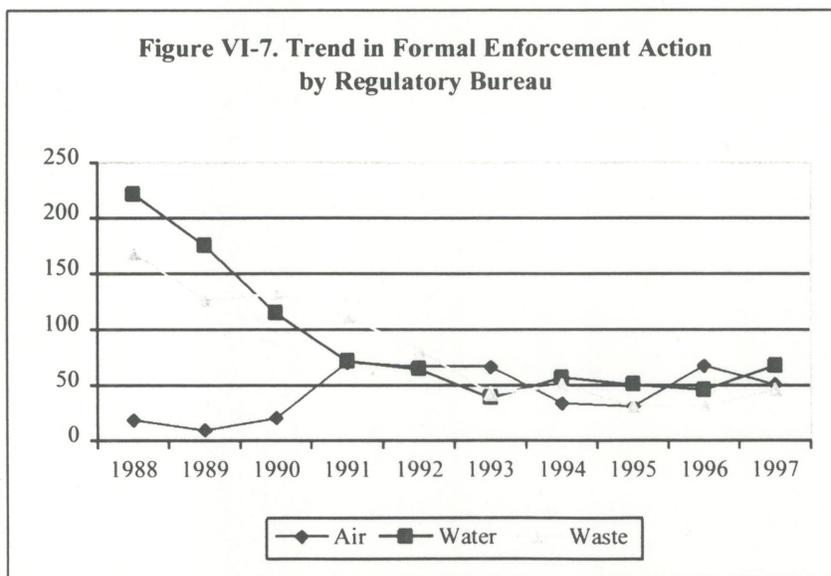
Figure VI-6 shows a breakdown by type of formal enforcement action for the past 10 years. As discussed, in terms of the overall number of enforcement actions taken by DEP, formal enforcement actions are a small

¹ The water bureau began issuing NOVs in 1992, with the advent of the agency-wide directive. Other programs were already using a similar tool. According to DEP staff, the method by which entities were notified of violations, absent the start of formal enforcement, varied among water enforcement personnel.

percentage of the total. However, these are the most severe actions the department can take against a violator and require the most staffing resources of any type of enforcement activity.

The prior analysis makes clear that formal enforcement declined during the 1990s and reached its lowest point in 1995. Figure VI-6 shows the overall decline and the changes in the types of enforcement used by DEP. Several trends are noted below.

- In terms of number of cases, the most drastic change in practice by the department relates to the issuance of unilateral orders. From 1988 through 1992, the department issued many more unilateral orders than it has in recent years. The number of orders decreased from a high of 209 in 1988 to its lowest point of 23 in 1996. The average number of unilateral orders issued from 1988 through 1992 is 132, while the average for 1993 through 1997 is 28.
- The number of consent orders issued per year has generally increased. The first significant increase of 62 percent (from 58 to 94 cases) occurred in 1992. The average number of consent orders issued in the first five years depicted in the figure (1988-1992) is 66, while the average in the following five years is 77.
- When looked at as a percentage of the caseload, the changes in the number of consent orders issued becomes more significant. Consent orders have represented a growing percentage of the total formal enforcement caseload, increasing from 17 percent of the actions in 1988 to over 60 percent in 1996. In 1997, consent orders dipped to just below 60 percent of the total caseload.
- The number of attorney general referrals declined from an average of 91 between 1988 and 1992, to 32 from 1993 through 1997.



In conclusion, the department is doing much less formal enforcement action, and in most of the cases that are resolved, the resolution is achieved in a consensual manner between DEP and the violator.

Figure VI-7 shows the trend in formal enforcement cases resolved by each of the regulatory bureaus: air, water,

and waste. The water and waste bureaus show similar trends that steadily decreased (77 percent and 82 percent respectively) from a high point in 1988 to a low point in 1995. The trend for the air bureau is more consistent but show a decrease in the mid-1990s with the lowest point also in 1995. Overall, the figure shows that all three bureaus show much less variability in the number of formal cases resolved since 1992, each clustering around 50 cases.

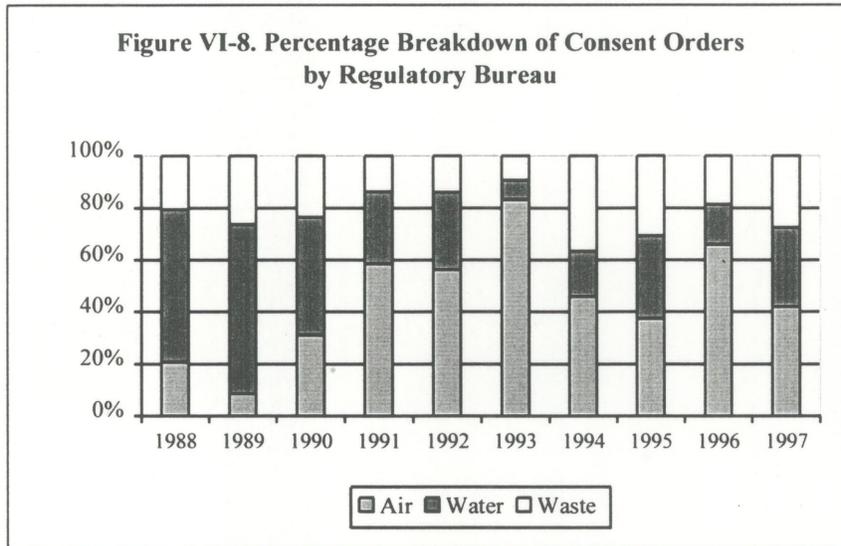
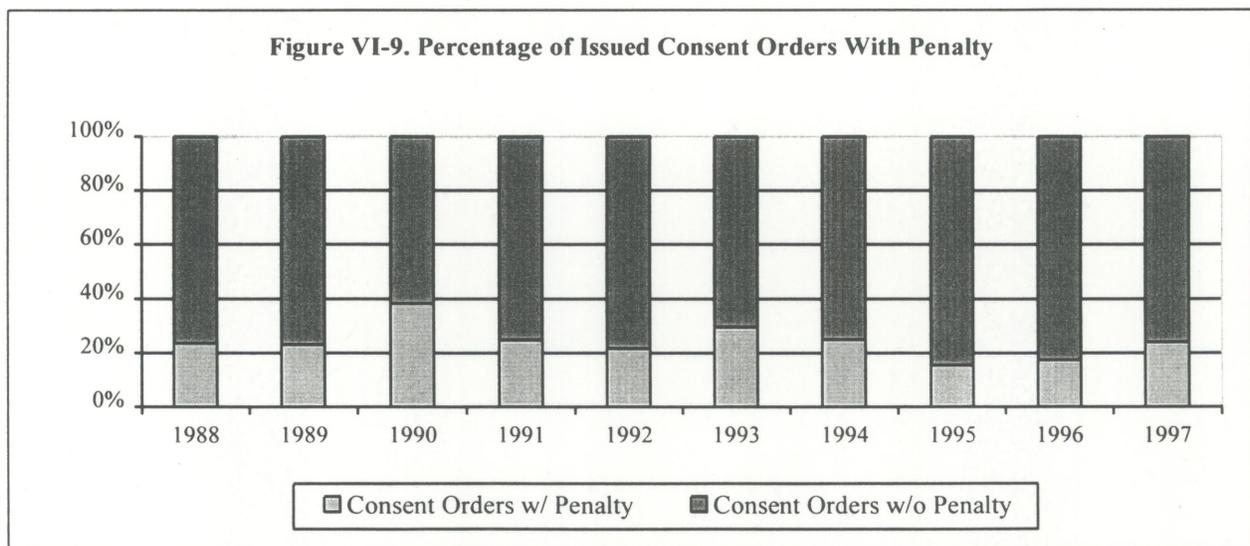


Figure VI-8 breaks down each bureau's consent order caseload as a percentage of all consent orders issued. Since 1991, the air bureau has represented the largest percentage of the total caseload. The changes have occurred as the percentage of cases issued by the air bureau increased and cases issued by the water bureau have decreased. The waste bureau has had a fair amount of variation over the 10-year

period, with its most notable changes in 1993 and 1994.

Figure VI-9 shows the percentage of all consent orders that include penalties. Overall, less than 30 percent of the consent orders issued by DEP impose penalties on violators. During the 10-year period (1988 through 1997), the regulatory bureaus' enforcement actions have assessed a total of \$4,666,723 against violators.

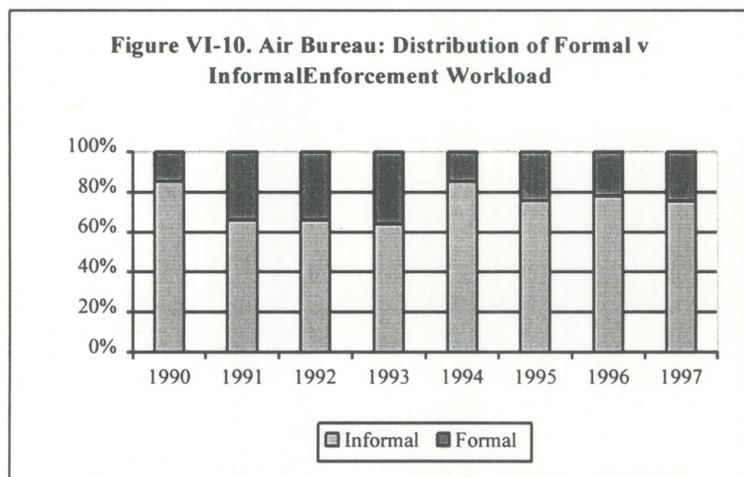


Penalties. The average penalty per consent order can be calculated in two ways. The total amount of assessed penalties can be compared to the total number of consent orders issued—that includes orders with and *without* penalties. Using this method, the average penalty in consent orders issued between 1988 through 1992 is \$7,774 and declines to an average of \$6,558 for orders issued between 1993 through 1997.

In the alternative, the total amount assessed can be compared against the total number of orders with a penalty, leaving out those orders without a penalty. When calculated in this way, the average assessed penalty in consent orders issued between 1988 through 1992 is \$18,524, and increases to an average of \$23,378 for consent orders issued between 1993 through 1997. It should also be noted that \$32,311,895 in penalties were assessed through court decisions or stipulated judgments that started as referrals to the AG.

Air Bureau Enforcement Analysis

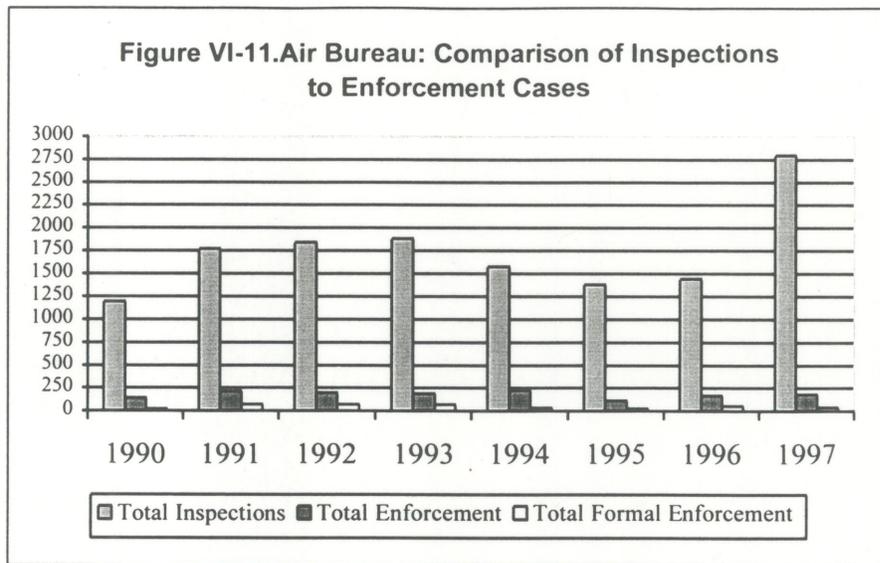
This section focuses on enforcement activity in the Air Bureau.² Figure VI-10 illustrates the distribution of the air bureau's workload between formal and informal enforcement cases for the last eight years (informal enforcement cases for the air bureau only include NOVs, as warning notices are not used).



Overall, the air bureau has consistently relied on informal enforcement to return the regulated community to compliance status. From 1991 through 1993, there was a slight increase in formal enforcement cases. However, beginning in 1994, over three-quarters of the enforcement work has been NOVs (informal cases).

Figure VI-11 shows a comparison of the total number of inspections to total informal and formal enforcement cases from 1990 to 1997. The bureau did not have data on the number of NOVs issued for 1988 and 1989. The purpose of analyzing the data in this way is to determine if there is a relationship between inspections and issued enforcement cases. Less time in the field

² In this analysis, the total number of consent orders issued does not include those orders issued under the emissions trading program. Emission trading orders are not traditional enforcement actions in that they are not initiated in response to an existing violation. The trading program is an ozone reduction initiative administered by the air bureau. The program allows sources to buy or sell credits, which are earned when source emissions are lowered below the federal attainment standards. The consent orders are the formal authorization documents for the trading, purchasing, and selling of credits. Since 1995, the air bureau has issued 26 trading orders.



may lead to less enforcement cases. However, the trend in the number of inspections reveals the air bureau has not significantly increased the number of inspections, except in 1997, and the number of enforcement cases has not changed considerably over the eight-year period. The graph does show a slight decrease in the number of inspections during 1995. The only significant

change occurred in 1997 when the number of inspections conducted increased approximately 100 percent. However, it is noted the enforcement numbers did not change in that year.

Most of the bureau's workload consists of inspections and, as indicated by this figure, a significant amount of the inspection work does not result in an enforcement case. In reviewing these two types of activities, it should be noted that administrative enforcement consumes many more resources in terms of staff time. Enforcement actions are complex and technical and can take years to resolve. A single inspector, though, can conduct several inspections in one day or take several days to complete a single inspection of a source.

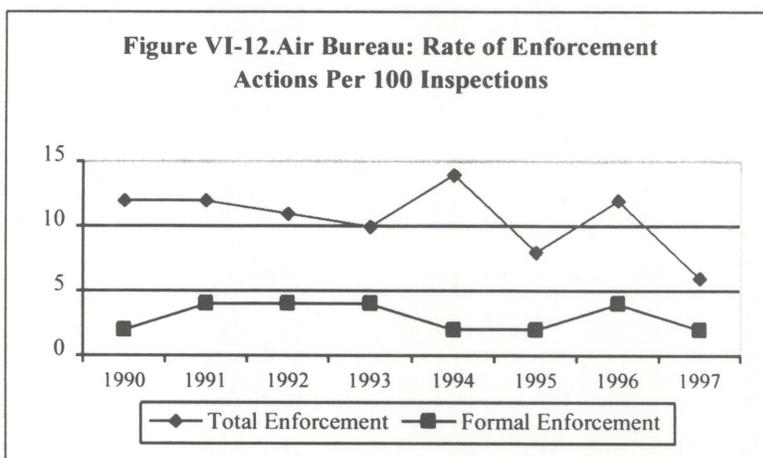
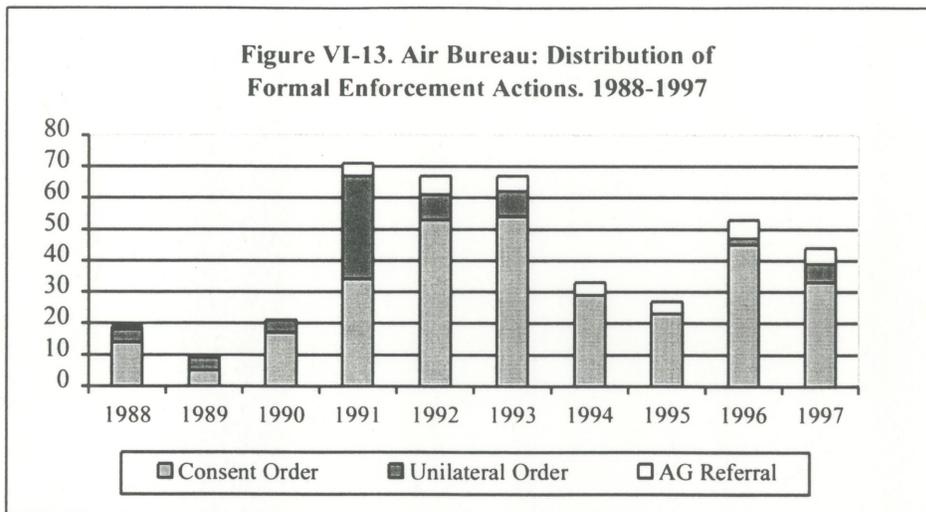


Figure VI-12 compares the rate of total and formal enforcement cases per 100 inspections. The overall trend shows the rate of total enforcement cases, on a per 100 inspections basis, declined slightly from 1990 to 1993. In 1994, the rate increased to a level of 14 cases per 100 inspections and then dropped to a rate of eight cases in 1995. The last two years under review also show an increase followed by a decrease in the rate of total

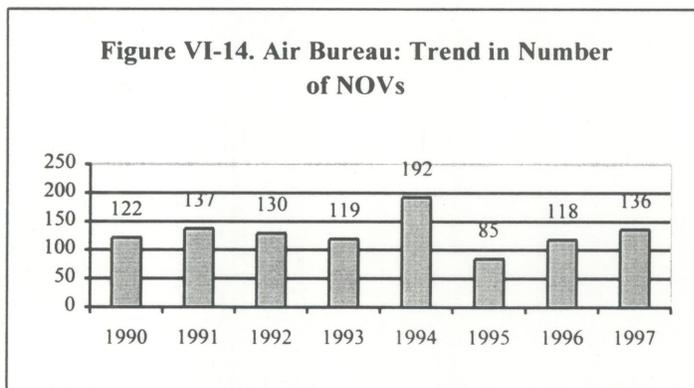
enforcement cases per 100 inspections. In 1996, there were 12 cases and in 1997 only six cases per 100 inspections. When formal enforcement cases are analyzed separately, the trend is basically flat over the eight-year period.



A breakdown of the type of formal enforcement activity, as illustrated in Figure VI-13, shows that consent orders comprise the majority (in terms of number of cases and also as a percentage of the total workload) of the formal enforcement cases in each of the

years under review. In 1991, the total number of administrative enforcement cases increased 238 percent from 1990, and remained fairly consistent until 1994 when the number of cases declined 51 percent. The rate of formal enforcement shows another change from 1995 to 1996 when it increased 96 percent. As is shown consistently throughout this analysis, there is an increase in enforcement beginning in 1996.

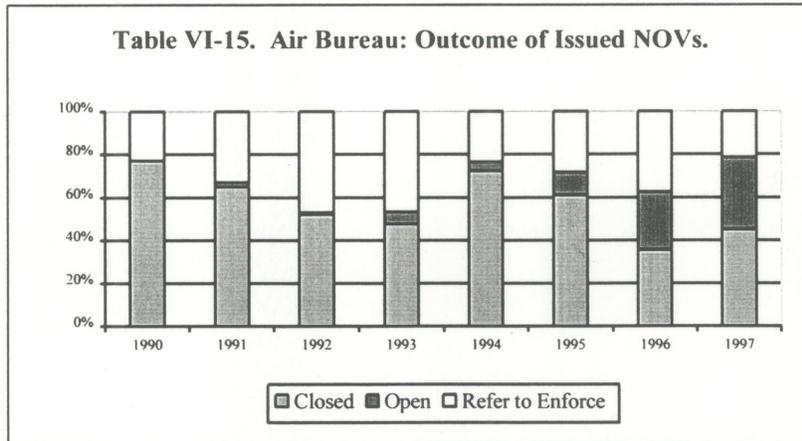
The air bureau did not issue any unilateral orders in 1994 or 1995, but recently has shown an increase in use of the order. Only a small percentage of the bureau's overall enforcement workload is referrals to the attorney general.



In terms of the number of informal cases (NOV's) issued per year, the air bureau is fairly consistent over the eight-year period. The only real change, as shown in Figure VI-14, is a 61 percent increase in 1994 followed by a 56 percent decrease in 1995.

Figure VI-15 depicts the outcomes of issued NOV's from 1990 through 1997. Since NOV's represent the bulk of the air bureau's enforcement cases, the rate of compliance by the regulated community was analyzed. Closed NOV's represent cases in which compliance was achieved as a result of informal enforcement action. Also shown on the graph are those cases referred for formal enforcement action. Compliance may have been achieved in these cases as a result of the NOV; however, formal enforcement action may be needed to impose a penalty. Some of these cases were referred for noncompliance. The third category is open cases in which the air bureau has not verified the source's return to compliance. Sources involved in open cases may have been granted extensions by the bureau to achieve compliance, some have failed to

respond to the NOV and the bureau may refer the source for formal enforcement, and some sources are in compliance but for administrative reasons the cases have not been closed. (Stage II NOVs are not included. Those NOVs were closed during 1993 and 1994.)

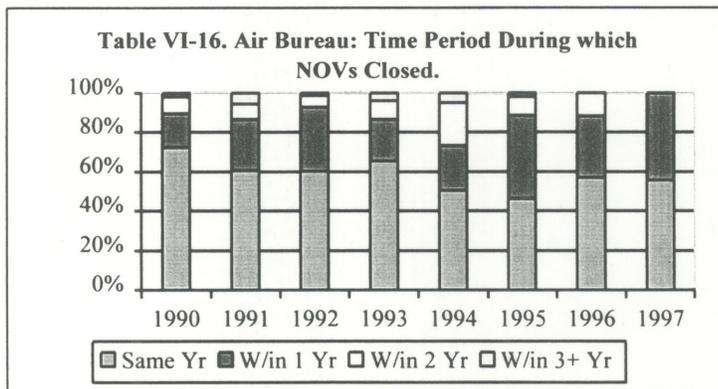


Anecdotally, the bureau had reported a high rate of compliance with NOVs and cited that as a primary reason for its regular use of informal enforcement. The bureau reported little need in most cases to escalate to formal enforcement because a violator often returns to compliance based on the issuance of a NOV. The overall trend fluctuates with the compliance rate decreasing during 1991, 1992, and 1993, and again in 1995 and 1996.

There are less closed cases in 1996 and 1997 and this may be attributed to ongoing compliance by the violator and monitoring by the bureau.

The trend in the number of cases referred for formal enforcement is also not consistent. During the early 1990s, more NOVs were referred for formal enforcement. The least number (24 cases) of NOVs were referred in 1995, even though the percentage of referrals to formal enforcement was not the smallest that year.

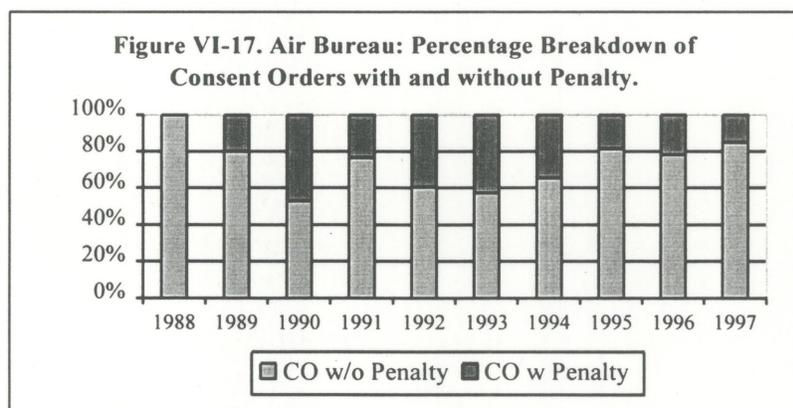
It is important to note that the air bureau has reported as open cases NOVs issued in the early 1990s. While the percentage of open cases is small from 1991 through 1995, there are still some cases open. As previously stated, the NOV allows a violator between 14 and 30 days to either return to compliance or submit a plan to return to compliance that will require additional time.



It appears, based on that directive, that the informal enforcement action is meant to exact compliance within a relatively short period of time. It can be argued, therefore, that a NOV should not remain open more than a few months. It is troublesome that the data show NOVs that are open several years after being issued.

The air bureau also provided data on how long NOVs remained open, broken out into four time periods: (1) closed during the same year the NOV was issued; (2) closed within one

year: (3) closed within two years; and (4) closed within 3 or more years of issuance. Figure VI-16 illustrates the length of time it took to close NOVs. As shown, more than half of the closed cases were closed during the year the NOV was issued. Only during 1995 did the bureau close less than half (46 percent) of the cases during the same year they were issued. Almost all closed cases are closed within one year of issuance of the NOV and, during 1997, all closed cases were closed within one year.



Penalties. The air bureau imposes penalties directly through consent orders or refers the case to the attorney general for a judgment with penalties. As previously discussed, the majority of the bureau's formal enforcement action is consent orders. Figure VI-17 shows a breakdown of the percentage of consent orders with and without penalties. Overall, the

percentage of consent orders including penalties has been decreasing since 1993. From 1995 to 1997, less than 25 percent of all consent orders include a penalty. In addition, as shown in previous graphs, the air bureau does not refer many cases to the attorney general.

Table VI-1 shows the amounts of penalties assessed through consent order and either court decision or stipulated judgment as a result of a referral to the attorney general. From 1989 through 1995, the percentage of penalties assessed through consent order ranged from 100 percent to 64 percent of the total penalties assessed. The bureau tends to get a higher penalty amount through a negotiated consent order rather than a referral. (It is not known from these data whether the attorney general referral penalty amounts are a result of a court decision or negotiated agreement between the violator and attorney general's office.)

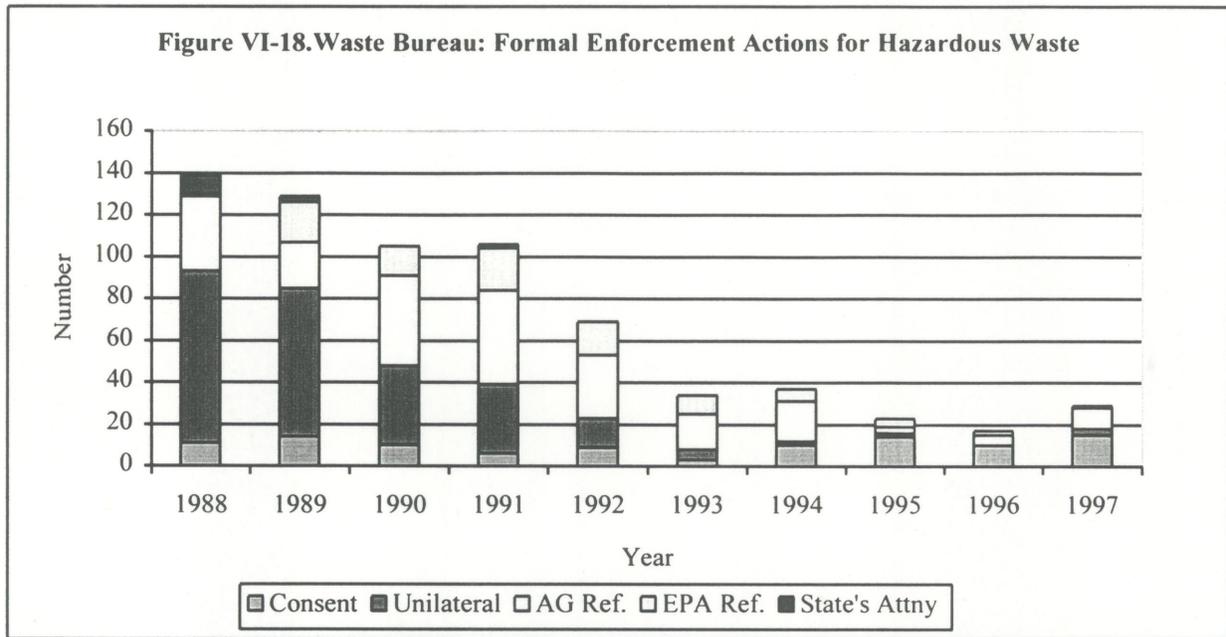
	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
Consent Order	0	2,800	66,102	16,000	144,800	390,700	188,025	62,482	101,900	65,850
AG Referral	5,000	0	7,500	0	30,000	60,000	74,000	35,000	116,000	126,200
Total	5,000	2,800	73,602	16,000	174,800	450,700	262,025	97,482	217,900	192,050

Source of Data: DEP

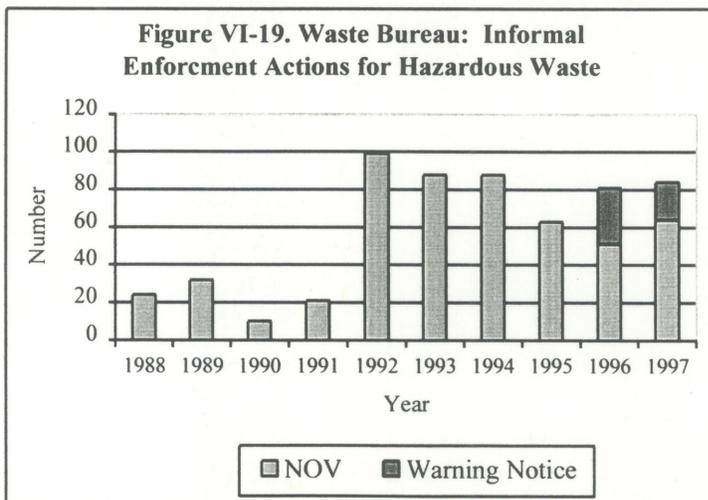
Since 1988, the air bureau has assessed over \$1 million in consent order penalties and over \$450,000 in penalties based on attorney general referrals. During that time, the bureau has collected over \$1.5 in paid penalties (\$1,055,973 from consent orders and \$476,850 from attorney general referrals).

Waste Bureau Enforcement Analysis

Hazardous waste. Figures VI-18 and VI-19 show the trend in formal (orders and referrals) and informal (NOVs and warning notices) enforcement actions, respectively, for the last 10 years for the hazardous waste section of the waste bureau. Overall, the figures taken together demonstrate a sharp decrease in the number of formal actions, while the number of informal actions has grown.



The number of formal enforcement actions drop every year, except in three instances; in 1991 there is an increase by one action (1 percent), in 1994 by three actions (9 percent), and in 1997 by 12 actions (71 percent). The



first large drop, 35 percent, in formal actions occurs in 1992, when the new Enforcement Response Policy is adopted. At the same time, the first large increase in informal actions occurs – an over 370 percent increase. The next two largest drops in formal actions occur in 1993, a 51 percent drop, and 1995, a 38 percent drop after the small increase in 1994.

Not only do the number of formal enforcement actions decrease overall, but the types of formal

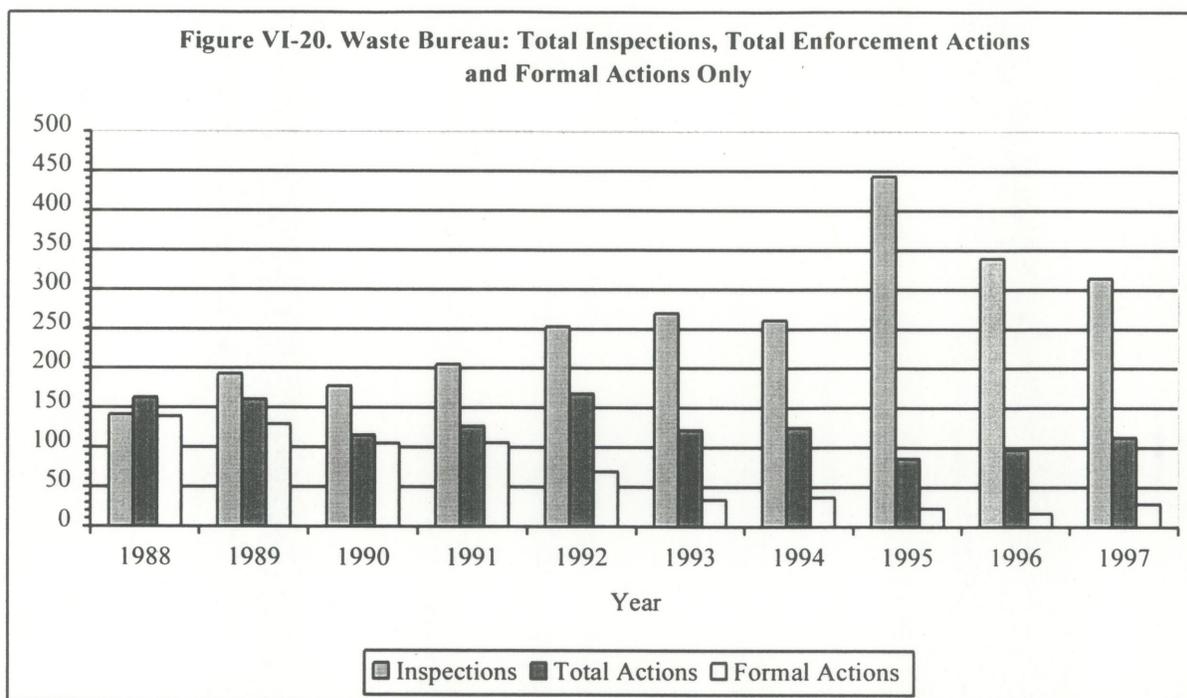
enforcement actions change also. There was a move away from imposing the more severe actions of referrals and unilateral orders, to the increased use of consent orders.

Additional trends are noted below.

- The highest number of enforcement actions occurred in 1988, when 139 formal actions were issued, and the lowest in 1996, when 17 actions were issued.
- Unilateral orders decreased from 82 in 1988 to three in 1997. In 1996, none were issued. The first five-year average for such orders issued is 32 percent of total actions (formal and informal); for the last five years it is 2 percent.
- Referrals to the attorney general have decreased from 36 in 1988 to 10 in 1997. The highest number of attorney general referrals (45) occurred in 1991. Referrals represented on average 25 percent of total actions for the first five years and 9 percent over the last five years.
- The average number of consent orders remains the same (about 10 issued) between the first five years as compared to the last five years, but the average percentage of consent orders compared to total actions increases from 7 percent to 10 percent over those two time periods.
- Referrals to EPA dropped from an average of 10 percent of total actions to 4 percent over the two time periods, while referrals to the chief state's attorney dropped to zero because its environmental unit was inactive during the mid-1990s.

Figure VI-20 provides a comparison of inspections, total actions (informal and formal), and formal actions. As noted earlier, the purpose of analyzing the data in this way is to determine if there is a relationship between inspections and enforcement actions issued. Less time in the field may lead to less enforcement actions. However, the trend in the number of inspections reveals that the hazardous waste section has spent more time in the field, while an apparent drop has occurred in the number of enforcement actions issued.

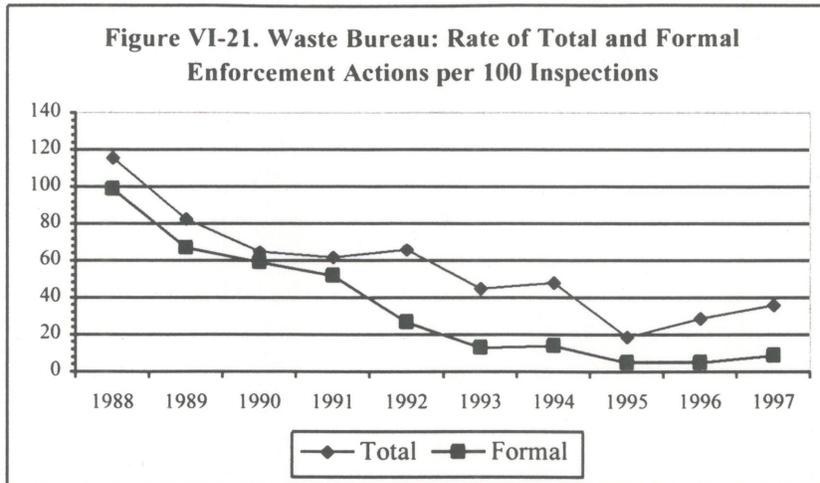
Beginning in 1995, there is a dramatic increase in the number of inspections conducted. At this time, the hazardous waste section began conducting compliance schedule evaluations, which are conducted at facilities already under an enforcement action, but the enforcement actions have not been closed out. The CSE inspection is only focused on areas of noncompliance previously found, unless the on-site conditions observed by the inspector indicate that a full inspection is warranted.



The total number of CSEs could be removed from the comparison. Nonetheless, even when the total number of CSEs are removed, on average more inspections were conducted in the last five years and fewer enforcement actions were issued, than in the previous five years. (A description of this CSE initiative can be found in Chapter Five). Based on the information presented in Figure VI-20, the following trends can be noted:

- between 1988 and 1992, an average of 194 inspections were conducted, 147 total enforcement actions were issued, and 110 formal actions were issued. For the last five an average of 325 inspections were conducted, 110 total enforcement actions were issued, and 28 formal enforcement actions were issued; and
- if the total number of CSEs are taken out of the inspection numbers, the average for the last five years drops to 255 inspections – still on average 61 more inspection per year than the first five years.

Another way to consider the relationship between inspections and enforcement actions is presented in Figure VI-21. This figure compares the rate of total and formal enforcement actions per 100 inspections. Some difficulties should be noted in analyzing the information in this way. In 1988, there are more enforcement actions than inspections. Theoretically, this is possible as the bureau could have issued two enforcement actions (a NOV and a referral, for example) against the same company as a result of one inspection. But it is also likely that the bureau issued more enforcement actions due to a backlog of cases from previous years. Some time delay between the inspections conducted and enforcement actions issued is expected. Nonetheless, the depiction of the overall trend over a decade should be valid.

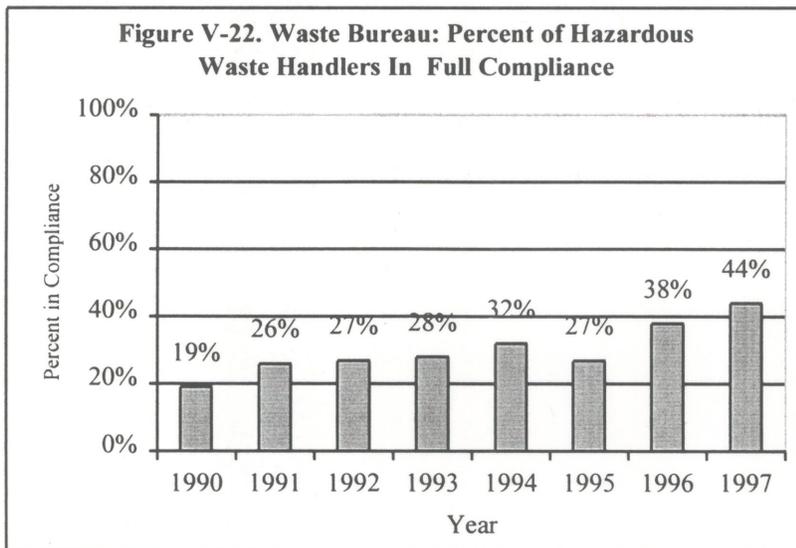


The overall trend shows the rate of total enforcement actions and formal actions only, on a per 100 inspections basis, has declined until 1995. A gradual increase occurred after that through 1997. Figure V-21 shows that in 1988, 116 enforcement actions were issued per 100 inspections, as compared to the lowest point in 1995 of 19. From this low point in

1995, the total number of enforcement actions rises to 36 in 1997.

When the formal actions are separated and analyzed, the trend remains the same. In 1988, 99 formal actions were issued, and there was a general decline until the lowest point in 1995 when five enforcement actions were issued. In 1997, the number of formal responses increased to nine.

If the numbers are adjusted to remove the impact of CSE inspections, the trend is still consistent with the previous analysis. This is not an entirely accurate way of adjusting the rate



because some number of CSEs led to further enforcement action. Removing the CSEs, then, would tend to overstate the rate—that is more enforcement per 100 inspections would appear to be occurring than actually occurred. Nonetheless, the rate of total actions rises to 38 in 1995, 38 in 1996, and 43 in 1997, but still lower than in each of the previous years. The rate for formal actions changes to 10, 7, and 11 for those years.

If the number of enforcement actions, both informal and formal, have generally been declining, the question remains as to why. Because of limitations in the data, a definitive answer cannot be provided. Part of the explanation, however, can be found in Figures VI-22 and VI-23.

Figure VI-22 indicates the percentage of hazardous waste handlers found in full compliance for the years 1990 through 1997, according to DEP. Handlers include companies that generate, transport, treat, store and/or dispose of hazardous waste and represent a significant amount of the inspection universe. The chart shows the percentage of handlers in compliance has increased over seven years from 19 percent in 1990 to 44 percent in 1997.

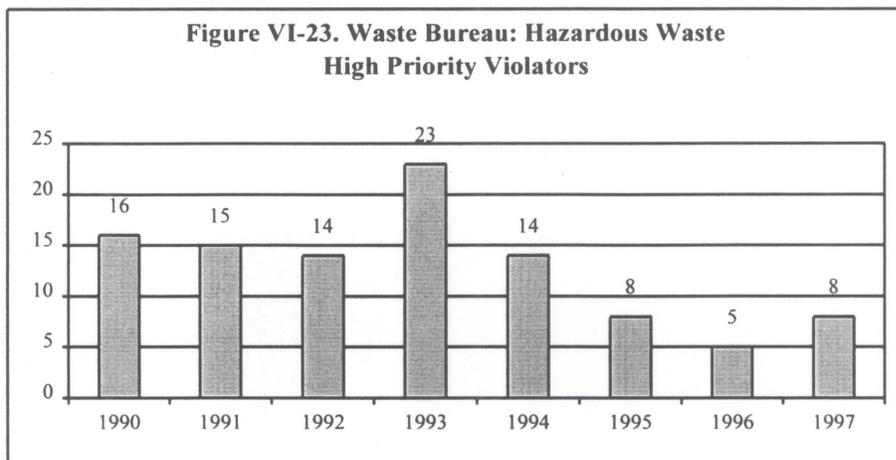
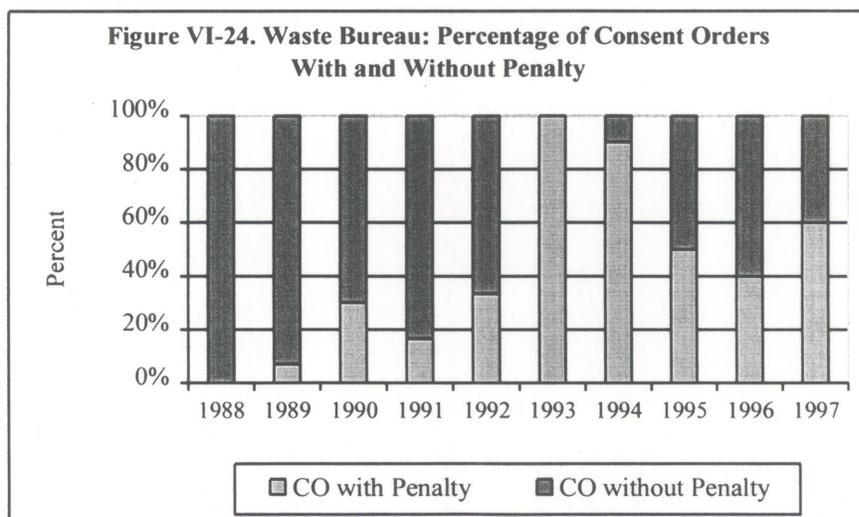


Figure VI-23 shows the number of high priority violators (HPVs) from 1990 through 1996. High priority violators represent the most serious violators and either have a chronic history of non-compliance or the violations involved have the potential to cause serious harm to

human health or the environment. The figure shows that except for 1993, the number of HPVs has declined over the last eight years—from 16 in 1990 to eight in 1997. The lowest amount was in 1996 when there were five and the highest number was 23 in 1993.

DEP has asserted that compliance has increased because the regulated community has become more aware of and sensitive to compliance with environmental regulation. Still, with over a decade since the regulations were first enacted the percentage of compliance is yet to hit 50 percent.



Penalties. With regard to penalties assessed for hazardous waste violations, a few trends can be noted. Figure VI-24 shows the percentage of consent orders with and without penalties. Opposite trends can be detected between the first five years compared to the last five years. From 1988 through 1992, the percentage of consent orders without

penalties exceeded the number with penalties in each year. After 1992, the percentage of consent orders with penalties exceeded the number without every year except 1996. This would be consistent with the trends noted earlier. The bureau was issuing more consent orders (and less referrals) and therefore should be assessing more penalties.

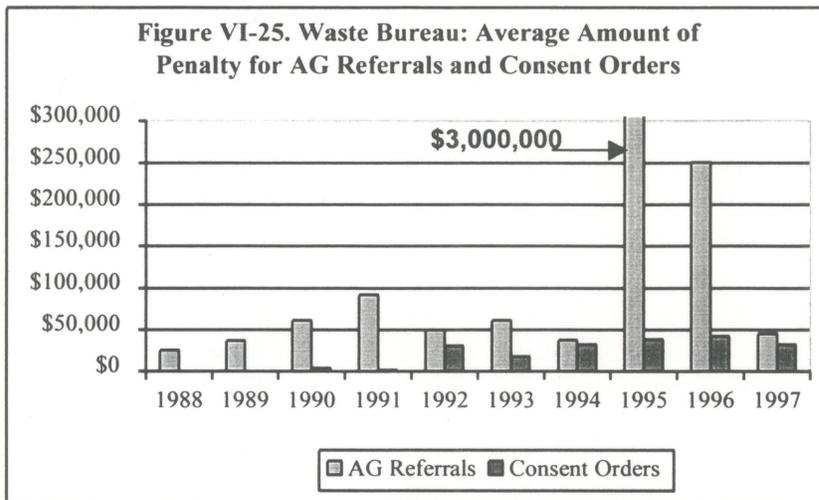
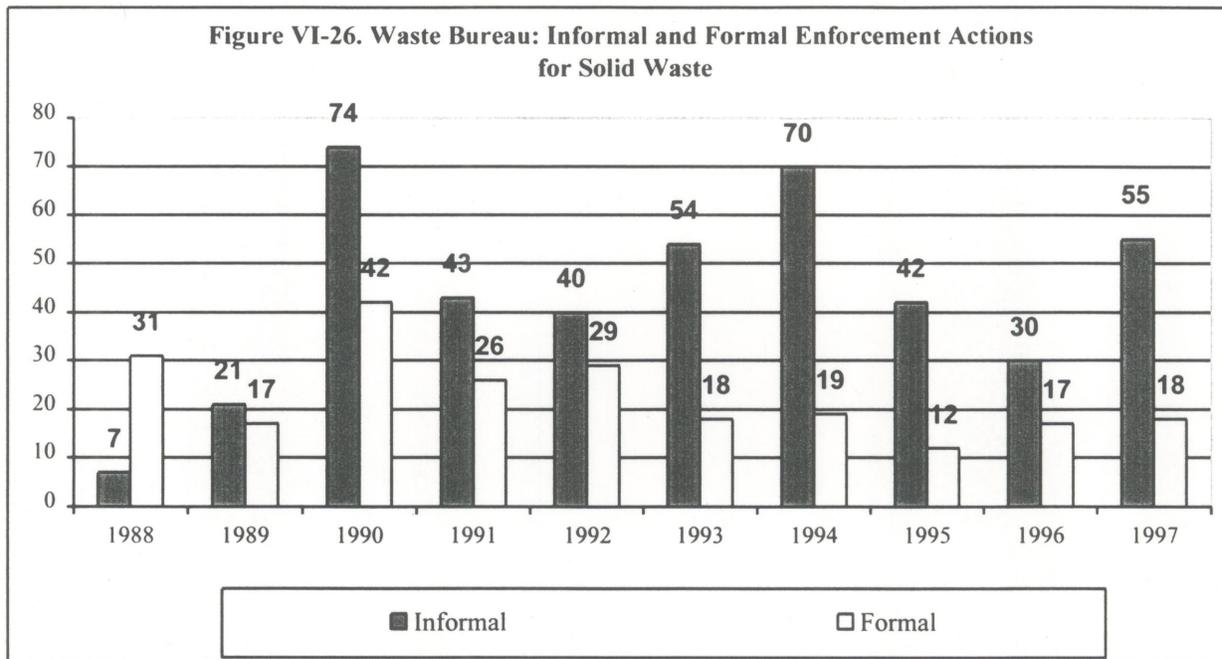


Figure VI-25 presents the average amount of penalty for attorney general referrals and consent orders. Referrals are negotiated and settled by the attorney general or litigated by the attorney general and consent orders are negotiated and settled by the hazardous waste section of DEP. To be consistent, the referrals that were withdrawn or not yet settled

were removed from the analysis. Penalties in this analysis include both monetary fines and the value of supplemental environmental projects. The average amount of penalties levied by cases handled by the attorney general has always been greater than the amount levied by the waste bureau.

In 1988, no penalties were assessed by the hazardous waste section for the 11 cases that were settled by consent order, whereas the average for the attorney general was \$25,308. The 1988 figures were the lowest amounts levied by both agencies. The highest average amount for the attorney general was \$3 million for one case in 1995. The highest average amount for the hazardous waste section was \$42,559 in 1996. This appears appropriate. The attorney general is likely to be getting the more serious cases. As one would expect, referral to the attorney general should be considered a more severe penalty. The more state agencies and personnel that have to be involved in an enforcement action, it is expected the more the violator would be paying.

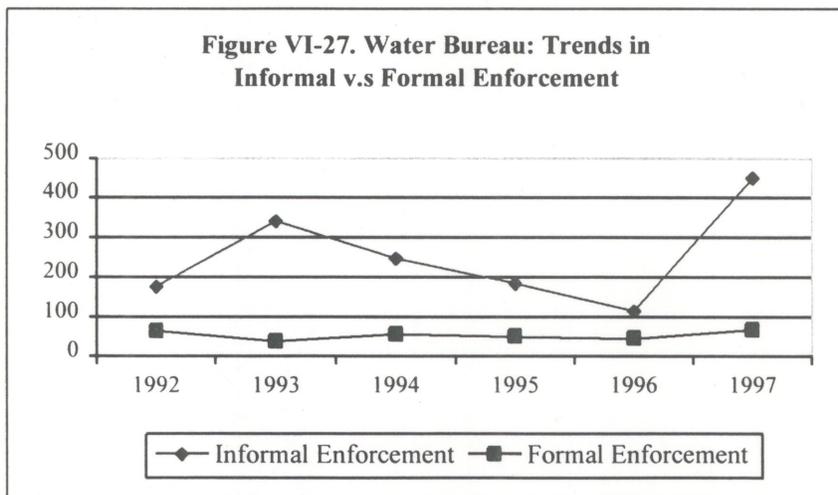
Solid waste. Figure VI-26 compares the number of informal and formal enforcement actions for the solid waste section of the waste bureau. The average number of total actions (formal and informal) has remained relatively consistent for the last 10 years. The average number of total enforcement actions from 1988 through 1992 is 66. The average for the last five years is 67. The total number of enforcement actions in the first five years, though, was more variable. In each of the first two years 38 actions were taken, while in the last two 69 were taken. In between, in 1990, 116 actions were taken. In 1993 and 1994, there was an increase in the number of actions taken, then a decrease in the next two years, and finally an increase in 1997.



Although the number of formal actions from one year to the next has been variable, the average number of formal actions has declined over the 10-year period. The average number of formal actions taken between 1988 and 1992 is 29. The average number for the last five years is 17.

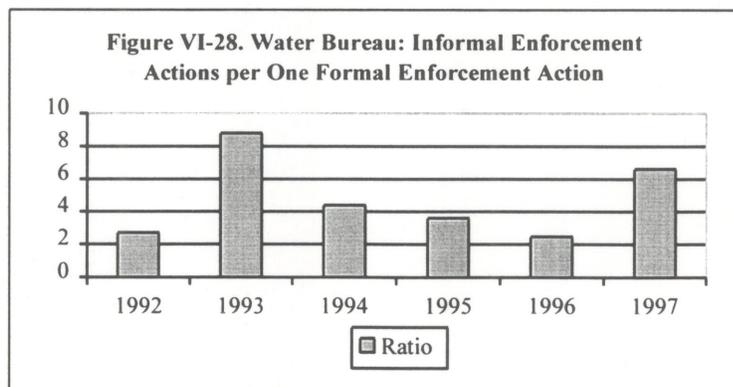
The number of informal actions taken has also fluctuated for the solid waste section. The average number of informal actions, though, has increased. In the first five years depicted in the figure, the average number of informal actions issued is 37. For the last five years it is 50.

Water Bureau Enforcement Analysis



This section presents information about enforcement-related activities conducted by the Permitting, Enforcement and Remediation Division of the Water Bureau. Figure VI-27 compares the trend of informal enforcement actions with the trend of formal enforcement cases from 1992 to 1997. Informal cases occur more frequently than formal enforcement cases.

The informal cases also show greater yearly variance. The number of NOVs increased 93 percent for 1992 to 1993, then declined from 1993 to 1996 by 66 percent. The low point during the six-year period occurred in 1996.



During 1997, the water bureau saw the greatest number of informal actions, an increase of 32 percent over the second highest year, 1993. The number of formal cases vary less from year-to-year, with the greatest change a 46 percent increase from 1993 to 1994 (from 31 to 57 cases).

Figure VI-28 depicts the ratio between NOVs and formal enforcement actions. The bars represent the number of NOVs issued for every one formal enforcement action. The ratio fluctuates from a low of 2 ½ NOVs for every one formal enforcement action in 1996 to a high of almost nine-to-one in 1993.

Figure VI-28 depicts the ratio between NOVs and formal enforcement actions. The bars

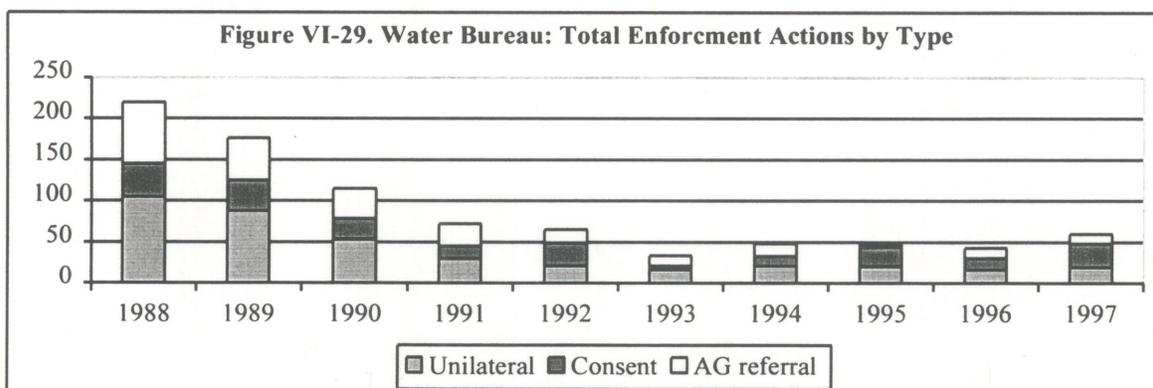


Figure VI-29 shows over a 10-year period the total number of formal enforcement actions, broken down into the three types: unilateral order; consent order; and attorney general referral. The figure shows that formal enforcement actions were at their highest in the late 1980s, and decreased significantly to a period low in 1993. Since 1993, there have been slight increases.

Figure VI-30 displays the same information as the previous figure, but in a way to more clearly compare the relative use of each type of enforcement action. In the late 1980s into the early 1990s, unilateral orders were used most often. This could in part be due to the use of such orders to municipalities to make improvements in their sewage treatment plants. In recent years, the consent order is used most often. In 1992, the percentage of consent orders as part of the

entire formal enforcement caseload grew to 43 percent, doubling in comparison to each of the previous four years. In 1993, there was an increase in unilateral orders to almost half of the formal enforcement cases, with a resulting decrease in the consent order portion. (As the previous graph shows, 1993 also had the fewest actual number of all enforcement orders.)

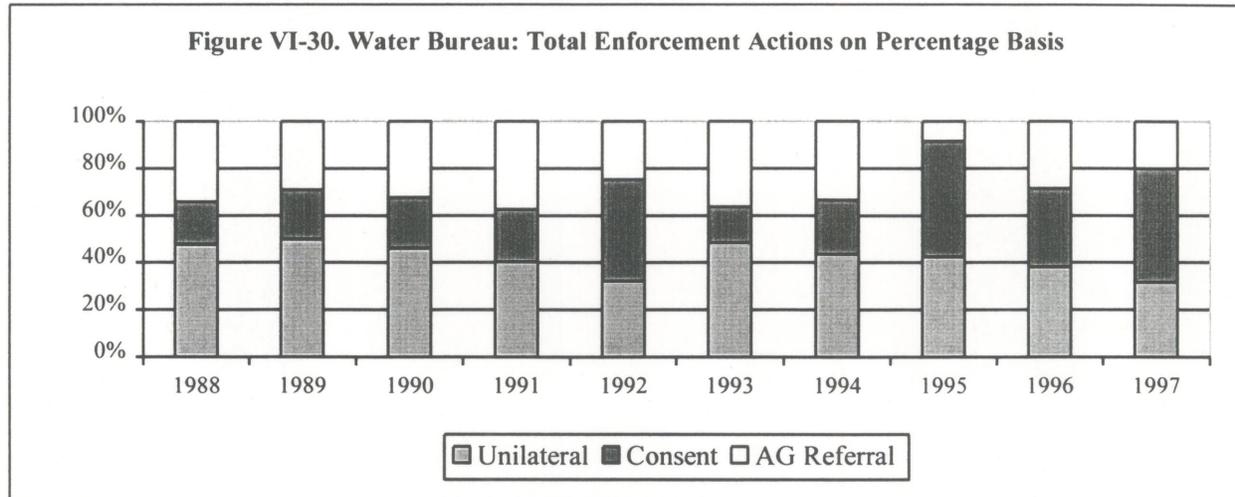
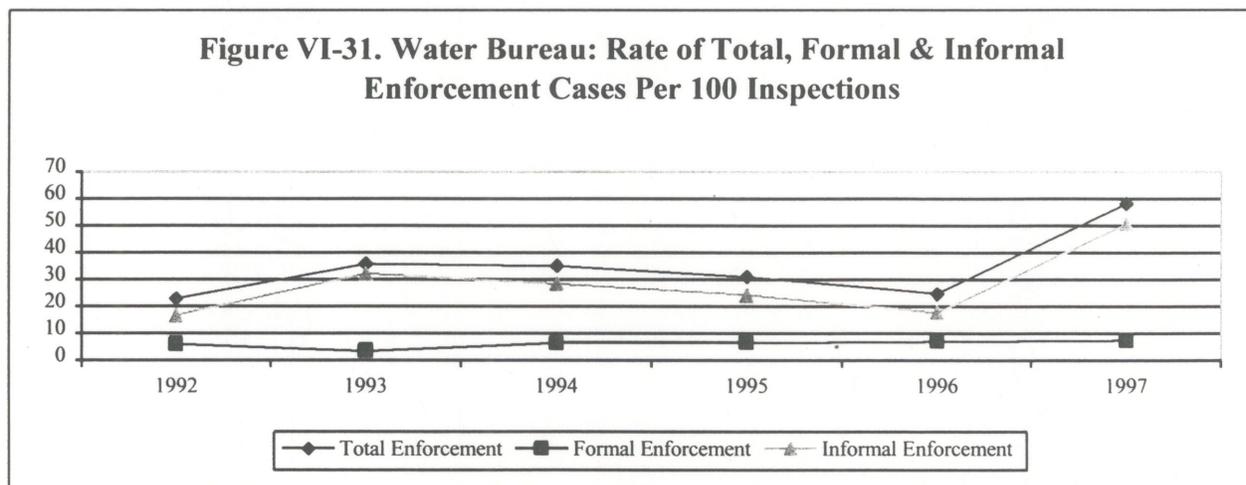
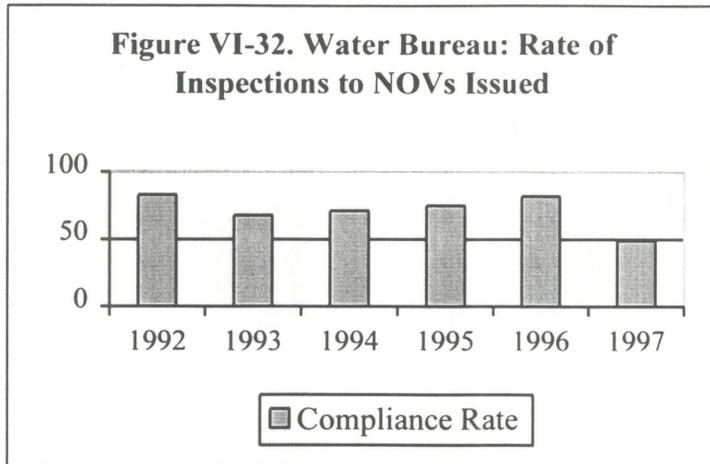


Figure VI-31 compares the rate of total, formal, and informal enforcement actions per 100 inspections. The total enforcement rate followed the informal rate, with a slight curve up and then down between 1992 and 1996. The sharp increase in 1997 results from the stormwater general permit enforcement initiative, when about 350 NOV's were issued. The rate for formal enforcement took a dip in 1993, but was otherwise flat over the six-year period.



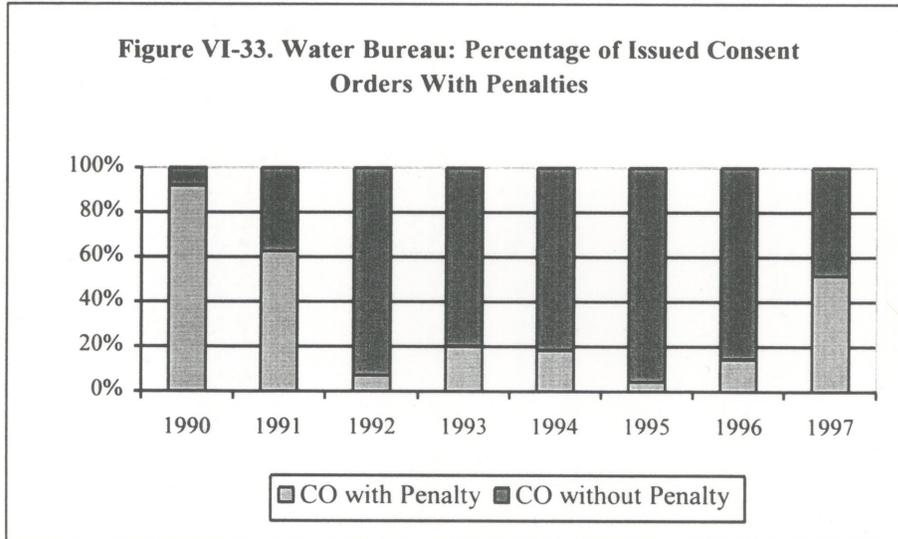
The Permitting, Enforcement and Remediation Division of the water bureau does not currently keep information on the numbers of inspections that uncover violations in contrast to those where no violations are found. This could be a useful program measure of compliance.

However, Figure VI-32 shows the ratio of the number of inspections conducted per year to the number of NOV's issued per year. This comparison has limitations. First, these numbers have no direct connection to each other—an inspection in 1994 could lead to an NOV in 1995. Also, there may be more than one inspection at the same facility. These limits understood, the comparison is used as a rough proxy for compliance. What it shows is that over five years, 1992 through 1996, there were on average 76 inspections to one NOV, or used as a compliance proxy, 76 percent of the inspections uncovered no violations.



During the last year, 1997 the rate decreases again due to the impact of the stormwater initiative.

Finally, Figure VI-33 shows the breakdown of consent orders between those with penalties and those without. The first two years, 1990 and 1991, show the highest percentage of consent orders with penalties. From 1992 through 1996, the use of penalties in consent orders decreased, rebounding to half of all consent orders in 1997.



Findings and Recommendations

This chapter contains the program review committee findings and recommendations for the Department of Environmental Protection enforcement policies and practices study. As the study scope established, in addition to focusing on the performance of DEP in enforcing environmental protection laws and policies through its procedures and practices, the study was also to identify and assess the nature of any internal or external influences on staff responsible for implementing those policies and procedures. Thus, as noted earlier, the study had two focuses: 1) the overall operations of the enforcement program and how it is being implemented; and 2) certain specific circumstances occurring at the department beginning when former Commissioner Sidney J. Holbrook took office, as well as a review of avenues available to DEP staff who might believe DEP enforcement is being carried out improperly.

The committee finds for the most part DEP has the basic tools it needs to meet its enforcement responsibilities. Thus, the aim of the program review committee recommendations is to strengthen management mechanisms to: (1) ensure policies and procedures are implemented as envisioned; and (2) provide information that presents a clear and accurate picture about enforcement efforts. Specifically, the recommendations address: management information needs; timeliness of enforcement actions; enforcement case documentation; compliance monitoring; penalties; and enforcement variance from DEP policies and practices.

With respect to specific circumstances occurring at the department--the impact of the "user friendly" approach on environmental enforcement and the activities of Commissioner's Holbrook's executive assistant--the committee makes findings, set out below, but no specific recommendations. Finally, the committee identifies certain concerns related to employee options for expressing opinions about DEP enforcement efforts, as well as general employee matters.

The findings related to specific circumstances at DEP are described first in this chapter. Next, the area of employee concerns is addressed. Finally, findings and recommendations involving the overall operations of the enforcement process are explained.

Specific Circumstances

Impact of a "User-Friendly" Approach on Environmental Enforcement

Finding. Much of the recent public attention and legislative scrutiny focused on DEP has surrounded the intent of the department's administration in implementing a "user-friendly" environmental policy and the subsequent impact of that policy on its enforcement practices. The department used the term "user-friendly" in a 1993 report¹ to the General Assembly. It did not appear to cause any overt concern among staff, the legislature, the regulated community, or public. In 1995, the department, specifically newly-appointed Commissioner Sidney J. Holbrook, adopted "user-friendly" as the catchword for the overall approach to dealing with the regulated community. *In this case, the message was a source of confusion and contention for many DEP employees which has had a disruptive impact on environmental enforcement.*

The department's administration stated they did not intend for the "user-friendly" approach to replace traditional enforcement methods or to soften the actions taken against violators. Rather, it was meant to promote a more professional and polite front to the public and regulated community and to seek consensual resolution of violations where possible. *The program review committee finds the administration was lax in providing the necessary guidance to staff in implementing a shift in policy, and was either inattentive or indifferent to staff confusion and concern and the subsequent effects on enforcement.* Furthermore, the overall enforcement trend indicates an acceleration of the downward trend in the numbers of enforcement actions beginning in 1995, evidencing a change in enforcement.

Background. During the 1994 gubernatorial campaign, one of the issues involved the Department of Environmental Protection's practices in dealing with the regulated community. There appeared to be a general tone of mistrust between the regulated community and DEP. Specifically, the department was perceived as: lacking clear direction, goals, and flexibility in its enforcement process; resisting efforts to resolve violations in a consensual manner; and being very slow to resolve enforcement cases and permit applications. The overall perception was the department's goal was enforcement rather than compliance.

At the same time, Connecticut was still feeling the effects of a recession that seriously impacted New England industries. Connecticut was slow to recover, and was dealing with businesses and industries closing and leaving the state. One incentive to keep industry in the state and to attract new businesses was to promote environmental regulatory practices geared to assisting business in complying with federal and state laws.

¹ The overall intent of the DEP Environmental Permitting Reengineering and Restructuring Plan was to improve the permitting process. The report cited, "the ultimate goal of many of the proposed changes will be to provide better services in a 'user-friendly' manner." (p13) This report was prepared during Commissioner Timothy Keeney's tenure, two years before Mr. Holbrook was appointed commissioner.

As discussed in Chapter I, there was also a national trend toward compliance assistance in environmental enforcement. Compliance assistance is a structured approach that provides assistance to sources in complying with environmental regulations and promotes a more flexible approach to traditional enforcement. Compliance assistance often includes technical assistance, education, and amnesty programs. It is an initiative meant to supplement traditional enforcement methods, not replace them. It was unclear whether the DEP's "user-friendly" approach was meant, at the time, to refer to any compliance assistance initiatives occurring in Connecticut and nationally.

In February 1995, newly-elected Governor Rowland appointed Mr. Holbrook as commissioner of the Department of Environmental Protection. Commissioner Holbrook began to implement the policies of the new administration, and attempted to communicate to the regulated community and businesses the department's new approach. In several public speeches, the commissioner described this new approach as "user-friendly".

During a series of introductory meetings, the commissioner also instructed DEP staff, including the regulatory staff, to be "user-friendly". He instructed staff to make every effort to resolve enforcement issues through consensus with the violator. The commissioner further established that violators were to be given a "second chance" to settle a case before the enforcement action was escalated. In practice, bureau chiefs were asked to make a final attempt to negotiate a stalled enforcement case before the commissioner would refer the case to the attorney general for civil action. As a result, the department did not refer any cases to the attorney general for most of 1995. In the summer of 1995, the lack of referrals became an issue in the press.

Commissioner Holbrook made his first referral to the attorney general in August 1995. DEP staff reported being asked by managers to "find" a case to refer to the attorney general because of the media attention focused on the issue. Also, Commissioner Holbrook stated he had discussed the lack of referrals with the attorney general, who had expressed concern that the department had stopped referring cases. It was at this time Commissioner Holbrook became aware of staff confusion over his directives.

The commissioner did not issue any written policies or directives nor did he formally change the existing enforcement policies (e.g., NOV policy, enforcement response policy, and civil penalty policy). Therefore, enforcement staff, bureau management, department administrators, the regulated community, and the public were left to interpret "user-friendly". Individuals perceived the policy in the context of their experience with DEP and changed their practice accordingly. Most important is the regulatory staff's interpretation and how that affected enforcement. The program review committee found the interpretations ran the gamut from a directive to stop referrals to the attorney general or to finalize state orders amiable to the requirements of business to an expectation of courtesy and politeness from staff to anyone having business with the department.

The differing interpretations and a lack of clarification or direction from the administration created an atmosphere of confusion, especially among the regulatory staff, about the direction of environmental enforcement. Almost immediately, enforcement work was affected. DEP staff reported three major reasons for the change in enforcement: (1) consent orders were the preferred enforcement tool; (2) enforcement could not be escalated to a referral to the attorney general; and (3) management was changing established enforcement practices and liberally interpreting the enforcement policies. This created a further problem by establishing a tone of contention between the regulatory staff and management, the extent of which appeared to vary by bureau and program.

In interviews with the committee staff, Commissioner Holbrook explained that the intent of the "user-friendly" policy was to specifically address the department's reputation and establish a polite, courteous, and helpful standard for the department. It was not meant to be interpreted as being "business-friendly" or lax on enforcement. Commissioner Holbrook maintained that any "user-friendly" effort should have been accompanied by an appropriate and credible enforcement action, and that he did not direct regulatory staff to cease enforcement action. However, he acknowledged the inconsistent manner in which the "user-friendly" policy was interpreted and implemented by regulatory staff, and the confusion about the appropriate balance between traditional enforcement and other compliance assistance initiatives. Commissioner Holbrook acknowledged that at the time of his appointment he knew little about environmental enforcement work and that he relied on the staff to inform him of the appropriate enforcement actions. However, he further stated his administrative staff (e.g., deputy and assistant commissioners) did not inform him that his decisions were inconsistent with the established enforcement practices or policies of the department.

As stated, in the summer of 1995, Commissioner Holbrook became aware of the confusion among staff regarding the "user-friendly" policy. He reiterated his intent to the assistant commissioner for enforcement and bureau chiefs of the regulatory bureau, and directed them to clarify the policy for the staff. The commissioner stated this was an appropriate response. In addition, in 1997, he issued the Compliance Assurance Policy and a compliance assistance guidance document. The policy reaffirmed the department's commitment to traditional enforcement methods. The policy stresses enforcement action is a *means* for compliance and not the *end* result to be achieved by the department. The policy further states compliance assistance initiatives augment, but do not replace, traditional enforcement methods.

In October 1997, Commissioner Holbrook left the department, Assistant Commissioner Arthur J. Rocque was appointed acting commissioner, and was subsequently confirmed as commissioner by the General Assembly in February 1998. In interviews with committee staff, Commissioner Rocque stated he understood Holbrook's intent when using the term "user-friendly". He further stated he did not change the enforcement process or direction as assistant commissioner for enforcement and he authorized all enforcement actions he found to be appropriate and necessary. Commissioner Rocque acknowledged staff confusion and contention over the term but agreed with Commissioner Holbrook's attempts to clarify the objective.

As commissioner, Rocque does not use the term "user-friendly", perhaps in acknowledgement of the past concern it has caused. He has stated he supports a mix of traditional enforcement methods and compliance assistance initiatives. Evidence of this can be found in his establishment of the Division of Environmental Assistance and Outreach that administers the compliance assistance program for the department. However, Commissioner Rocque must still deal with the lingering effects of the "user-friendly" policy which at best have left enforcement staff apprehensive about the compliance assistance initiative.

Another legacy of "user-friendly" is the current legislative and media attention focused on the department. Scrutiny of the department is a problem in itself and has had a negative effect on the morale of the staff, particularly those working in enforcement.

Activities of Commissioner Holbrook's Executive Assistant Vito Santarsiero

Finding. Another issue receiving public attention early in 1998 was the activity of a former executive assistant of former Commissioner Holbrook, Mr. Vito Santarsiero. In the context of all the issues before DEP, the program review committee notes that Mr. Santarsiero was clearly not the department's biggest problem. *However, the committee finds that Mr. Santarsiero was more active in regulatory cases than has been officially described by DEP, and at times was a disruptive influence in cases in which he became involved. Ultimately, he never seemed to affect the final decisions in any case, but did impact case processes. His presence, coinciding with the start of a new administration and commissioner whose "user-friendly" message was at best a source of confusion for many DEP employees, caused unnecessary distraction and concern at an agency already facing enormous tasks and challenges. DEP management was aware of concerns caused by Mr. Santarsiero among its professional staff, and took some actions in response, but not enough to eliminate perceptions that professionalism was to take a back seat to patronage.*

Vague job description. Mr. Santarsiero applied to the Rowland administration for a job after Governor Rowland's 1994 election and interviewed with persons in the governor's office and DEP. On April 6, 1995, Mr. Santarsiero began his tenure at DEP as a durational project manager, acting as executive assistant to the commissioner. In response to a question by program review, the department described his duties as "executive assistant duties assigned by former Commissioner Holbrook". When he left the agency on February 18, 1998, his job title was customer service program developer, a change that took place after Commissioner Holbrook left to serve in the Governor's office.

In part, Mr. Santarsiero's job was to assist Commissioner Holbrook due to his use of a wheelchair. Also, at the outset of his tenure, Mr. Santarsiero was given the responsibility for implementing a corporate contribution program whereby private funds or in-kind contributions would be solicited to augment DEP's budget. According to DEP staff, corporate contributions were sought by DEP in the early 1990s, although no one person was in charge. For example, in 1993, Connecticut Light and Power (CL&P) donated a bucket truck to the department which was used until just recently.

Commissioner Holbrook instructed Mr. Santarsiero to seek guidance from DEP legal counsel as to how to go about the corporate contribution program. Although there were no written rules developed to carry out the program, there seemed to be a general understanding that businesses with pending actions before the department should not be solicited. Mr. Santarsiero was instructed to check with DEP staff before approaching any specific company. Mr. Santarsiero told program review staff he did check about approaching CL&P for a donation, and was not told of any problems. As it turns out, the company was the subject of a pending enforcement action at the time. Ultimately, the corporate contributions program was stopped because of its negative perception.

Beyond the corporate contribution role, there is no clear articulation of what Mr. Santarsiero's role was with respect to other aspects of DEP activity, such as his involvement with enforcement and permitting cases. He has been described as a "facilitator", apparently meaning providing assistance in bringing people and information together by, for example, setting up meetings. Commissioner Holbrook was adamant with program review staff that it was never his intention for Mr. Santarsiero to have a substantive role—he acknowledged, as did Mr. Santarsiero, that Santarsiero had no experience in environmental regulation. However, there is evidence to suggest that Mr. Santarsiero's activities went further than convening meetings, and could have at least been perceived by staff and those outside DEP as more substantive.

There can often be inherent distrust by agency staff of political appointees who are perceived to have no relevant experience, especially in a complicated field like environmental regulation. Mr. Santarsiero's appointment was political, not based on civil service rules and not unlike political appointments in virtually every state agency. Also, Mr. Santarsiero was not the first political appointee at DEP. Other previous DEP deputy commissioners and executive assistants have been political appointees.

What has been suggested by some at DEP as different about Mr. Santarsiero was his practice of going directly to line staff for information and other assistance, as opposed to working through upper management. Coupled with this approach was Mr. Santarsiero's communication style, which was described as loud and intimidating by some people, but not everyone. Both Commissioner Holbrook and Assistant Commissioner Rocque told Mr. Santarsiero on different occasions to amend his behavior, in response to concerns raised by DEP managers, including making sure bureau chiefs knew when Mr. Santarsiero was directly communicating with staff.

Finally, even though the program review committee is critical of the general circumstances of Mr. Santarsiero's role at DEP and how he was managed, it is only fair to note DEP staff reported that on some occasions Mr. Santarsiero supported them in situations where companies were hostile or uncooperative. Indeed, Mr. Santarsiero went out on three inspections at the request of an inspector who felt the need for backup at certain businesses where he had earlier been treated in an uncooperative manner.

Regulatory case involvement. Within his first two months at DEP, Mr. Santarsiero demonstrated his direct style and became involved in an enforcement case. He received a phone call from an official of a company, Waterbury Rolling Mills (WRM), that was the subject of a pending suit by the attorney general, which after three years was very close to either trial or settlement. Prompted by a recent DEP inspection where hazardous waste violations were discovered, the official complained DEP inspectors were harassing his company. Mr. Santarsiero's course of action was to call two DEP inspectors into his office to find out what the situation was. By all accounts, the meeting did not go well, and the waste bureau director expressed his concern when he learned of the meeting that Mr. Santarsiero had not come to him first.

On another occasion with respect to a pending permit application decision for which an appeal had been filed, Mr. Santarsiero approached the hearing officer handling the appeal and inquired about the application's status. There are conflicting accounts of the nature of his approach. However, given the rules prohibiting *ex parte* communications in the context of administrative hearings, the prudent course for an executive assistant to the commissioner seeking status information on a case would *not* be to approach the actual hearing officer responsible for the case, out of concern for at least the appearance of attempting to exert influence. This incident led to Assistant Commissioner Rocque telling Mr. Santarsiero to not go directly to hearing officers anymore for information.

In another case in which Mr. Santarsiero got involved, he approached an enforcement engineer unhappy because he thought a new referral to the attorney general had been made regarding a company without his knowledge. As it turned out, he mistook compliance monitoring activity on a previous referral for a new referral. In another incident involving the same company, not only did Mr. Santarsiero set up a meeting between company officials seeking a permit and the pertinent DEP staff, he questioned DEP staff about the permit at the meeting.

Finally, in another case, staff reported Mr. Santarsiero directed them to conduct an announced reinspection of a facility where previously violations had been found.

Independent meetings with violators. An allegation against Mr. Santarsiero with respect to the Waterbury Rolling Mills case was that he met secretly with company officials. In addition to meetings he attended between DEP staff and the company in attempts to deal with the violations discovered, he also met alone with company officials during ongoing negotiations, on about 10 occasions by his account. He discussed meeting with company officials alone with DEP counsel, who advised him in a handwritten note "if you meet with company please make it a no-lawyer meeting." While the note seems to deflate the secret meetings charge, the question of why anyone from DEP would meet with company officials alone while various enforcement decisions were being made remains. More questionable is that the DEP representative -- Mr. Santarsiero-- was someone who supposedly had no substantive role in enforcement cases.

Information conduit. Mr. Santarsiero apparently was the conduit through which WRM chose to relay its counteroffer to a proposed consent order proposal. Given the relationship Mr.

Santarsiero established with the company, that is not surprising. Although in and of itself it is not evidence that Mr. Santarsiero was involved in the substance of negotiations (i.e., determining the amount of a penalty), it raises questions about the nature of his role. In another case, he also served at least as the relayer of penalty proposals between DEP and a violating company.

During an investigation of an oil spill in another case, when several environmental violations were found, the company owner told the inspector to talk to Mr. Santarsiero because the owner knew him personally and had called him. The inspector did talk to him, and apparently Mr. Santarsiero told his friend to do whatever the inspector told him. However, the fact that the inspector found himself in the position of having to speak with a DEP executive assistant out in the field is troubling.

Deviation from normal practice. Waterbury Rolling Mills serves as an example of the influence of the Holbrook policy to attempt to negotiate first before a referral, even in the face of countervailing indicators. It is hard to attribute that decision solely to Mr. Santarsiero's influence, although he was in the middle of the case, including meeting alone with the company several times while negotiations were attempted. Generally, when new violations are discovered at a facility that already has a case pending before the attorney general, DEP will request the attorney general to add the new violations to that case. As a matter of enforcement strategy, new violations while a company is already facing enforcement would logically strengthen the attorney general's position, and achieve enforcement economies. This was the case in WRM.

Mr. Santarsiero told program review staff no one told him that seeking a consent order for these new violations would deviate from agency practice. DEP initially proposed a consent order containing a penalty of \$120,000. The company's counteroffer, significantly lower than the final proposed consent order penalty, was rejected and the case was soon thereafter referred to the Office of Attorney General, just days after a stipulated judgement was entered for other, earlier violations. The combination of Mr. Santarsiero's involvement and the application of the "consensus first" policy served to prolong a negotiation that might not have occurred under different circumstances.

Interceding with NOV. In December 1996, a DEP inspector noticed open burning while on the way to another inspection. The inspector told the person at the business site to stop the burning immediately as it was a violation of air pollution laws, and that he should expect an NOV. The inspector completed the inspection report and drafted an NOV for supervisory review.

That same day, Mr. Santarsiero called the air bureau chief and asked if the NOV had to be issued. The bureau chief indicated as long as the business sent in a letter admitting its wrongdoing and describing how similar material would be disposed of in the future, an NOV did not need to be sent. A couple of weeks later, the company sent in a letter to DEP, and no NOV was issued. Subsequently, staff were told by Mr. Santarsiero the case was under "executive review". Over a year later, in the spring of 1998, apparently due to publicity surrounding Mr.

Santarsiero, the air bureau chief reviewed the file, and determined the letter was not sufficient and issued an NOV.

Under the current enforcement response policy, the decision to not issue an NOV in certain circumstances is discussed as appropriate. It states: "if the violator has already corrected all violations to the Department's satisfaction by the time that an enforcement action is to be taken, and adequate documentation of compliance has already been received from the violator, it is often not necessary to issue an order or NOV." However, in a footnote to the ERP, the air bureau is always supposed to issue an NOV, even "in cases in which the violator has returned to compliance before the issuance of an NOV."

Employee Options for Addressing Concerns about Enforcement Matters

The next area discussed relates to employee options for expressing concerns about enforcement matters at DEP.

Finding. Current avenues available to DEP employees concerned about enforcement operations carried out in compliance with law and policy were discussed in Chapter Three. These included C.G.S. Sec. 4-61d, commonly referred to as the state whistleblower statute, as well as other provisions. The committee acknowledges the decision to use the whistleblower process is not an easy one, but it does contain basic protections. Further, C.G.S. Sec. 31-51q, as noted in Chapter Three, bolsters employee safeguards outside the C.G.S. Sec. 4-61d provisions. Thus, no changes to the whistleblower provision are recommended in this report. The committee expects the recommendations discussed later in this chapter, intended to increase accountability at DEP, will provide information enabling more public assessments of how the department is carrying out the laws it is established to implement.

However, as noted earlier, this is a time of transition as the department uses new methods to achieve environmental compliance. During the course of the study, many employees expressed disappointment about the direction of the department's philosophy and implementation of that philosophy. While it is important to understand management has ultimate authority to make policy decisions within the realm of statutory duty, it is also important employees feel a part of agency direction, and that discussion and questioning is allowed.

Therefore, the program review committee recommends:

DEP issue an affirmative policy statement to all its employees that retaliation against employees for statements of employee opinions related to environmental matters will not be tolerated. It shall reinforce that policy with all its managers.

In discussions with the department, upper management has continually expressed its willingness to hear from employees. The committee believes making a formal commitment to the safe expression of employee opinion would be beneficial.

Other Employee Matters

Finding. Substantive regulatory disagreements may be difficult to distinguish from those related to style and personality clashes in the workplace. Indeed, the two circumstances can build off or exacerbate each other. It is not unusual in reviewing state agencies for the program review committee to come across personnel clashes; any organization will have its share of disagreements and conflicts. These matters are almost never discussed in a committee report because they are clearly peripheral to the study.

In the context of this study of DEP enforcement, what is difficult from the committee's perspective is sorting out substantive disagreements from those that may be motivated by personal concerns. Regardless, *the committee reluctantly finds, while taking no side, it is obvious there are very hard feelings between certain people at DEP at both management and staff levels, which reverberate beyond the persons directly involved.*

The committee understands personnel conflicts are often complex, sometimes rooted in past occurrences and dynamics, and diametrically opposed perceptions of motive and reality. Some personalities are simply harder to deal with in a team setting. As the study focus was on the enforcement program, when these conflicts were raised, program review staff always asked what impact these problems had on enforcement. The responses were not clear. However, the committee believes that even though impact is not quantifiable, distrust and noncommunication among persons who *must* work as a team to be optimally effective cannot help but impact the efforts, given the complex nature of enforcement work.

In the committee's view, specific internal agency personnel issues are not appropriately handled by the legislature. However, the legislature as policy maker needs to be assured that any executive branch agency has the management ability, will, and structure to effectively carry out state policies. Although everyone involved shares responsibility, it is management's job to facilitate a respectful and rational working environment by example, action, and policy. *The committee finds top DEP management has not exerted sufficient leadership to address these issues effectively.*

Enforcement Operations

Statutory Civil Penalty Requirement Not Met by DEP

The following findings and recommendations relate to weakness in the Department of Environmental Protection's civil penalty policy and to the department's statutory authority to impose penalties.

Finding. State law (C.G.S. § 22a-6b) mandates DEP to promulgate regulations to impose civil penalties through a unilateral order. To date, the department has not drafted the regulations and cannot impose civil penalties in unilateral orders. *Therefore, the program review committee finds DEP is not in compliance with the statutory requirement.*

Since 1971, DEP has had the authority to enact regulations to impose civil penalties, subject to statutory limits, through a unilateral order. In 1993, the legislature mandated rather than authorized the promulgation of such regulations. Under the mandate, the department is to prepare regulations establishing a schedule of penalty amounts, or amount ranges, or a method for calculating the amount of civil penalties. The statute provides the civil penalties for each violation shall be sufficient to insure immediate and continued compliance with applicable laws, regulations, orders, and permits, while imposing penalty limits.

The statute further provides factors for the department to consider in developing regulations for any civil penalty schedule or method. The factors include:

- impact of the violation on natural resources, especially any rare or unique natural phenomena;
- injury to or interference with public health, safety, and welfare caused or threatened to be caused by the violation;
- injury or impairment to or interference with air, water, land, and other natural resources caused or threatened to be caused by the violation;
- conduct of the source in taking all feasible steps or procedures necessary or appropriate to comply or correct the violation;
- any prior violations by the source;
- economic and financial conditions of the violator;
- economic benefit derived by the source as a result of the violation; and
- any other factors deemed appropriate by DEP, including voluntary measures taken by the violator to prevent pollution or enhance or preserve natural resources.

The unilateral order is imposed by the department without the formal consent of the other party, as with a consent order. The violator has the right to request a hearing before the department within 30 days after the order is issued. The hearing is conducted by the DEP adjudications unit in accordance with the Uniform Administrative Procedures Act. The violator may petition the agency for reconsideration of the hearing officer's decision and then appeal that

decision to the state's Superior Court. If a hearing is not requested, the unilateral order becomes final and enforceable after the 30 days.

Cause. The current DEP administration cites three main reasons why the department has not promulgated the civil penalty regulations as required by state law. First, the department is not convinced imposing civil penalties through unilateral orders will offer a significant advantage in insuring compliance or improve the efficiency of the enforcement process. DEP states it has sufficient enforcement tools, including NOVs, consent orders, and referrals to the attorney general. However, it can only impose civil penalties through consent orders. Penalties may also be assessed in those cases referred by DEP to the attorney general.

Second, the department is concerned the practice of imposing penalties through unilateral orders will create a backlog of requests for administrative hearings that will constrain the enforcement process.² As previously stated, violators may request an administrative hearing on an issued unilateral order. The order may not be finalized and, is therefore not enforceable, until the final decision is issued by the department. In addition, a violator may appeal any administrative final decision to the state Superior Court. It is DEP's position that due to the right of appeal, the penalties may not be realized and the administrative costs and allocation of resources incurred during the hearing phase may not be recouped in the final penalty amount.

The air, water, and waste bureaus combined issued 102 unilateral orders during 1994 through 1997. During the past four fiscal years, the department's adjudications unit received 42 hearing requests for unilateral orders: FY 95, 13 requests; FY 96, 8 requests; FY 97, 8 requests; and FY 98, 13 requests. Based on these data, approximately 41 percent of issued unilateral orders prompted a hearing request. It should be noted, however, that not all requests result in an administrative hearing. Cases may be resolved in a stipulated agreement between both parties prior to a final decision by the hearing officer, much like a consent order. (While the hearing officer finalizes a stipulated agreement, the negotiation is conducted between the regulatory staff and the source.)

The committee conducted a file review of formal enforcement actions issued in 1993 and 1997, the results of which are presented later in this chapter. However, as will be discussed, the data show it takes less time to complete the unilateral order process (from issuance date to compliance date, including the administrative hearing) than the consent order process (from issuance of the order to compliance).

The final reason cited by DEP for not promulgating civil penalty regulations is the difficulty in developing a useable calculation process and comprehensive penalty policy. The department can develop a penalty policy based on environmental harm assessment, a major element of an environmental enforcement penalty policy. However, it does not appear to have sufficient financial experience or expertise to develop the financial aspects of the penalty

² The DEP adjudications unit reported the bulk of its caseload, in terms of actual number of cases and scope, consists of hearings on permit applications and not unilateral enforcement orders.

regulations, such as calculation of administrative costs, costs of violations, economic benefit, and violators' ability to pay.

The current administrative civil penalty policy, drafted in 1992, is used to calculate penalties imposed through consent orders. Incorporated into the agency policy is the EPA computer model BEN, used to calculate the economic benefit portion of a civil penalty imposed through a consent order or recommended penalty amount in a referral to the attorney general. *The program review committee finds deficiencies in the existing civil penalty policy and in the regulatory bureaus' practice in calculating penalties. The program review committee also finds economic benefit is rarely included in the final penalty amounts.* As will be discussed in the next finding area, some of the problems are: the penalty policy is too subjective; the multi-day and economic benefit components are too difficult to calculate; and penalty amounts calculated based on the policy are unrealistic and staff must adjust the amounts based on bureau-specific practices and precedent.

The program review committee recommends the Department of Environmental Protection resolve the issue of imposing civil penalties through unilateral orders either by promulgating the regulations and thereby complying with state law or requesting the General Assembly repeal or revise the statutory mandate.

As an instrument of state government, DEP must operate within a framework of statutory mandates. Promulgating civil penalty regulations is an existing statutory mandate that the department has not met for the past five years. Clearly, the Department of Environmental Protection, as a regulatory agency, should have great sensitivity to compliance with the law.

The federal Environmental Protection Agency imposes civil penalties through unilateral order. The EPA's authority is established in federal law; however, the process is guided by administrative policy rather than federal regulations. The EPA has encouraged DEP to use its authority to impose civil penalties and has cited its failure to do so in a federal audit.

The program review committee believes DEP may not have the in-house financial expertise to develop specific sections or calculations of a civil penalty policy for unilateral orders. DEP, as a state agency, can contract for the services of an outside financial consultant or expert.

Civil Penalty Policy Does Not Provide Adequate Guidance to Staff

Finding. The goal of the civil penalty policy is to provide assistance to staff in calculating appropriate and consistent monetary penalties for violators. *Overall, the program review committee finds the policy developed by DEP does not assure the outcome is appropriate or consistent.*

The civil penalty policy has several components. Essentially, the policy requires staff to first determine the degree of seriousness of each violation (gravity). To do this, staff must assess two factors -- "potential for harm" and "extent of deviation" from legal requirements. In addition, the staff may consider a multi-day component to account for the duration of the violation. Adjustments may be made that add or subtract from the penalty amount and include such things as a good faith effort to address the problems or lack of good faith; history of noncompliance; and ability to pay. Finally, the policy requires any economic benefit the violator gained through noncompliance be included in the penalty amount.

The program review committee finds:

- *DEP has not revised its policies in a timely manner. The civil penalty policy was developed in 1993 and remains in draft form. The nature of violations has changed and the policies do not always reflect the current regulatory environment;*
- *the matrix has been described as too subjective and different staff can develop differing penalty amounts for the same violations;*
- *adjustments and reductions are made by staff and management. Rationale for the changes is often not provided in the case files making it difficult to determine why changes were made;*
- *economic benefit is reported by DEP staff to be too difficult to calculate and is usually not included in the final penalty amount; and*
- *multi-day penalties are not often used by DEP staff because they raise the final amount of the penalty unrealistically high.*

The purpose of having a civil penalty policy, according to DEP, is to:

- assure penalties for violations of the department's programs are assessed in a fair and consistent manner;
- expeditiously achieve compliance;
- assure penalty amounts are appropriate;
- eliminate economic incentives for noncompliance and ensure no source gains a competitive advantage; and
- assure penalties are sufficient to deter future noncompliance and violations.

The consequence of not having an effective policy is contrary to all those concerns identified by the department. The regulated community ultimately receives different messages about violations.

Cause. The department's management has exhibited disinterest in finalizing the policy as it has allowed the policy to remain in draft form for five years. As discussed in the previous finding area, DEP appears reluctant to revise the existing civil penalty policy because it has difficulty in developing a useable calculation process. Part of that reason may be that it does not have in-house expertise to develop the financial aspects of a penalty policy.

Training is an important aspect in ensuring that any policy is properly implemented in practice, especially when crossing multiple regulatory bureaus. The department acknowledged at the program review committee's public hearing on December 1, 1998, that it needs to provide training in the use of the civil penalty policy.

In addition, DEP does not provide sufficient oversight of penalty calculation and assessment to ensure penalties are assessed in a fair and consistent manner. There is no systematic analysis comparing like violations and penalties. The program review committee acknowledges this is a difficult endeavor. However, even the attempt may suggest alternative penalty strategies and calculation methods for the department.

The program review committee recommends the Department of Environmental Protection:

- **revise and adopt a civil penalty policy that provides adequate and consistent guidance to staff in calculating penalties. The department shall periodically update the civil penalty policy to ensure penalties and classifications remain consistent with current environmental practices and concerns;**
- **develop and implement a standardized penalty calculation worksheet to be used in every case that imposes a penalty. The worksheet should show the evolution of the final penalty calculation, including any adjustments to the penalty amount and rationale for those adjustments; and**
- **provide training to all regulatory bureau enforcement staff and management responsible for calculating penalties.**

This final section presents findings and recommendations relating to deficiencies in the Department of Environmental Protection's enforcement process. The findings cover weaknesses in case documentation, compliance monitoring, management information systems, and timeliness. In addition, a number of cases are highlighted in which DEP practice did not follow administrative enforcement policies.

Case Documentation Is Insufficient

Finding. In the course of this evaluation, the program review committee examined more than 300 files in the three regulatory bureaus. A number of deficiencies in case documentation were noted. *Specifically, the program review committee finds:*

- *each bureau organizes case files and documentation differently. For example, the waste bureau maintains files by company and then by various subcategories, the air bureau maintains files by informal actions and formal actions, and the water bureau separates inspection files and informal enforcement actions from formal enforcement files;*
- *it was very difficult to locate documentation for significant events or decisions in some complex cases. The program review committee found it difficult to reconstruct and interpret what had happened in several cases by examining what was provided in the case files;*
- *DEP management also had difficulty in a number of instances in determining what specifically had occurred in some cases and why certain enforcement decisions were made. This was especially true in cases where enforcement personnel had transferred or left DEP;*
- *basic information, such as how many times an enforcement staff person or manager met with a company, how many revisions were made to a consent order, and who made or initiated certain decisions was often not possible to determine;*
- *as stated in the timeliness finding (discussed later in this chapter), the review of DEP enforcement files disclosed that 49 cases had no documented response to a NOV from the violator and 197 cases did not have documentation for case closure;*
- *certain policies and practices related to case administration were not consistently followed in all the bureaus. For example, closure letters for enforcement actions are supposed to be sent to the respondent and be maintained in the case file. Not all bureaus adhere to this policy. In addition, multimedia coordination worksheets are supposed to be filled out for cases that involve overlapping jurisdictions to facilitate a joint response. While this is not necessary for all cases, the program review committee noted many instances where it should have been used or, if the worksheet was present, the responding bureaus in some cases had not replied to the request. Finally, notification in the public files of the existence of confidential documents is required per DEP policy, but not consistently followed in all bureaus; and*

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- *problems with penalty documentation, which were outlined in the previous finding.*

Given the inadequacies of the department's management information system (MIS), discussed in more detail later in this report, case file documentation is of paramount concern. The case record should provide adequate documentation for the enforcement lead as well as any manager to understand what has taken place. The case record provides the basis for any legal action against violators and the only reliable method to reconstruct what and when something has occurred in a case.

Cause. Certainly the requirements of providing open access to files to the public creates documentation problems for the department. Many of the case file problems noted above, though, are related to documents that were not part of the public file or because of organizational difficulties created by the department. Moreover, DEP management has not articulated a uniform policy on the organization of case files.

The program review committee notes the department has recently developed a case conclusion data sheet. This will aid in rectifying some problems associated with case documentation and reconstruction. However, additional measures are necessary to improve case file organization and simplify case review. **Therefore, the program review committee recommends:**

- **DEP review its existing file management practices and develop a comprehensive file management system to ensure case files contain the necessary documentation important to a case and those documents required by DEP policy. The files should be maintained in a reasonably consistent and readily accessible format for each of the bureaus. Periodic case review on the part of management, even if on a random sample basis, should be part of the file management system; and**
- **in order to assist in the reconstruction of a case, DEP shall develop a case log activity sheet for each case file. This sheet would document all activities related to a case. It would include dates of significant actions, such as the decision to pursue particular strategies at agenda meetings and the mailing of consent orders, to not so significant events such as documenting each contact with a violator. The activity log would provide a chronology of a case and assist in explaining *what* and *when* actions occurred. This would be a necessary adjunct to the newly developed case conclusion summary, which should be an aid in explaining the *why* of what occurred.**

Compliance Monitoring And Close Out Of Enforcement Cases Is Inadequate

Finding. The issuance of an enforcement action is usually not the end of DEP's involvement in an enforcement case. In order for a business to come into compliance, various requirements may be imposed on the violator that must be completed to close out a violation. This can involve the purchase of new equipment, development and implementation of new procedures, training of staff, or remediation of a site. It typically falls to the enforcement lead to track compliance. This includes determining if deadlines are met, and the sufficiency of documentation submitted or actions performed. Closing out a case often requires the case lead schedule or perform a follow-up inspection to ensure compliance is achieved. Per a 1997 directive by former Commissioner Holbrook, companies should be notified when they have achieved compliance with informal enforcement. In addition, case files should also note the compliance status of a company. *The program review committee find:*

- *some staff members have no systematic way of keeping track of compliance, while others have resorted to developing their own systems, from databases to handwritten calendars;*
- *some staff indicated they may not be aware of a deadline in a particular case until the business prompts them;*
- *DEP management had little to no awareness of case compliance;*
- *case close-out backlogs have developed in the past where businesses had notified DEP they performed the actions required, yet DEP had not closed out the cases;*
- *current estimates of case close-out backlogs could not be provided by DEP; and*
- *inconsistent practices among the bureaus in sending close-out letters to companies involved in enforcement actions where compliance has been verified, and in noting compliance in the case files.*

Compliance is an essential component of the enforcement process. The point of enforcement is to not only establish liability for noncompliance, but to correct and prevent further violations. The regulated community and DEP have a vested interest in determining compliance and closure of cases.

When violators are not required to be timely in performing compliance activities, the credibility of DEP is questioned. Ineffective oversight of compliance efforts results in a number of deficiencies, including:

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- uneven and inconsistent enforcement efforts within and among the bureaus;
 - misstating active caseloads, possibly resulting in a misdirection of scarce resources;
 - hampering efficiency and effectiveness of compliance history checks; and
 - raising questions about fairness in the regulated community. On the one hand, a violator who comes into compliance and is not recorded as being so, may have problems selling property or securing credit. On the other hand, companies that continue to remain noncompliant maintain an unfair competitive advantage over others.

Cause. This condition has been allowed to persist because it appears DEP has directed most of its resources to initiating actions, rather than the entire case administration process. The lack of a management information system for the regulatory bureaus further exacerbates this problem.

The program review committee recommends DEP develop and implement a management information system that provides the tools necessary to enable DEP staff and management to track compliance with enforcement actions in a timely manner. (See following timeliness finding for related recommendation).

Deficient Management Information and Case Tracking Systems Stymy Enforcement Efforts and Effective Oversight

Finding. DEP has an inadequate management information system that limits the department's enforcement ability and management's oversight of enforcement efforts. Each bureau has a different system for collecting and processing enforcement information efforts. *The program review committee found the following deficiencies:*

- *each bureau maintains several different enforcement databases, usually organized around separate enforcement tools;*
- *the individual databases are not linked to each other **within** the bureaus which, in many cases, results in the same information having to be entered multiple times into separate databases;*
- *the individual databases are not linked to each other **among** the bureaus which, in addition to other things, results in time consuming and inefficient multimedia compliance history checks;*
- *the accuracy of the data is not regularly reviewed or checked. In response to the committee's request for enforcement information, hand written logs that are maintained for individual enforcement actions had to be checked to ensure accuracy of electronic databases. In other instances, the accuracy*

could only be determined by manually pulling individual case files or consulting with enforcement personnel;

- *instances were noted where the definitions of data elements were not consistently used among staff;*
- *enforcement databases at DEP were updated and substantially revised in certain cases as a result of the committee's inquiries, raising questions about the reliability and accuracy of enforcement numbers previously provided to DEP management, the General Assembly, and the public; and*
- *none of the systems are designed to provide accurate, concise, and timely information to management about the aggregate status of caseloads or about outcomes.*

This patchwork system is inadequate, redundant, and inconsistent. The purpose of a management information system is to produce essential information about organizational accomplishments in a readily useable format. MIS reports allow management to monitor the performance of the organization, evaluate any deviations from expected or desired results, identify necessary improvements, and implement corrective actions in a timely manner.

The consequence of an ineffective MIS is that decision makers, at all levels, fail to receive an accurate understanding of program operations and the degree to which a program is meeting its intended goals. Specifically, ensuring timeliness of enforcement actions and compliance with those actions in individual cases is difficult, compliance history checks are not effective or efficiently processed, multimedia coordination is hampered, and the efficient distribution and evaluation of workload among staff in individual bureaus is restricted.

Cause. Management has taken an ad hoc approach to developing management information systems. To be sure, the requirements imposed by federal regulators complicate data management efforts, but do not prevent the state from developing its own system. In the absence of a thoughtful, coordinated effort, the department has allowed a fragmented and disconnected system to develop in each bureau.

The program review committee is encouraged by the recent efforts of the Bureau of Air Management to develop the enforcement case management pilot system. Some DEP staff, though, have expressed concerns about the level of administrative commitment. Recent projections indicate the pilot project will not be implemented until early 2001 with current resources, and full department-wide implementation may not be initiated until years after that. While these development efforts have involved some limited input from the other bureaus, the program review committee is concerned that the air bureau's efforts may become too focused on the needs of a particular bureau, further exacerbating the fragmented structure of enforcement efforts at DEP.

The program review committee recommends DEP design and implement a uniform, automated management information system for the regulatory bureaus that captures essential enforcement case information and results in the production of valid, reliable data. The system at a minimum should include, but not be limited to, the following:

- critical case processing milestones, such as inspection dates, report completion dates, date of enforcement actions, enforcement action deadlines, etc.;
- case assessment information, such as violator types, types of violations, penalty calculations, revisions to any case information indicating reasons for change, who authorized, and when, etc.;
- case outcome information, such as any environmental benefits that can be identified as the result of an enforcement action, payment of penalties, etc.;
- the ability to generate standard management reports on the timeliness and performance of individual personnel as well as divisions in completing inspections, in assessing inspection reports, and in issuing and monitoring enforcement actions; and
- the ability to generate customized reports, compliance histories, and standardized enforcement documents.

The program review committee recognizes the development of a comprehensive management information system and a restructuring of the technology infrastructure at DEP will require a significant commitment of resources. The completion of any such system will, in all likelihood, take a number of years even with such a commitment. In the meantime, a number of basic MIS objectives, such as case tracking and measures of bureau outcomes (e.g., time measurements between critical case processing milestones), are well within the current capability of DEP through the utilization of off-the-shelf technology.

Enforcement Actions Not Completed in Timely Manner

Finding. Environmental law, regulations, and administrative policies require prompt cleanup of pollution and immediate and continued compliance with all legal requirements by violators. Prudent practice, therefore, dictates that enforcement actions be initiated and completed in a timely manner. The department's enforcement response policy, the primary document guiding enforcement decisions and actions, establishes time frames in which certain actions are to be completed. *The program review committee finds the department does not complete enforcement actions in a timely manner consistent with its administrative policies.*

The program review committee conducted an audit of informal and formal enforcement cases from the air, water, and waste bureaus. For informal enforcement, the committee staff reviewed a sample of NOV cases. Thirty NOVs, representing a significant percentage of NOVs issued, were randomly selected from each bureau for each of the years 1993, 1995, and 1997. A total of 270 NOVs were reviewed. For formal enforcement, the committee staff reviewed all consent orders, unilateral orders, and referrals to the attorney general issued by the air and waste bureaus in 1993 and 1997.

Informal enforcement. To analyze the timeliness of the department's informal enforcement process, the program review committee identified several key points within the process:

- field inspection date;
- NOV issuance date;
- NOV response deadline (number of days specified in NOV for the violator to respond to NOV);
- violator's compliance response time (number of days it actually took violator to respond to NOV from date NOV issued);
- NOV case closure date; and
- date NOV referred for formal enforcement action, if necessary.

The data were used to measure: (1) the length of time it takes the air, water, and waste bureaus to take informal enforcement action in response to violations; and (2) the efficiency of the NOV process.

Inspection to NOV. The first phase in the informal enforcement process is from the date of the first inspection during which a violation is discovered to the date a NOV is issued by a bureau to the violator. During this period the inspector must complete an inspection report citing any violations found, draft a NOV if appropriate, and submit it for review by bureau management. The draft NOV is generally reviewed by an inspection supervisor, assistant director, and director who finalizes the document. In some cases, the bureau chief may be included in the review chain-of-command. It should be noted that any changes to the document are forwarded back to the field inspector for editing purposes and then the NOV is reviewed again.

Among the three bureaus, it took an average of 99 days to finalize and issue a NOV once a violation had been cited (inspection). Some NOVs were issued on the same date as the inspection, and the longest period of time to issue a NOV was 481 days (about 16 months). Table VII-1 shows the ranges of time periods to issue a NOV. As shown, half (124) of the NOVs were issued between 60 and 180 days (two to six months) after inspection and 36 percent (89) were issued during the first 60 days after inspection. There were 24 NOVs issued more than 180 days (six months) after the inspections with seven of them taking longer than one year to issue.

Table VII-1. Number of Days between Inspection and NOV Issued.		
Time Period (in days)	Number of NOVs	Percentage
Same day as inspection	9	3.6%
1 to 30	42	17%
31 to 60	47	19.1%
61 to 120	75	30.4%
121 to 180	49	19.9%
181 to 365	17	6.9%
365+	7	2.8%
TOTAL NOVs	246	

NOV to compliance. The next significant phase in the informal enforcement process is between the issuance of the NOV and the violator's compliance response to DEP. Typically, a NOV allows a violator 30 days in which to respond to the department with a plan for correcting the violation or to report its return to compliance status.³ In some instances, however, the department may change the response time from as few as 10 to as many as 90 days.

In reviewing this time period, 85 cases were excluded from the analysis because there was no NOV issuance date or response documented either because the violator had not responded or there appeared to be incorrect record keeping or missing information in the files. A total of 185 NOVs contained a NOV issuance and compliance response date.

Sources cited for a violation responded on average within 42 days after the NOV was issued, with the response time ranging from two to 562 days (or almost 19 months). Most sources (131 or 71 percent) responded within 30 days, as required by the NOV. Thirty-one sources responded within 60 days, 7 within 90 days, 13 within a year, and three sources took more than a year to respond to a NOV.

Since the response time given by DEP to a violator can vary from the norm of 30 days, the number of responses not meeting the deadline were analyzed. Program review committee staff reviewed the number of days over the NOV deadline for each late response. On average, those violators responding late to a NOV answered about 16 days past the deadline.

Informal to formal enforcement. The DEP may escalate its enforcement response to a violation if the informal action (NOV) does not achieve compliance by the violator or compliance is achieved but a penalty or other action is also necessary. Formal enforcement action includes consent orders, unilateral orders, and referrals to the attorney general. Of the 270 NOVs reviewed in the case audit, 36 (13 percent) were referred for formal enforcement action: 24 for consent orders; 11 for referral to the attorney general; and one for a unilateral order. On average, it took 411 days from the date the NOV was issued to the date the formal enforcement

³ A 1997 NOV policy directive established the option for violators to submit *plans* for returning to compliance status in lieu of reporting full compliance within the period set out in the NOV.

action was finalized. The time periods to finalize formal enforcement ranged from 104 days from the date the NOV was issued to more than 1,000 days (almost three years).

NOV closure. The final phase analyzed was the length of time it took DEP to close a NOV. A case is closed when the violator has reported and DEP has verified a full return to compliance status. The air and waste bureaus verify compliance through follow-up inspections and/or based on a certified statement of compliance from the violator. Compliance is documented in a memo in the enforcement file. The water bureau rarely reinspects to verify compliance but will review the certified statement of compliance when received, and assess the violator's compliance status during the next regularly scheduled inspection. The water bureau does not typically document compliance status or closure of NOVs in the files.

Of the 270 NOVs in the sample, only 73 (27 percent) were closed. The program review committee noted compliance may have been achieved in some of the non-closed cases; however, due to insufficient case management and poor record keeping a closure date was not documented in the files. This analysis included only those NOVs in which a closed date was indicated.

The average length of time to close the 73 NOV cases was 339 days (almost one year). As shown in Table VII-2, 14 (19 percent) of the NOVs were closed within 60 days, 17 (24 percent) within 180 days, 14 (19 percent) within one year, and 28 (38 percent) took longer than one year to close.

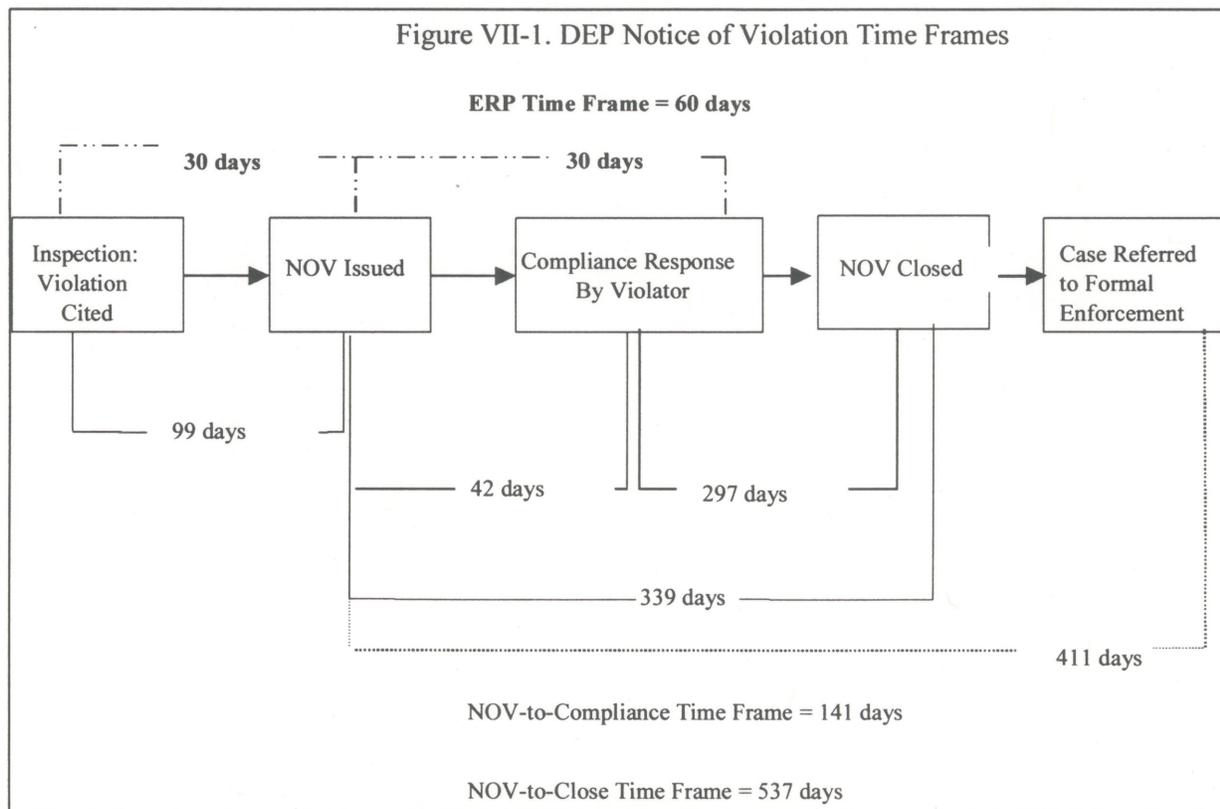
Time Period (in days)	Number of NOVs	Percentage
1 to 30	4	5.4%
31 to 60	10	13.6%
61 to 120	12	16.4%
121 to 180	5	6.8%
181 to 352	14	19.1%
352+	28	38.3%
TOTAL Closed NOVs	73	

As previously stated, the NOV allows a violator typically 30 days to either return to compliance or submit a plan to return to compliance that will require additional time. It appears, based on that directive, that the informal enforcement action is meant to exact compliance within a relatively short period of time. It can be argued, therefore, that a NOV should not remain open more than a few months. It is troublesome that throughout this analysis the data show many of the NOVs issued in 1993, 1995, and 1997 are not yet closed or have missing compliance information, and that those that are closed take substantially longer than the usual time permitted to close. The committee found generally three reasons for the lack of data: (1) compliance has not been monitored and, therefore, the case cannot be closed; (2) the case has not been administratively closed due to poor record keeping practices and inadequate case management;

and (3) bureau resources were diverted from completing the enforcement process to beginning the enforcement process and other activities such as permitting.

Figure VII-1 is a flowchart of the significant activities within the informal enforcement process and shows the average amount of time (in days) to complete each activity, based on the file review.

Formal enforcement. The committee's case audit also included formal enforcement cases: consent orders; unilateral orders; and referrals to the attorney general. All formal enforcement cases issued by the air and waste bureaus in 1993 and 1997 were examined. The analysis sample consisted of a total of 113 cases: 57 consent orders; 22 unilateral orders; and 34 referrals to the attorney general. Formal enforcement cases from the water bureau were reviewed but not analyzed here due to date collection difficulties as well as the fact that many of the water bureau orders are not totally enforcement-oriented.



As discussed throughout this report, the department has exhibited deficiencies in case management and case documentation. It was difficult for committee staff and the DEP to locate documentation for significant events or decisions in some cases and it was also difficult to reconstruct and interpret what had happened. This hindered the program review committee's

ability to review formal enforcement cases and to collect accurate data. The following analysis, therefore, is limited by the availability of reliable data.

Given that, the program review committee identified key points in the formal enforcement process. The primary points include:

- NOV issuance date;
- date administrative order was finalized or referral made by DEP;
- compliance deadline established in final order;
- recorded date of compliance by the violator; and
- if other or further formal enforcement action was warranted, date action was finalized.

NOV to administrative order. The first phase analyzed covered the length of time between the date the NOV was issued to the date the administrative order (consent order or unilateral order) was finalized. This is a measure of the length of time to complete the formal enforcement phase. The analysis disclosed the following:

- of the 59 consent orders, 31 contained the issuance date for both the NOV and consent order. The average amount of time to complete the consent order process was 522 days (or about one and a half years). The formal enforcement period ranged from 44 days to over three years. One case in the sample took more than five years to finalize the consent order; this case was not included in the general range of time periods.
- the sample of unilateral orders consisted of 22 cases, 14 of which contained an issuance date for both the NOV and order. From the point the NOV was issued, the average amount of time for DEP to finalize and issue the unilateral order was approximately 621 days (21 months). The time period ranged from a minimum of 73 days to a maximum of almost four years (or 1,415 days). One case, not included in the general range, took six and a half years (or 2,406 days) to finalize.

For those cases in the sample that did not contain a NOV date, the inspection date was used as the beginning point for the formal enforcement process. Naturally, this will lengthen the time period since the inspection is routinely conducted prior to the issuance of the NOV. The missing NOV date may be the result of incomplete records and not that a NOV was not issued. There were 12 consent order and eight unilateral order cases analyzed separately in this manner. (In total, 16 cases had no inspection or NOV date and three cases contained incorrect dates and, therefore, were not included in the analysis.) The analysis showed the following:

- The average length of time between inspection and the date the consent order was finalized was 747 days (about 2 years). The time period ranged between 46 days to approximately four years (1,562 days). One case, not included in the overall analysis,

took over six years (2,368 days) from the date of inspection to finalize the consent order.

- The average length of time for unilateral orders to be issued was about 17 months (or 521 days), ranging from a minimum of 72 days to well over three years (or 2,607 days).

Administrative order to compliance. A formal enforcement case is considered closed once the violator has fully complied with the conditions and requirements established in the final consent or unilateral order. Therefore, the second phase of formal enforcement was calculated from the date the order was finalized to the date the violator returned to compliance status.

There were 25 consent order cases in the sample that contained a final compliance date. The average length of time for a violator to return to compliance once a consent order had been finalized was one and a half years (539 days). Compliance was reported as being achieved in as few as 10 days in some cases to over four years (1,690 days) in others.

For those consent order cases in which final compliance was not recorded, the deadline for compliance established in the consent order was used as a proxy to show the length of time DEP allowed for the violator to meet all the conditions in the order. For 19 cases in which the measure was used, the violators were given on average about one year to return to compliance status. The range covered from about two weeks to approximately three years.

The process to finalize a unilateral order allows the violator the right to request an administrative hearing on the order within 30 days of issuance of that order. A final decision is rendered by DEP as a result of the hearing. If no hearing is requested, the unilateral order becomes final and enforceable after 30 days. Of the 22 unilateral orders reviewed, hearings were requested in eight (36 percent), but in only five of those cases was a hearing actually held. In those five cases it took approximately 50 days (or about 2 months) for the department to render final decisions.

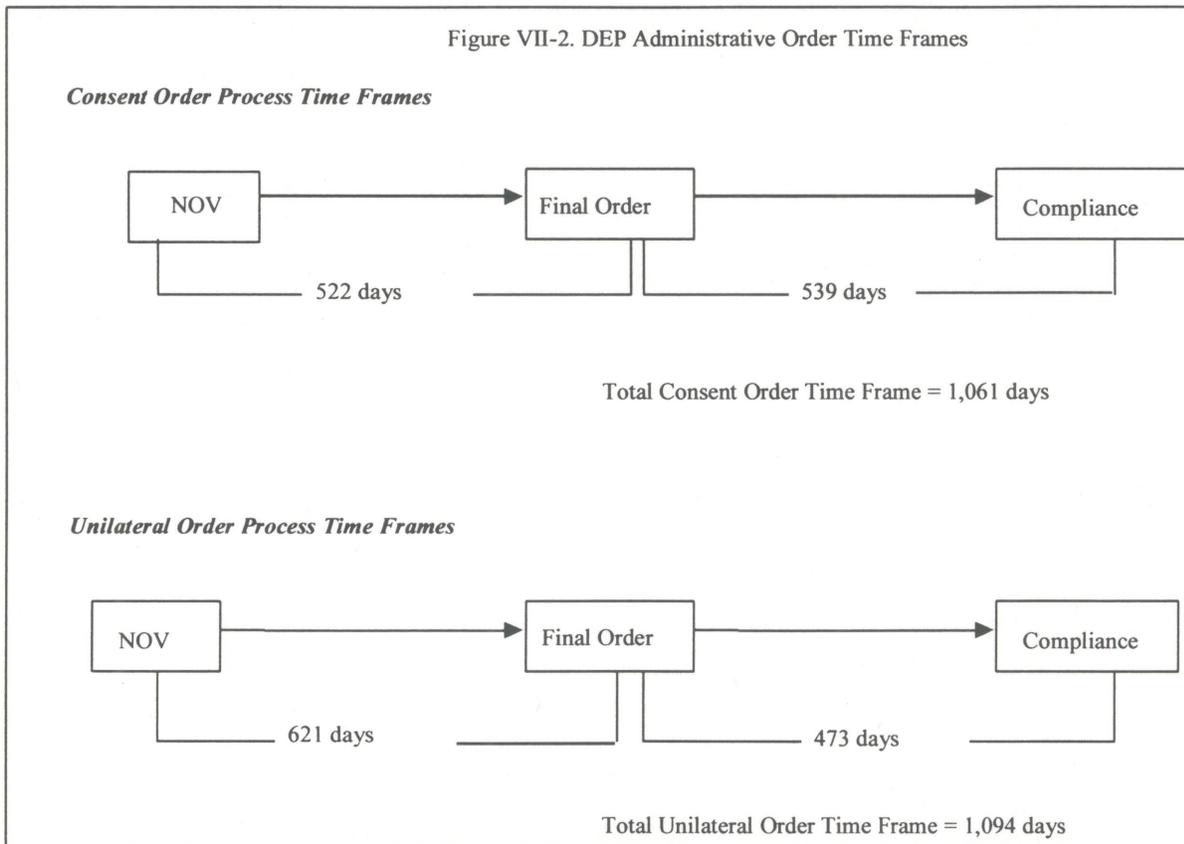
The records reviewed included 14 cases in which an administrative hearing was not requested by the violator. In seven of those cases (50 percent), the unilateral order was finalized the same day it was issued. This is a common practice in the waste bureau, the source for these cases. In the remaining cases (7), the time period to finalize a unilateral order was slightly longer than two months (or 70 days). The range included a minimum of one day to finalize the order to eight months (or 248 days).

To determine if compliance was achieved in a timely manner, the time period between the compliance deadline in the consent and unilateral orders and the actual compliance date reported by the violators was analyzed. There were 25 consent order cases reporting both dates and only four of those met the consent order deadline. The majority of the violators (21) fully came into compliance on average nine months after the compliance deadline set out in the consent order. In one case, the violator took almost five years longer to comply than was allotted in the consent order.

Only nine of the unilateral order cases included the compliance deadline date and the actual date of compliance. However, in these cases, all violators met the requirements of the final order within the allotted time.

Figure VII-2 shows a flowchart of significant activities within each of the formal enforcement orders issued by DEP: consent orders and unilateral orders. The flowchart shows the average amount of time (in days) to complete each phase of the order process, based on the committee's review of enforcement files.

Escalation of enforcement. The department may escalate any enforcement action if the pending action does not achieve the goal of compliance. If a consent order does not achieve compliance or the violator does not make a good faith effort to meet the order's requirements, a referral may be made to the attorney general. Five consent order cases in the sample were

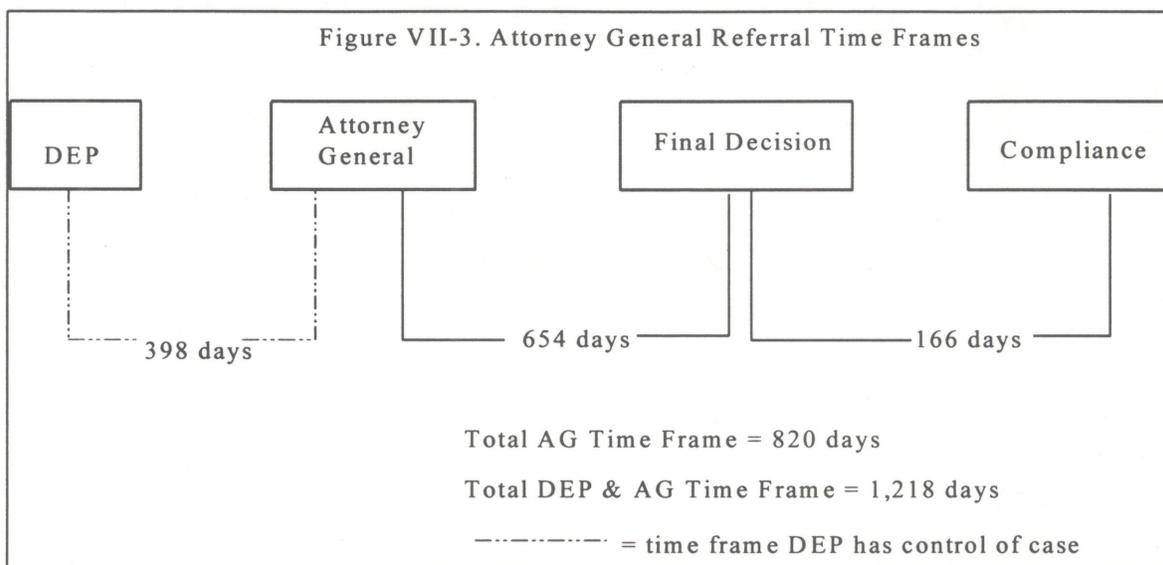


ultimately referred to the attorney general; however, only three cases contained the date of referral. In one case it took eight months from the date the consent order was issued to the date a referral was made, another took 10 months, and the third case took five years.

Only two unilateral order cases required referral to the attorney general. One case was referred 49 days after the unilateral order was finalized and the other was referred after 129 days.

Attorney general referral. One of the most severe actions DEP can take against a violator is to refer the enforcement case to the Office of Attorney General for civil action. The sample of cases reviewed included 34 referrals to the attorney general from the air and waste bureaus. The analysis of time frames is different because once a case has been referred it is the responsibility of the attorney general's office. The case processing is also affected by the docket of the Superior Court, over which the attorney general and DEP have no control.

Of the 34 cases, 23 contained dates for the issuance of the NOV and referral to the attorney general. On average, the department referred the cases about 13 months (or 398 days) after the violation was cited in a NOV. In two cases, not included in the general analysis, DEP was involved in enforcement action against the violators for 7 and 10 years respectively before the cases were referred to the attorney general.



A court decision or stipulated judgment has been entered in 19 of the 34 referred cases. The remaining cases did not include any information as to their resolutions; they are either still pending or the information provided by DEP was incomplete. As expected it takes much longer to resolve an enforcement case through the judicial process. On average, a final decision was rendered almost 22 months (or 654 days) after the referral by DEP to the attorney general. The time period ranged between a minimum of 71 days to about four and a half years.

Finally, the time period between the final decision and compliance by the violator was analyzed. Violators reported compliance, on average, within about six months (or 166 days) after the final court decision.

Figure VII-3 is a flowchart showing the time frames for the significant activities for cases referred by DEP to the attorney general. The average amount of time to complete each phase is shown in days.

Analysis summary. To summarize the time frame analysis presented above, the program review committee finds:

- *The Enforcement Response Policy states the NOV "requires minimal staff time and can be issued quickly". However, it takes DEP on average 99 days to issue a NOV once a violation has been cited.*
- *One of the stated chief advantages of the NOV is it puts the violator on notice of a violation and may prompt compliance without the need for formal enforcement action. Most violators responded within 30 days, as typically required by NOVs.*
- *The data show the NOV process takes substantially longer from issuance to closure than intended by DEP as specified by policy.*
- *Administrative orders (consent and unilateral) take significantly longer than a year to issue.*
- *Compliance with administrative orders is achieved on average more quickly through a unilateral order (11 months, including the hearing process) than a consent order (18 months).*
- *Resolution of enforcement cases referred to the attorney general takes longer than administrative orders, but not significantly longer (approximately 4 months more).*
- *On average, enforcement cases are resolved and compliance achieved more quickly through a referral to the attorney general (27 months) than a consent order (35 months). (This time frame calculation does not include the approximately 13 months it takes DEP to actually refer a case to the attorney general).*

Cause. Internal performance measurement does not appear to be a priority for DEP management. While the department established internal time frames through the 1992 Enforcement Response Policy, it does not consistently measure staff efforts to ensure time frames are met.

The department has recently proposed a revision to the ERP in which the time frames have been amended. However, the program review committee notes the systems do not appear to be in place to measure adherence to the time frames. It is important to track timeliness of the enforcement process because delays in enforcement can subject the environment and public to unnecessary risk or harm.

The program review committee recommends the Department of Environmental Protection:

-
- establish in the Enforcement Response Policy realistic time frames for the completion of significant steps in the informal and formal enforcement processes; and
 - monitor and measure the time it takes for the completion of each step in the informal and formal enforcement processes. The department shall report the average amount of time for each type of action by program and by bureau, and shall report the number of actions that exceed the time lines established in the proposed ERP by program and by bureau. Finally, the department shall revise time frames or make process adjustments, as necessary, to ensure enforcement actions are executed in a timely manner.

Data on the timeliness of enforcement actions are to be included in the annual report, *Environmental Compliance in Connecticut*, to the joint standing committee having cognizance of matters relating to the environment beginning with the February 2000 report.

Enforcement Actions And Strategies Are At Variance With Stated Policies And Practices

Finding. *As a result of numerous interviews with professional enforcement staff and its file review, the program review committee finds a number of instances where actions taken by DEP were at variance with the stated policies and usual practices of the department. Examples of these exceptions are outlined below.*

- A chemical manufacturer spilled approximately 1,500 gallons of toxic waste into the Naugatuck River, which resulted in a significant fish kill. The company had a prior record of serious violations. The ERP suggests that a referral to the attorney general would be appropriate or a consent order be issued at the very least. DEP negotiated a “voluntary agreement” with the company. There is no statute, regulation, or policy that addresses the use of such an agreement. DEP could not provide any example of where this type of agreement had been used before or since. In fact, the use of agreements is disallowed by the ERP, as they are not enforceable in court. The company paid a penalty, but was subsequently referred to the attorney general for discharging without a permit and other regulatory violations not related to the spill incident.
- A manufacturing company was referred to the Office of the Attorney General for noncompliance with an administrative order in September 1992. Negotiations for a stipulated judgement continued in the attorney general’s office for the next three years. Near the conclusion of those negotiations in May 1995, a hazardous waste inspection was conducted for the purposes of determining compliance with the proposed agreement and the previous administrative order. The inspection revealed over 20 violations, including several high priority violations.

The normal practice of the department would be to refer the additional violations to the attorney general, especially for high priority violations. This would further strengthen the legal case to be made against the company. Moreover, a respondent that has violated a unilateral order, negotiating with the attorney general over past violations, *and still violating the law*, would be an unlikely candidate for a negotiated consent order agreement with DEP. In addition, continuing violations of an administrative order would usually require DEP to refer the case to the attorney general, per the guidance offered in the ERP, as was the case with the violations found in 1995. Instead, the department chose to negotiate a consent order with the company. The negotiation ultimately failed and the violations were referred to the attorney general.

- A company involved in the recycling, treatment, and storage of hazardous waste at three locations within Connecticut was the subject of two consent orders issued in December 1992. Numerous subsequent inspections over the next six years disclosed nearly 50 violations and over 60 counts against the company. Several violations of the original consent orders as well as other repeat violations were found. No action was taken on these violations until two underground storage tanks were found to be leaking in February 1997. Instead of escalating the action as provided in the ERP, DEP decided to pursue another consent order to address the tank leak issue as well as the numerous violations that had been accumulating.

Over the six-year period, DEP was also negotiating a permit with the company. The company's requirements, plan of operation, and ownership changed during the development of the permit, complicating an already difficult process.

At some point, the department decided to connect the resolution of the violations with the issuance of the permit. DEP believed the permit process would be completed in a more timely manner. The department in the course of negotiations made several concessions and DEP believed it was close to resolution on many occasions. Ultimately, this linkage of the permit and the resolution of the violations resulted in a significant delay in enforcement for those violations.

During the course of consent order negotiations (July 1997), a spill incident occurred involving a customer of the company. The violations resulting from this one incident were referred to the Office of the Attorney General. Still, the department pursued consent order negotiations and established a deadline for resolution of both the permit and the consent order by July 1998. It became apparent that neither issue would be resolved in July, and the department referred the rest of the violations to the attorney general.

- A construction company was found to be conducting an open burn without the required permit. The company sent a letter to the department which was initially deemed a sufficient response and, therefore, no NOV was issued. Over a year later,

the bureau chief reviewed the file and determined the response was insufficient. A NOV was then issued. According to the current ERP, the air bureau is always supposed to issue a NOV, even “in cases in which the violator has returned to compliance before the issuance of a NOV.”

- A state agency that is a large quantity generator of hazardous waste failed to fully comply with consent orders issued in January 1989 and June 1994, and was issued another consent order for some of the same violations (along with others) in September 1996. Multiple consent orders for the same violations are discouraged by the ERP. The policy states that significant violations of consent orders must be escalated above the action already taken.
- Both the current and proposed revision to the ERP establishes time frames for the completion of enforcement actions. While establishing time frames is an important aspect of measuring the performance of DEP’s enforcement efforts, the department has made no provision for systematically tracking and reporting how it does against those time frames. Findings above relating to timeliness, in addition to a number of other specific cases brought to program review’s attention by DEP personnel indicate the department does not complete its actions in a timely manner. (See previous finding and recommendation related to timeliness.)

The purpose of policies is to provide consistent and appropriate guidance to staff in implementing the law. Policies and procedures help to ensure mutual understanding about operations and responsibilities between management and staff, assign accountability, and assist with the continuity of operations over time.

Cause. As holders of the public trust, state agencies are governed and guided by law, regulation, and policy. Given the complexities of the enforcement function, no policy can hope to anticipate every conceivable situation that the three regulatory bureaus encounter. The program review committee recognizes the need for some flexibility in responding to the complex and changing regulatory universe that DEP oversees. As discussed earlier, the Environmental Response Policy is a guidance document and exceptions to the policy can be made.

However, when a significant number of cases appear to fall outside of the expected response, the credibility of the agency is questioned. The course of action may be appropriate. But when the agency has inadequate management information and case tracking systems, and insufficient case documentation, its ability to explain and justify its decisions is severely hampered.

DEP management has acknowledged that certain aspects of the ERP have been unworkable and outdated. The time frames for response, for example, were known almost upon publication of the ERP to be unrealistic. Yet, no attempt was made until recently to determine a more practical time frame. A troubling aspect of this problem is that DEP has not adequately established or measured itself against *any* internal performance measures.

It is the responsibility of management to ensure that all actions fall within the scope of law and policy and to constantly examine the utility of those policies. In order to determine utility and applicability of policy, management must have sufficient awareness of its use and more importantly its deficiencies.

In order that management and other decision makers, at all levels, be fully informed about the utility of their own policies in a more systematic way, the program review committee recommends a policy exception report be developed by DEP. This report shall include the number and a brief description of significant exceptions or variances to stated policies that the department pursues by each regulatory program. Significant exceptions would include, but not be limited to:

- **multiple NOV's issued for the same violations;**
- **only a NOV issued for high priority violations. This would require all bureaus to complete an abbreviated Enforcement Action Summary for NOV's, so that all violations are classified;**
- **when a lower level enforcement action is issued for violations of a previously issued enforcement action. For example, if a unilateral order is violated, the expected course of action is a referral to the attorney general. If a consent order is issued for that violation, that would be considered an exception. Also, violations of a consent order handled through the issuance of another consent order would be considered an exception;**
- **multiple modifications to consent orders;**
- **consent or voluntary "agreements" issued for the resolution of violations;**
- **Supplemental Environmental Project policy exceptions, such as when a SEP totally displaces a monetary penalty; and**
- **other actions at variance with stated policies that the department would deem significant.**

The exception report is to be included for a five-year period in the annual report, *Environmental Compliance in Connecticut*, to the joint standing committee having cognizance of matters relating to the environment beginning with the February 2001 report. At the conclusion of the five-year period, the committee shall decide whether to continue, alter, or terminate the policy exception reporting.

The program review committee also endorsed the development and use of "results-oriented" performance measures. Historically, EPA has determined the adequacy of a state's enforcement program by the number of inspections conducted and enforcement actions taken. The states, however, have increasingly cited the inadequacies of such "output measures" as they fail to measure the impact of cooperative efforts, such as technical assistance and incentives that are now needed to increase compliance. (As discussed, the regulatory community is debating how best to balance traditional enforcement with compliance assistance efforts.) Key technical

barriers have been cited in a recent report by the federal Government Accounting Office (GAO) in developing performance measures, including the absence of baseline data, difficulty in quantifying outcomes, and difficulty in establishing causal links. Nonetheless, cooperative efforts between the EPA and the state to find better ways to measure program success continue.

APPENDICES

APPENDIX A

Agency Response

Program Review Note: Due to final format editing after the committee draft report was sent to the Department of Environmental Protection for comment, some page numbers were changed. Where the DEP response cites a page number that was subsequently changed, the new, correct page number is footnoted.



STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

79 ELM STREET HARTFORD, CONNECTICUT 06106

PHONE: (860) 424-3001



Arthur J. Rocque, Jr.
Commissioner

February 11, 1999

Mr. Michael L. Nauer, Director
Legislative Program Review and Investigations Committee
State Capitol - Room 506
Hartford, CT 06106-1591

Re: Legislative Program Review & Investigations Committee Report on the Department of Environmental Protection's Enforcement Policies and Practices

Dear Mr. Nauer:

Thank you for providing the opportunity to submit written comments on the above-referenced report ("report"). Before reaching the substance of my comments, let me first commend program review staff for the thorough, professional job they did in carrying out the objectives of the study. The stated purposes of the report are to: (1) apprise Committee members of the performance of the Department in enforcing environmental laws and policies through its procedures and practices, and (2) make specific recommendations on action necessary "to strengthen management mechanisms to ensure policies and procedures are implemented as envisioned." To that end, program review staff have produced a very valuable document containing numerous findings and recommendations that will assist the Department's ongoing efforts to administer and enhance its enforcement programs.

As part of the Department's response, I have included a copy of testimony offered by Assistant Commissioner Stahl at the December 1, 1998, public hearing on the draft report before the Legislative Program Review and Investigations Committee (Attachment I). I believe that this testimony provides important contextual reference for statistics included throughout the report. I am also attaching a discussion on the section of the report dealing with time frames for the issuance of and compliance with formal enforcement actions (Attachment II). It is important to undertake this exercise because this section has bearing on new, expanded time frames to be included in a revised Enforcement Response Policy. Consistent with program review staff's recommendation on page 114 of the report, the Department expects to adopt a revised Enforcement Response Policy with longer response time frames within the next month. It is

* New page 113 - PRI

expected that the revised time frames for enforcement action will be similar to those currently used by EPA and will be reviewed and approved by them. While still aggressive, the new time frames will result in a much greater percentage of cases initiated and completed within the periods contained in the Enforcement Response Policy.

The Department now offers specific additional remarks on the report and on the recommendations contained therein. Program Review's recommendations fall into four broad categories: (1) civil penalty regulation and policy issues; (2) information management/information technology-based issues; (3) enforcement policy and procedure refinement and development; and (4) implementing new and more extensive documentation procedures relative to case file management, case development and case resolution.

Civil Penalty Regulation and Policy Issues

Connecticut General Statutes Section 22a-6b mandates that the Department promulgate regulations to impose civil penalties through a unilateral order. Program Review correctly states that despite statutory authority to do so since 1971, the Department has failed to promulgate such regulations. The Department agrees with Program Review's recommendation that it must resolve the issue of imposing civil penalties through unilateral orders either by promulgating the regulations or requesting that the General Assembly repeal or revise the statutory mandate. In order to choose the best course of action, the Department will review federal law and practice and that of other states which currently have some form of administrative civil penalty regulations. Contacts with enforcement officials outside Connecticut have already been made and civil penalty regulations from four states have been collected for review. Following completion of such review, the Department will report back to the General Assembly on its preferred course of action next session.

Program Review also finds that the Department's existing Civil Penalty Policy does not provide adequate guidance to staff and that application of existing policy does not assure the outcome [monetary penalties assessed on violators] is appropriate or consistent. We agree that our current penalty policy needs review and revision, especially concerning application of the multi-day component. EPA, in its June, 1997, *Final Multimedia Review of the Enforcement Programs of the Connecticut Department of Environmental Protection*, found our approach to assessing civil penalties well reasoned and rigorous but cited inconsistency in application of the current policy. In response, we conducted extensive training in the use of EPA's computer model to calculate economic benefit, created a *Case Conclusion Data Sheet* to document final penalty adjustments, and reviewed EPA Region I's civil penalty policies (particularly regarding multi-day components) to identify potential modifications to our system. We will dedicate significant resources to refining or replacing the existing Civil Penalty Policy. In addition, personnel with enforcement oversight responsibility will conduct periodic "cross media" reviews of enforcement actions to assess and assure consistent application of the Department's current penalty policy.

Information Management and Technology Issues

The Department recognizes the need for a comprehensive document/file management system. This spring the Department, in conjunction with the Department of Information Technology, will initiate a pilot project to evaluate and test a document management system that will handle both paper and electronic files. This project will be coordinated with existing and prospective information management system initiatives.

The Department clearly recognizes the importance of being able effectively and efficiently to access, integrate and utilize information and has begun work to develop an integrated approach to managing information throughout the environmental quality programs. To that end, the Department proposes to integrate the multiple disparate tracking systems in Air, Water, Waste and the Office of Long Island Sound Programs into a single, holistic comprehensive information system to:

- Integrate the permit, monitoring, and enforcement function;
- More efficiently track and report on enforcement actions and status;
- Incorporate a common facility identifier (a national EPA goal);
- Support Department efforts (and EPA's direction) to focus on integration and information;
- Improve access to agency records and data.

This process will take both time and money. In the interim, greater attention is and will be paid to standardizing enforcement files across the agency and ensuring that all case files contain the necessary documentation important to a case. A tracking form is being prepared to provide an "at a glance" status report on the subject enforcement case. This sheet will be affixed to the inside cover of the file and will have spaces for the staff to record such information as: date(s) of inspection(s); name(s) of inspector(s); date notice of violation (NOV) was issued; date of response to NOV; and whether the response to the NOV was satisfactory. This information should not only help someone quickly come up to speed with the current status of the case, but it will also assist in understanding the historical and procedural perspective of the case.

Policy and Procedure Refinement and Development

As pointed out in the report's introduction, the Department has developed most of the basic tools it needs to meet its enforcement responsibilities. However, Program Review staff has identified the need for refinement of existing tools or the creation of additional tools to enable the Department to carry out a stronger and more effective enforcement program. In response, the Commissioner has created an Environmental Program, Policy and Practices group within the Assistant Commissioner's Office. Four experienced enforcement staff have been assigned on a full time basis to guide the Department through substantive changes responsive to the report and beyond. More specifically, this group has: (1) assisted in drafting the Annual Report on

enforcement and compliance activities provided to the Environment Committee of the General Assembly on February 1, 1999; (2) begun to coordinate Department efforts in response to Program Review's report; and (3) assumed responsibility for completing projects initiated in response to the June 1997 EPA multimedia review of the Department's enforcement programs. The Environmental Program, Policy and Practices group will also be responsible for:

- producing or revising the full range of enforcement policies and guidance documents, including the enforcement response policy, enforcement action summary, civil penalty policy, case conclusion data sheet, and a compliance history policy;
- producing an enforcement policy and practice desk reference comprising the documents mentioned above along with other appropriate documents to be distributed to all personnel involved in the Department's enforcement efforts; and
- training enforcement personnel in the application of documents contained in the desk reference.

In addition, over the longer term, the group will provide oversight for enforcement activities, evaluate organizational alternatives for enforcement programs based on a review of other states' efforts and make final recommendations on administrative civil penalty regulations.

Implementation of New and Expanded Documentation and File Management Requirements

The Department is in agreement with Program Review that further documentation should be included in the file to provide a case reviewer with a "road map" identifying significant points on the way to case resolution. The Department's newly developed *Case Conclusion Data Sheet* is expected to provide critical information relative to adherence to or exceptions from the agency's operative enforcement policies such as the civil penalty policy and the supplemental environmental projects policy. The *Case Conclusion Data Sheet* will also provide documentation concerning action time frames and a narrative explanation when a time frame set out in the revised Enforcement Response Policy is missed. Also, in cases where the Department's action differs from that called for by strict application of the policy, the *Case Conclusion Data Sheet* will identify and explain the need for the deviation.

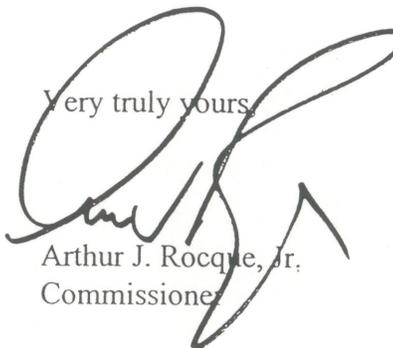
Absent additional resources, adding documentation requirements to each enforcement case beyond what the Department has already committed to (case tracking form and the *Case Conclusion Data Sheet*) may result in a decline in the number of enforcement actions the Department is able to take on an annual basis.

Finally, Program Review is clearly concerned that organizational communications and interpersonal relations issues be proactively addressed to avoid or minimize their impact on the functioning of the agency. I share this concern and, within the constraints of the civil service

system and labor-management laws, will endeavor to address these issues. Toward that end I have instituted a staff forum (Attachment III) so that staff has direct access to me on a monthly basis. Within the next few weeks I anticipate distributing the first in a series of employee questionnaires designed to inform me about issues and concerns and help guide the productive discussions begun in the staff forum. In addition, my personnel and affirmative action offices are preparing a fact sheet for all employees describing internal sources of information and assistance and avenues of recourse available to anyone in such need. An affirmative policy statement regarding retaliation against employees for opinions related to environmental matters will be prepared in consultation with the Offices of the Attorney General and Labor Relations to ensure the consistency of any such statement with state and federal law.

The Department would once again like to thank you and your staff for the exhaustive assessment of our enforcement programs and policies.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Arthur J. Rocque, Jr.', is written over the typed name and title.

Arthur J. Rocque, Jr.
Commissioner

AJR/ptb
Enclosures (3)

Attachment I

Testimony of Assistant Commissioner Jane K. Stahl Before the Legislature's Program Review and Investigation Committee Regarding Department of Environmental Protection Enforcement Programs

December 1, 1998

Good afternoon Senator Lovegrove, Representative Jarjura, members of the Program Review and Investigation Committee. Thank you for the opportunity to comment on the report prepared by your staff regarding the Department of Environmental Protection's enforcement programs. Let me begin by commending staff for the thorough, professional job they did. It is indeed a daunting task to learn about, understand and evaluate how the department's complex and diverse programs evolved over the past twenty years. They captured the overview of each of our disparate programs and identified some of the evolutionary circumstances which led to our present day organization, policies and practices. I would also like to personally thank your staff for the courtesy and understanding which they afforded my staff throughout this review.

Staff's report and presentation highlighted, rightly so, the many responsibilities of the department's regulatory bureaus. In its efforts to protect and manage the state's air, land and water resources each bureau implements a mix of permitting, enforcement, resource/environmental quality management and monitoring, and grant administration programs. Indeed as we reported to the Environment Committee last February, enforcement is not by itself a goal; it is one tool we use toward achieving compliance with environmental standards. Other tools include permitting, monitoring and compliance assistance.

Achieving the right mix of traditional enforcement and compliance assistance is a challenge and discussion recognized by Program Review staff as actively going on in and among both state and federal environmental offices. "EPA is involved in this same discussion at the national level, with an emphasis on the importance (and perhaps difficulty) of clear communication about changing compliance tools. A May 1998 report prepared by the General Accounting Office for Congress notes:

While EPA's policy is that compliance assistance should be accompanied by a strong and credible enforcement deterrent, state officials have noted that the inconsistent manner in which this policy has been interpreted and implemented by different EPA offices has led to confusion about the appropriate balance between traditional enforcement and other compliance tools." Draft Program Review Report, p. 5

This recognition of the complexities of environmental enforcement is important in understanding the context of the department's enforcement programs.

The report verified several things we knew about our enforcement programs and makes similar substantive findings to those identified by EPA in its 1997 review of our enforcement program. Some of the nuances of our programs and their evolution need more context to explain what may otherwise be left as mis-impressions. To that end, I would offer the following observations:

Enforcement Statistics vis a vis Inspections

The report identifies an increase in inspections without an increase in total enforcement actions. This reflects the changing nature of the types of inspections we conduct and the level of compliance we're finding. Our compliance rates show improvement since notices of violations (NOVs) were first issued in 1992. For example, from 1992 through 1997 the water bureau conducted approximately 300 industrial compliance inspections a year. In 1992, 56% of those inspections yielded violations; in 1997 only 15% of those inspections resulted in violations. Similarly, 300 program specific inspections by the air bureau in 1995 yielded only 3 violations.

Trends in Informal and Formal Enforcement

The report identifies an increase in "informal actions" taken by the department. This reflects the addition of new tools we use in enforcement. In addition, certain data peaks and valleys parallel targeted efforts and initiatives. Notable upswings include the period from 1991 through 1993 during which time the department adopted its Enforcement Response Policy, guiding and directing staff actions through uniform policy for the first time. That timeframe also saw the development of a standardized NOV format and associated guidelines for use of this new informal mechanism to resolve less serious violations. On the decline side, decreases in informal actions in 1994 and 1995 reflect departmentwide permit backlog reduction efforts. (You may recall the significant public interest expressed about five years ago in the state of the department's permitting programs and the significant shifting of resources the department undertook to address permitting issues.) Also of note during this period, air bureau staff was diverted to accomplish a Stage II vapor recovery sweep (resulting in hundreds of NOVs not included in report). Similarly, an upswing in informal actions in 1996/97 reflects a campaign to inspect and issue NOVs for storm water management noncompliance.

Overall, the report would indicate that numbers of formal enforcement actions are fairly steady. In looking back, we can identify the years of 1988 through 1990 as more of an anomaly than a high point from which we descended. The exaggerated numbers reflect a sweep of referrals to the Attorney General for water discharge permit exceedences and host of unilateral orders addressing groundwater issues. The department paid a price for these efforts; the shift in resources contributed significantly to the water discharge permit backlog, tied up our adjudications unit with administrative appeals, and left many of the initial enforcement matters unresolved. Also during this time frame, the waste bureau referred **all** enforcement cases to the Attorney General as a condition of federal program approval (many of these cases (38) were subsequently withdrawn or returned to the agency by the Attorney General.)

Total Distribution of Formal Enforcement Actions

The changing mix of types of formal actions reported reflects our evolving knowledge and comparative success with each type of action. The increased use of consent orders was a conscious decision based on the effectiveness and efficiency of that tool in many circumstances. Specifically, consent orders represent the end of a process as opposed to either unilateral orders or referrals to the Attorney General which reflect the beginning of a formal enforcement process. Consent orders are final enforceable orders which can include corrective action, schedules of future actions and penalties. This compares very favorably to unilateral orders which are almost universally appealed and go through a lengthy adversarial adjudicatory process, do not contain penalties unless a second action is brought through the Attorney General's Office, and can of course, be appealed through the judicial system thereafter. It also compares favorably in many instances to referrals to the Attorney General's Office. Here again, the referral is the beginning of a process. Department staff prepare thorough complete cases prior to the referral; the Attorney General's Office requires sufficient prep time to produce an appropriate complaint prior to either settlement (which includes DEP staff participation and must reflect DEP's desired outcome) or litigation and court disposition. All of these tools, along with informal actions have a role to play in the department's enforcement efforts. It is unfortunate that the report leads to inference by some that consent orders are less effective or less desirable tools than they really are.

Data Management

The report's findings on data management and the needs of the department in this regard are instructive and constructive. It accurately identifies the fragmented development of data management systems based on federal requirements and dollars available to individual programs. In response to the EPA report on the shortcomings of our data management system, we have redoubled our efforts to correct the deficiencies in the individual media reporting systems. In addition, without specifically dedicated resources we established an enforcement "module" within an existing permit application management system which is the department's only unified system. It is a very basic start to a departmentwide enforcement data tracking, but a start none the less. Looking toward the future, as the report identifies, the Air Bureau which has significant permit fee generated funds strictly for air bureau use per federal law, is developing a pilot project enforcement management system. While we are committed to the successful completion of this pilot, we are concerned that this will continue rather than repair the fragmented development of our system, unless we find the resources to bring the water and waste systems along. We estimate an up-front commitment of \$1.5 million will be necessary to design and implement a comprehensive data management system. Even then, integrated systems which are compatible with federally required systems are very complex. But Connecticut is not alone - all states as well as EPA are grappling with the same issue. We are learning from each others' successes and mistakes as we attempt to move forward to create an integrated data management system.

Compliance Monitoring

The report's findings on compliance monitoring are also instructive. We believe that improved compliance monitoring is intrinsically related to improved data management; if our analysts, engineers and managers can readily track enforcement cases from inspection through resolution, compliance under enforcement actions can be timely scheduled and monitored. Even with improved data management, however, we will have to deal with the balance of staff resources between and among field inspections, follow up administrative actions and monitoring for enforcement as well as permit compliance.

Penalties

We agree that our penalty policies need review and revision. As you may recall, EPA found our approach to assessing civil penalties well reasoned and rigorous but cited inconsistency in application of that approach through use of the current policy. In response, we conducted extensive training in use of EPA's computer model to calculate economic benefit; created a case conclusion data sheet to document final penalty adjustments; and are reviewing other civil penalty policies (particularly regarding multi-day components) to identify potential modifications to our system. So far our review indicates that there are no perfect models out there; other states and EPA are dealing with models and systems that suffer similar flaws - difficulty of application, varying ranges of penalties and subjective classification schemes. We are and will continue to keep working on this effort.

Conclusion

Again I'd like to thank the committee and staff for the opportunity to comment on this report. My staff has some technical comments that they will be sharing with Program Review staff. We look forward to continuing to work with you and your colleagues and other stakeholders toward the further improvement of our enforcement programs. Thank you.

Attachment II

A Discussion of Report Findings and Conclusions Related to Time Frames for Department Issuance of and Violator Compliance with Formal Enforcement Actions

Introduction

The Department acknowledges that implementing most of the recommendations found in the review will have a positive impact on the Department's enforcement programs. However, we have included this discussion because the section of the report relative to time frames for formal enforcement (pages 107-114)^{*} could leave misimpressions regarding the efficacy and desirability of certain types of enforcement actions, and because the factual underpinnings of the section will have bearing on new, expanded time frames to be contained in a revised Enforcement Response Policy.

Beginning at page 107, program review staff present a detailed analysis of the length of time between key events in the evolution of a formal enforcement case. (A formal enforcement case is one resolved by a unilateral order, a consent order or by civil action following referral to the Attorney General.) At the conclusion of the time frame analysis, program review offers in its analysis summary (pp.112-113)^{**} seven findings, three of which are:

- compliance with administrative orders is achieved on average more quickly through a unilateral order (11 months, including the hearing process) than a consent order (18 months);
- resolution of enforcement cases referred to the Attorney General take longer than administrative orders, but not significantly longer (approximately 4 months more);
- on average, enforcement cases are resolved and compliance achieved more quickly through a referral to the Attorney General (27 months) than a consent order (35 months). (This time frame calculation does not include the approximately 13 months it takes DEP to actually refer the case to the Attorney General.)

The Department believes that further analysis of the facts underlying these statements might result in a different set of findings. As a general observation, we must first point out that early in the development of every enforcement case, the Department attempts to match the particulars of the case (i.e., appropriateness of including a penalty, negotiability of injunctive relief, likelihood of agreement) to the most appropriate enforcement response needed to address those particulars. Given these and other differences, the validity of general conclusions drawn from a comparison of time frames between and among administrative actions and civil action is questionable. Regarding the time frame analysis contained in the report, the Department has provided supplemental analysis in this attachment, where able. There are, however, several points for which we could not identify an effective underlying explanation. We raise them to inform readers who may rely upon this report to evaluate Department activities.

* New pages 107-113 - PRI

** New page 112 - PRI

Compliance with a Unilateral Order Is Achieved More Quickly than a Consent Order

Regarding the first finding referenced above, the reason for quicker compliance with a unilateral order is due to the shorter time period needed to issue it. A unilateral order is not negotiated and does not include a penalty, the amount of which is often the most contentious issue to resolve in an enforcement case. It is therefore much easier and faster to finalize, especially in a case where the violator does not request a hearing.

However, violations which trigger formal enforcement often warrant the collection of a penalty under the Department's Civil Penalty Policy. If the Department determines that a penalty is appropriate following issuance of a unilateral order, it must refer the case to the Attorney General for a second proceeding. The same enforcement staff used to pursue injunctive relief through the order process may be called upon to support a judicial penalty case. Such course of action results in greater expenditure of time and resources and a delay in the ultimate resolution of the enforcement case.

In contrast, a consent order takes longer to issue because, as mentioned above, it is negotiated with the violator and often includes specific detailed steps toward compliance (i.e. injunctive relief) and a significant cash penalty. In addition to injunctive relief and a penalty, a consent order may (and frequently does) include a supplemental environmental project, stipulated future penalties, audit requirements, or myriad other conditions to which a violator may consent but that the Department cannot impose unilaterally. Unlike the issuance of a unilateral order or a referral to the Attorney General for the filing of a civil action, the entering into of a consent order by the Commissioner represents the end of a contested matter rather than the beginning.

Therefore, while the report is accurate in its assessment that compliance with a unilateral order is generally achieved more quickly than with a consent order, the report fails to mention that penalty assessment after unilateral order issuance requires a referral to the Attorney General for the filing of a civil action.

Cases Referred to the Attorney General Are Resolved Nearly as Fast as Unilateral Orders and Faster than Consent Orders

Restating the last two report findings referenced above, Program Review staff finds that resolution of enforcement cases by referral does not take significantly longer than by unilateral order and that referral to the Attorney General results in resolution of an enforcement case more quickly than an administrative consent order. The Department does not believe these findings are accurate and provides further clarification below.

First, program review acknowledges that it did not include in the Attorney General resolution time frames the approximately 13 months it takes the Department to prepare the case for referral to the Attorney General. The referral package preparation interval should be included in the time frame necessary to resolve a case through Attorney General action. As noted by Program Review staff on page 36 of the report, "preliminary work in the development of an enforcement case is

basically the same and not dependent on the type of action". In fact, a properly constructed referral package involves many hours of staff time to develop and takes months to accomplish. It typically includes, among other things, multiple inspections, assembly of at least five years of historic compliance information, a detailed penalty calculation, and a comprehensive plan and schedule for injunctive relief. Without this work being done prior to referral, the Attorney General would be unable to file suit against a violator. Furthermore, the supporting material is generated during the same time period after discovery of the violations whether the case is resolved administratively or by Attorney General action. To count this time in the establishment of administrative time frames while discounting it for referral purposes compares a complete process with a partial one.

Second, and more significantly, the time frame comparisons between cases resolved administratively as opposed to by referral are flawed by the fact that only 56% (19 of 34) of the Attorney General cases reflect final resolution at the time of issuance of Program Review's report. Therefore, time continues to accrue on 44% of the Attorney General cases in Program Review's sample analysis, with the effect of lengthening the average time for Attorney General resolution with each passing day. Not until all 34 cases referred to the Attorney General are resolved can an accurate and fair time frame comparison between administrative action and civil referral be made.

Time Frame Ranges for Return to Compliance

In its time frame analysis, Program Review includes the average length of time for a violator to come back into compliance after order or judgement as well as the extremes within the study group. For example, on page 109 Program Review states:

"There were 25 consent order cases in the sample that contained a final compliance date. The average length of time for a violator to return to compliance once a consent order had been finalized was one and a half years (539) days. Compliance was reported as being achieved in as few as 10 days in some cases to over four years (1,690 days) in others."

It is the Department's view that time lines for return to compliance are meaningless absent proper context. To provide ranges of time before full compliance with an order is achieved does not, as a reader might imply, indicate inconsistency from action to action. Rather it reflects the uniqueness of every enforcement case the Department takes. As stated in the report's introduction, "[t]he complexities of the enforcement function spanning distinct regulatory programs in the three media - air, water, and waste - would be difficult to overstate even if nothing ever changed." Four years may be just as timely compliance as ten days, depending on the nature of the non-compliance being addressed and the injunctive relief necessary to remedy it. For example, ten days may be an appropriate time frame to allow for clean up of a properly constructed but poorly operated solid waste transfer station. It may be equally appropriate for the Department to allow four years for return to compliance in a case where a contaminant plume has entered fractured bedrock and affected drinking water supplies. In that time, the violator will be required to do at least the following: hire a consultant; prepare a scope of study; present to the Department for review and approval a remediation plan based on the study; and then carry out

the remedial action under the supervision of Department staff.

Time Frames for Resolution Following Referral

On page 112*, Program Review staff makes the observation that “[a]s expected it takes much longer to resolve an enforcement case through the judicial process”. While this is true for cases that proceed to trial, only a fraction of the cases referred to the Attorney General take this path. As noted on page 38** of the report, the referral itself (and the prospect of litigation absent consensual settlement) sometimes has the effect of inducing a violator to resolve a case. Most cases sent to the Attorney General’s office are in fact concluded by stipulated judgement in a process very similar to a consent order negotiation. In fact, like consent order negotiations, a great deal of Department staff time and effort may be consumed in assisting the Attorney General’s Office as it negotiates the terms of a stipulated judgment.

Furthermore, the Assistant Attorney General many times has the advantage of picking up a case that has been the subject of recent prior unsuccessful consent order negotiations with the Department. And to the extent the Department has resolved some, if not many, of the contentious issues frequently embedded in a single enforcement action, it serves to shorten the time and narrow the scope of issues left for the Attorney General’s Office to resolve.

Additional Areas in the Formal Enforcement Time Frame Discussion in Need of Further Clarification

The Department fully appreciates the complexity of the analysis undertaken by Program Review staff. We will use the report to better address outstanding issues facing the Department’s enforcement programs. To that end, we seek further clarification on the following:

- On page 109, Program Review staff correctly point out that, absent a request for administrative hearing, a unilateral order becomes final and enforceable 30 days after issuance. Program Review also finds that in seven cases in which a hearing was not requested by the violator, *the unilateral order was finalized the same day it was issued*. In twelve other cases, *the time frame to finalize a unilateral order was slightly longer than two months (70 days)*. The latter two findings appear inconsistent with the statement that absent a hearing request a unilateral order becomes final after the passage of thirty days. The Department would appreciate clarification of these findings and a better explanation as to how these findings affected the time frame calculations relied upon to formulate findings of fact.
- Page 109 also presents some confusion on the number of cases appealed versus unappealed. The fourth full paragraph states that “[o]f the 22 unilateral orders reviewed, hearings were requested in eight (36%) and in only five of those cases was a hearing actually held.” The next paragraph begins by noting that “[t]he records reviewed included 19 cases in which an administrative hearing was not requested by the violator.” The Department questions how, if there were 22 unilateral orders reviewed and a hearing requested in 8 of them, there can be 19 cases in which a hearing was not

* New page 111 - PRI

** New page 40 - PRI

requested by the violator? *

Conclusion

As noted in the response letter to which this discussion is appended, the Commissioner has created an Environmental Program, Policy and Practices group to guide the Department through substantive changes responsive to the report and beyond. This group would welcome the opportunity to sit down with the Program Review staff at its convenience to better understand the report in general and the section discussed above in particular.

* The number 19 was a typographical error, and should have read "14". It has been corrected in the final report.

STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PHONE: (860) 424-3001



Arthur J. Rocque, Jr.
Commissioner



Memo

To: All DEP Staff
From: Art Rocque
Date: 01/13/99
Re: Establishment of a Staff Forum with the Commissioner

I am pleased to announce the establishment of a regularly scheduled forum for staff to meet with me for the discussion of matters and issues of staffs choosing in an informal, no holds barred setting. While I've always espoused an open door policy and my willingness to meet with staff any time, any place, I recognize that my schedule can be an impediment to your taking advantage of this offer. I also recognize that some people are reluctant to come forward personally, but might provide input through a designee if an appropriate opportunity were made available. To provide just that opportunity, I would like to institute the following approach.

I have asked Lynn Tobin, my executive assistant, to set aside time each month on a regularly scheduled basis for these meetings to occur. They will be announced in advance and any employee will be welcome.

I would like each division of each bureau, as well as the Natural Resources Center, Office of Long Island Sound Programs and Division of Environmental Assistance and Outreach to choose for themselves a representative who will regularly attend these meetings. Again, while the meetings will be open to any employee, I hope that by having identified staff designees, those of you who would not feel comfortable coming forward personally will share concerns or raise issues for discussion through your designated colleagues. Through this memo, I would request managers throughout the agency to **facilitate** the selection of division representatives, by which I mean promptly provide a staff only opportunity for such selection to take place. If each designee can make him or herself known to Lynn within the next two weeks, we can begin to meet by the beginning of the month.

While this idea has been under consideration for some time, I wanted to wait for the legislative Program Review and Investigations reports on several DEP programs to be completed before announcing it so as not to appear to preempt any part of their investigations. It is now time to establish this important forum as a means of improving general communication throughout the Department.

I am looking forward to these meetings as a real opportunity to hear from and talk with you about matters which concern you. Thank you.

APPENDIX B

Summary of Significant Environmental Legislation

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Summary of Significant Environmental Legislation

Summary of Significant Air Pollution Control Laws

Federal law. Prior to 1955, air pollution was controlled at the state and local level. The first federal legislation to focus on the problem of air pollution was the Air Pollution Control-Research and Technical Assistance Act, enacted by Congress in 1955. There was no regulatory authority contained in the act, which mandated the review and research of air pollution issues. In 1963, Congress passed the first Clean Air Act (CAA) that recognized air pollution "resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation." The CAA protects human health and the environment from emissions that pollute outdoor (or ambient) air. An important provision of the act established that pollution prevention and control were primarily the responsibility of individual states, and focused the federal government's role on financial and technical support.

In 1965, amendments to the Clean Air Act divided regulation of air pollution into two titles; one addressed pollution prevention in general and the other addressed mobile sources. The Air Quality Act of 1967 was the first attempt by Congress to establish air quality standards and it mandated federal enforcement authority against violators.

The Clean Air Act Amendments of 1970 established the framework for air quality regulation that remains in effect today. The federal Environmental Protection Agency (EPA) was authorized to develop National Ambient Air Quality Standards (NAAQS) to limit the levels of specific pollutants in the air. There are six criteria pollutants that will be discussed later in this section. The amendments further differentiated between areas of the United States meeting established standards (resulting in relatively good air quality) and those in noncompliance (resulting in relatively poor air quality), and created different rules to regulate air pollution in these areas. The law also established time schedules for compliance with standards for areas with poor air quality.

By the mid-1970s, it was generally recognized that many areas of the county would not meet the schedules for improving air quality. The 1977 CAA amendments addressed this issue by establishing new schedules and developing more stringent means to meet the timelines. However, many areas of the United States continued to have trouble meeting the pollution measures and standards, but there was no further air quality legislation at the federal level until 1990.

In 1990, Congress significantly amended the Clean Air Act to ensure that air quality in all areas of the country meet certain federally mandated minimum standards and that states have primary responsibility to assure adequate air quality. Areas not in attainment with the minimum standards are required to implement specific air pollution controls. The act also established a comprehensive permitting system for all sources of air pollutants. The 1990 revisions:

- strengthen measures for attaining air quality standards (Title I);
- set forth provisions relating to mobile sources (Title II);
- expand the regulation of hazardous air pollutants (Title III);
- require substantial reductions in power plant emissions for control of acid rain (Title IV);
- establish operating permits for all major sources of air pollution (Title V);
- establish provisions for stratospheric ozone protection (Title VI); and
- expand enforcement powers and penalties (Title VII).

The following is a brief description of the requirements and goals of each of the Clean Air Act titles.

Title I. In accordance with the 1970 Clean Air Act amendments, the EPA established National Ambient Air Quality Standards (NAAQS) to limit the level of pollutants in the air. EPA promulgated NAAQS for six criteria pollutants: sulfur dioxide; nitrogen dioxide; carbon monoxide; ozone; lead; and particulate matter¹. All areas of the United States are required to maintain levels of these pollutants below the minimum NAAQS levels. Any area that does not meet these standards is in "nonattainment" or noncompliance with federal air quality standards.

The 1990 CAA amendments expanded the boundaries of the urban areas that were in serious, severe, or extreme nonattainment with ozone or carbon monoxide standards, and reduced the size of those plants (emitting or with the potential to emit pollutants) subject to permitting and other operating requirements. The previous law defined a "major source" as a plant with the potential to emit more than 100 tons of pollutants per year. The new requirements have reduced the level, based on nonattainment levels and NAAQS, to between 10 tons per year up to 70 tons per year.

Title II. The New Source Performance Standards (NSPS) in Title II set minimum nationwide emission limits for classes of facilities (major and minor sources). The NSPS levels reflect the degree of control achievable through the best system of continuous emission reduction for the specific category of sources, the cost of achieving emission reductions, and any non-air quality health and environmental impacts and energy requirements.

Title III. The goal of the National Emissions Standards for Hazardous Air Pollutants (NESHAPs) is to control pollutants that may result in either an increase in mortality or serious irreversible or incapacitating, but reversible, illness. Since 1970, EPA had listed only eight hazardous air pollutants and had established standards for seven. However, the 1990 amendments mandated EPA to develop standards for 189 hazardous substances. The agency was further authorized to create a program for the prevention of accidental releases of hazardous substances.

Title IV. Title IV is aimed at permanently reducing sulfur dioxide emissions to control acid rain. The stated goal is to reduce from the 1980 levels by 10 million tons.

¹ A generic term for any type of particulate emissions.

Title V. The 1990 amendments to the Clean Air Act added Title V that requires states to administer a permit program for the operation of sources emitting air pollutants. The program is similar to the Clean Water Act permit program and significantly changes the way air pollutant sources had been permitted. The program required states to develop and implement a Title V permit program, subject to EPA approval, within a five year timeframe. EPA has the authority to impose and administer its own plan if a state fails to develop or receive federal approval for its permit program.

Major sources that emit or have the potential to emit 100 tons per year of any regulated pollutant and stationary sources that emit or have the potential to emit lesser amounts of hazardous air pollutants are subject to the new permitting requirements. The new permit program is fee-based, statutorily set at \$25 per ton of each regulated pollutant up to 4,000 tons per year. As part of the permit process, a source must submit a compliance plan and certify compliance to the state environmental protection agency. The term of a Title V permit is limited to no more than five years, and sources are required to renew at the end of the term.

Under previous federal law, construction permits were required only for new sources. Existing sources were left largely unpermitted, unless the state elected impose an operating permit.

Title VI. Title VI requires a complete phase-out of the use of Class I and II chemicals, which are ozone-depleting substances (i.e., chlorofluorocarbons, halons, chloroform, and hydrogen). Class I is scheduled to be phased-out by 2002 and Class II by 2030. The EPA has also established regulations on: reductions and emissions of Class I and II substances; servicing of motor vehicle air conditioners; and warning labels on containers of products containing or manufactured with certain ozone depleting substances.

Title VII. Under this law, EPA is authorized to impose administrative penalties of up to \$25,000 per day (up to a maximum penalty of \$200,000 in most instances) for the violation of any environmental protection requirement, prohibition, permit, rule, or order. Also, during on-site investigations of a facilities, inspectors can impose penalties up to \$5,000 per day for each violation. In addition, citizens are authorized to seek civil penalties against violators.

The amendment created new criminal sanctions for negligent violations of environmental protection laws and regulations, and established an administrative penalty process to complement the traditional judicial enforcement program. The fines range from up to \$250,000 per violation or \$250,000 per day for knowing endangerment for individuals, and up to \$500,000 per violation or up to \$1 million per day for knowing endangerment for corporations. The statutorily authorized prison sentences range from five to 15 years.

State law. Connecticut's environmental protection statutes are categorized by media: air; water; and solid and hazardous waste. Air pollution is statutorily defined as the presence of one or more air pollutants in the outdoor atmosphere that are or may be injurious to public welfare, the health of human, animal, or plant life, or property, or may unreasonably interfere with the enjoyment of life and property. The Department of Environmental Protection is responsible for:

- determining the causes, effects, and hazards of air pollution;
- implementing air pollution control education programs;
- adopting and enforcing regulations to control and prohibit air pollution that are consistent with the federal Clean Air Act and Air Pollution Control Act; and
- cooperating with the federal, state, and municipal agencies to control air pollution.

Summary of Significant Hazardous Waste Laws

Hazardous wastes have been an inevitable and dangerous by-product of our industrialized and technology-based society. The first federal attempt to regulate the method of disposal of household, municipal, and industrial refuse occurred in 1965 with the passage of the Solid Waste Disposal Act. It was amended in 1970 by the Resource Recovery Act, which changed the focus of the legislation from the efficiency of disposal to concerns over reclamation of energy and materials from solid waste.

However, neither the federal government nor the states effectively regulated hazardous wastes until the passage in 1976 of the Resource Conservation and Recovery Act (RCRA). This act would represent a more active, regulatory role for the federal government. The purpose of RCRA, which became effective in 1980, is to ensure the proper handling and disposal of municipal and industrial solid wastes nationwide. The requirements promulgated under RCRA have been expanded several times by Congress. The most significant changes occurred in 1984 with the passage of the Hazardous and Solid Waste Amendments (HSWA). These changes served to expand the scope of RCRA (e.g., to include small quantity generators) and increased the degree of detail of many of its provisions. The HSWA attempted to prevent future cleanup problems by imposing stricter requirements for disposal facilities. Taken together the federal actions established a framework to achieve environmentally sound management of both hazardous and nonhazardous wastes.

Purpose and Goals. RCRA represents a different approach to environmental regulation. Unlike other major pieces of federal environmental legislation, such as the Clean Air Act and the Clean Water Act, RCRA's purpose is not to prevent pollution through the issuance of operating permits that specify certain conditions and discharge limitations, commonly referred to as "end of pipe" regulation. Rather, the focus of RCRA is preventative. The intention of the legislation is to prevent spills and improper disposal of hazardous waste by prescribing processes and procedures to ensure the proper management of waste. In short, the goals of RCRA are to:

- protect human health and the environment;
- reduce the amount of waste generated and conserve energy and natural resources; and
- reduce and eliminate the generation of hazardous wastes.

RCRA provides a framework to achieve these goals within its 10 subsections called Subtitles. The most important areas for the purpose of this discussion involve Subtitles C and D.

Subtitle C program establishes a system for controlling hazardous waste from generation until ultimate disposal, which is often referred to as “cradle-to-grave” management. EPA has issued regulations pursuant to this subtitle regarding the generation, transportation, treatment, storage, and disposal of hazardous wastes. Subtitle D program establishes a system for controlling solid (primarily nonhazardous) wastes, such as household waste.

It is important to note that RCRA does not address problems associated with past mismanagement of hazardous wastes. The cleanup of inactive and abandoned hazardous waste sites is covered in RCRA’s companion law, the Comprehensive Environmental Response, Compensations, and Liability Act (CERCLA or Superfund) of 1980.

Delegation to the states. Congress made provisions in RCRA to delegate to the states authorization to implement the federal hazardous waste regulations. To receive authorization, a state must demonstrate that their regulatory program is equivalent to federal authority and at least as stringent as the federal regulations. States may also elect to have a more stringent program or broader in scope.

Connecticut’s program received interim authorization and was working toward final authorization during the mid-1980’s. However, administrative authority reverted to EPA in January 1986, when the state failed to obtain final authorization due to deficiencies in staff resources and certain enforcement policies and procedures. RCRA activities were jointly managed by the state and EPA Region I office until final authorization was obtained on December 31, 1990.

Hazardous Waste Defined. A material must first be classified as a solid waste to be considered a hazardous waste. Solid wastes come in many forms and can be solid, liquids, semisolids, sludges, or contained gaseous material. A solid waste will be considered hazardous if it:

- Exhibits any one of the characteristics of a hazardous waste. The characteristics are toxicity, ignitability, corrosivity, and reactivity;
- Has been specifically listed as a hazardous waste in the regulations;
- Is a mixture containing a listed waste and a non-hazardous waste;
- Is a waste derived from the treatment, storage, or disposal of a listed hazardous waste.
- Is not excluded from regulation as a hazardous waste. (Excluded wastes include domestic sewerage, nuclear material regulated under the Atomic Energy Act, and certain mining materials).

EPA considers certain wastes “acutely hazardous.” These wastes have been determined to be so dangerous in small amounts that they are regulated in the same manner as large amounts of other hazardous wastes. This distinction for regulatory purposes is discussed further below.

Regulated Community. Under RCRA, generators, transporters, and treatment, storage and disposal facilities (TSDFs) are subject to regulation. Broadly speaking, a generator is a business whose processes create a hazardous waste, while a transporter is someone who engages

in the off-site removal of hazardous waste. A TSDF can be any one of many types of facilities that handle (i.e., treat, store or dispose) hazardous waste in a specific way.

Generators. Generators must manage waste according to regulations specific to their generator type. Hazardous waste generators must comply with regulations concerning record keeping and reporting, the labeling of wastes; the use of appropriate containers; storage requirements; the provision of information about the waste's composition to transporters, treaters, and disposers; provide personnel training; and the use of a manifest system to track the waste. RCRA does not require generators to have a permit. Rather it relies on generators to be aware of the regulations and comply with them. In addition, RCRA also relies on the generators to identify themselves to regulatory agencies. The EPA and the states are largely dependent on the willingness of the facilities to notify those agencies that they fall within the regulatory framework of RCRA

The more hazardous waste that a company generates the more restrictive the regulations become. Hazardous waste generators are divided into three categories, according to how much they generate in a calendar month:

- *Large Quantity Generators (LQGs).* LQGs generate greater than or equal to 300 gallons of hazardous waste per month (equivalent to 1,000 kg or about 2,200 lbs.), or greater than .02 gallons (approximately 1 kg or 2.2 lbs.) of acutely hazardous waste. They may only accumulate waste on-site for up to 90 days;
- *Small Quantity Generators (SQGs).* SQGs generate more than 25 gallons (equivalent to 100 kg or about 220 lbs.) but less than 300 gallons (1,000 kg or 2,200 lbs.) of hazardous waste per month. They may not accumulate more than 300 gallons (1,000 kg) of hazardous waste or .02 gallons (1 kg or 2.2 lbs.) of acutely hazardous waste on site at any one time. They may only accumulate waste on-site for up to 180 days; and
- *Conditionally Exempt Small Quantity Generators (CESQGs).* CESQGs generate less than 25 gallons of hazardous waste per month (or equal to 100 kg or 220 lbs.). These generators are exempt from many of the regulations governing hazardous waste generators. They may accumulate hazardous waste on-site as long as they do not have on-site, at any one time, more than 300 gallons (2,200 lbs.) of hazardous waste or .02 gallons (2.2 lbs.) of acutely hazardous waste.

Transporters. Transporters of hazardous waste must also meet certain standards. EPA adopted by reference most of the Department of Transportation's Hazardous Materials Transportation Act regulations that are meant to ensure the safe transportation of hazardous wastes. Anyone who transports a hazardous waste off-site via air, rail, highway, or water is subject to the RCRA transporter requirements. An important aspect of this regulation is the manifest system that is used to track wastes from their point of generation, along their transportation routes, to the place of final treatment, storage, or disposal.

TSDFs. Finally, treatment, storage, and disposal facilities are the only entities that are required to have a permit under RCRA. They must comply with certain operating standards, meet financial requirements in case of accidents, meet personnel training requirements, properly characterize wastes to be managed in the facility, maintain proper record keeping and reporting, and close their facilities in accordance with EPA regulations.

Connecticut Regulated Waste (CRW). Connecticut also regulates certain wastes that do not fall under RCRA. This means that these wastes are neither characteristically nor listed RCRA hazardous wastes. These are called non-RCRA hazardous wastes or Connecticut Regulated Wastes (CRW). A generator of these wastes must manage and dispose of the wastes properly. A facility permit is required (CGS 22a-454) for a business engaged in the storage, treatment, disposal or transportation of these wastes.

There are five different types of wastes that are considered non-RCRA hazardous wastes. They are:

- *Waste PCBs.* Any waste material containing or contaminated by Polychlorinated Biphenyl's in concentrations above 50 parts per billion;
- *Waste Oil.* Oil or petroleum that is no longer suitable for the services for which it was manufactured due to the presence of impurities or a loss of original properties and is not miscible in water;
- *Waste Water Soluble Oil.* Oil or petroleum that is no longer suitable for the services for which it was manufactured due to the presence of impurities or a loss of original properties and is miscible in water;
- *Waste Chemical Liquids.* Any wastes that are liquid, free flowing, and contain liquids and are toxic, hazardous to handle and /or may cause contamination of ground and or surface water if improperly managed. These wastes may include latex and solvent paints wastes, antifreeze and glycol solutions; and
- *Waste Chemical Solids.* Any chemical solid or semi-solid from a commercial, industrial, agricultural, or community activity. These wastes include, but are not limited to grinding dusts, tumbling sludges, scrap plastic and rubber flash and other ground or chipped waste solid.

Summary of Significant Water Laws

The primary regulatory programs directly related to water include: water pollution control (surface and groundwater); water diversion control; land use activity affecting inland wetlands; groundwater contamination remediation; and coastal water management.

The enforcement of water pollution control laws, especially as they pertain to industry and somewhat to publicly owned sewage treatment facilities (POTW) has been the focus of the program review study. Connecticut adopted its own Clean Water Act (CTCWA) in 1967, which served, according to DEP, as a model to Congress for the development of the modern federal Clean Water Act (CWA) enacted in 1972. The objective of the federal act is “the restoration and maintenance of the chemical, physical, and biological integrity of the Nation’s water.” There are two goals under the act: zero discharges of pollutants and water quality that is fishable and swimmable. Both the Connecticut and the federal Clean Waters Acts require a permit for discharge of water, substance or material into state waters. Because of the primacy of federal law in this area, Connecticut permits must be consistent with the federal CWA.

The federal CWA has two major parts: 1)Regulatory requirements applying to industrial and municipal dischargers; and 2) federal financial assistance for municipal sewage treatment plan construction.

Industrial and municipal discharges. The federal Clean Water Act requires that discharges into the nation’s waters are prohibited unless authorized by a permit. A discharge means the emission of any water, substance or material into water, whether or not the substance causes pollution. The concern is that any discharge can upset the chemical, physical, and biological attributes of water.

The National Pollutant Discharge Elimination System (NPDES) is the specific permit program administered by Connecticut under a delegation agreement with EPA. The program covers all discharges to the surface waters of the state. The federal Clean Water Act also has a pretreatment program that covers facilities (nondomestic) that discharge to publicly owned sanitary sewer systems (as opposed to surface waters). The term pretreatment refers to the fact that the facility process wastewater must be pretreated prior to its entering the sewer system so it does not harm the sewage treatment plant operations. Connecticut and federal law cover groundwater discharges.

In order to issue a permit DEP must find the discharge as proposed by the permit seeker will not cause pollution. NPDES permits regulate, among other items, water flow amounts and the manner and nature of discharges. They also require the proper operation and maintenance of any pollution abatement system required by the permit. Effluent regulations categorize wastewater in part based on the type of manufacturing activity that is producing it, based on what typically is involved in those processes. For example, there are specific permit limits set for battery manufacturing, grain mills, and porcelain enameling. Likewise there are distinct requirements for wastewaters from other types of activities, like car washes and dry cleaners.

Regulations also set out “general conditions applicable to water discharge permits”, which a permit holder must obey as well as the specific terms of the permit. All NPDES permits are for five years, as are pretreatment permits, but both may be modified if necessary to reflect changing conditions. A major permit requirement is that the permit holder is required to monitor, measure, and report to DEP on the discharges, on a schedule ranging from weekly, twice per month, or monthly depending on the type of discharge and quantity (daily average flow).

Permit types. The NPDES and pretreatment permits are categorized based primarily on size and nature of discharge. The categories are described mainly to show the variations in water discharges. The NPDES *major* category covers both industrial and municipal discharges. By EPA definition, a facility must score a certain number of points in a rating system, or it may be designated as a major at the discretion of DEP. The designation is designed for discharges that involve “large flows, toxic pollutants, discharge to streams with limited assimilative capacity, or otherwise have capacity or potential to impact human health or environment.”

An *NPDES significant minor* refers to any industrial or municipal direct discharge that does not qualify as a major facility, though other circumstances make them significant. There is no point designation system, but certain factors define significant minors, as follows:

- The facility is subject to EPA categorical effluent guidelines (because of the type of production process conducted at the facility);
- The discharge is significant in volume (>5000 gallons per day) and contains toxic substances; and
- The facility has a problem compliance history and thus should be inspected regularly.

An *NPDES minor* includes wastewater streams that require minimal or no treatment. NPDES major and significant minors are subject to commitments for permitting, inspection and data collection between DEP and EPA, while minors are not.

The pretreatment program involves facilities that discharge to sewer systems, as opposed to directly to surface water. EPA defines a *Significant Industrial User* as an industrial user:

- that is subject to EPA categorical pretreatment standards (because of what they make) regardless of volume; or
- discharges 25,000 gallons per day of process wastewater to a POTW; or
- contributes a process wastestream which is 5% or more of the POTW design capacity; or
- In DEP’s opinion has the potential to adversely affect POTW operations or cause violations of the POTW’s permit.

Municipal facility construction. Federal grants were authorized for the planning, design, and construction of municipal sewage treatment facilities beginning in 1956, although the grant program grew most significantly in 1972. Generally, the grant program provided 55 percent of the project costs, with municipalities responsible for the non-federal share. Federal law changes in 1986 have required a transition to total state and local government financing responsibility for financing after 1994 with a revolving loan program.

Issues related to enforcement arise in part because municipal sewage treatment facilities have discharges regulated by the NPDES program, to the surface waters of the state. As such

they have permit requirements and limits just like industry. A major impediment to meeting permit requirements and increasingly stringent limits is out-of date waste treatment operations. In Connecticut, the same division has been responsible for the administration of the construction grant program and also enforcement against the facilities when warranted.

APPENDIX C

Department of Environmental Protection Compliance Assurance Policy

COMPLIANCE ASSURANCE POLICY

The mission of the Department of Environmental Protection is to protect the public health and welfare and to conserve, improve and protect the natural resources of the State of Connecticut. As trustee of the environment for present and future generations, the Department achieves its mission by controlling pollution through regulation, enforcement, and licensing procedures; by managing the State's parks and forests and other recreational amenities; and by developing and coordinating the State's environmental plans and educational programs with other public and private agencies. Fundamental to accomplishing its mission is the Department's effort to ensure compliance with the laws and regulations that protect human health and the environment. The Department carries out its mission in a way that encourages the social and economic development of the State while preserving the natural environment and the life it supports.

In recent years, traditional strategies of ensuring environmental compliance through issuance of notices of violation, warning notices, administrative orders, consent orders and the institution of lawsuits to require compliance and assess penalties have been augmented by cooperative efforts between the Department and the regulated community. In light of the success of such efforts in many situations, the Department is committed to further supplementing traditional enforcement with financial, regulatory, and technical compliance assistance, including the facilitation and promotion of pollution prevention techniques, to produce a comprehensive compliance assurance program.

The purpose of this Compliance Assurance Policy is to reaffirm the Department's commitment to traditional enforcement methods consistent with the Department's Enforcement Response Policy while at the same time expanding existing compliance assistance efforts. The Department will dedicate resources to better target the appropriate compliance assistance technique to the particular problem of noncompliance. Appropriate use of the various means of compliance assurance will protect public health and the environment in the most cost-effective manner.

THE POLICY

It is the policy of the Department of Environmental Protection to achieve the highest level of environmental protection for the citizens of Connecticut by use of traditional enforcement methods together with financial, regulatory, and technical compliance assistance, when appropriate. The Department is committed to enforcing applicable law by means of administrative orders and lawsuits when serious violations or chronic or recalcitrant violators are involved while at the same time promoting compliance assistance in its planning, permitting, and

enforcement programs. In pursuit of this policy, the Department will act as follows:

- * Traditional enforcement activities will remain the cornerstone of the Department's compliance assurance efforts.
- * Compliance assistance techniques will be considered a counterpart to traditional enforcement.
- * Barriers to compliance will be evaluated for their susceptibility to financial, regulatory and technical assistance designed to bring about voluntary compliance.
- * Compliance assistance strategies will be developed for specific sectors, pollutants or geographic areas where the Department determines that such assistance is an effective way to achieve compliance.
- * The Department will continually evaluate new opportunities for compliance assistance.
- * Partnerships with trade groups, the U.S. EPA and others will be pursued to further Department compliance assistance efforts.
- * If a facility continues to violate applicable law after receiving compliance assistance, the Department will take aggressive enforcement action.

POLICY IMPLEMENTATION

The Air, Waste and Water Bureaus and the Office of Long Island Sound Programs shall develop plans for implementing compliance assurance consistent with this policy within four months. Such plans shall be tailored to the programmatic needs of each bureau. Each bureau and OLISP shall continue their traditional enforcement activities, and shall take steps to improve coordination and communication with the others through multi-media approaches. Such improvements shall be addressed in the compliance assurance plan. Each bureau and OLISP shall designate a compliance assurance coordinator to coordinate compliance assurance efforts within its jurisdiction.

In addition to its other duties, the Air Management Bureau shall coordinate the compliance assistance efforts of the agency consistent with this policy and the Compliance Assistance Guidance Document. Air Bureau responsibilities shall include:

- A. Planning Support. Provide agency-wide compliance assistance planning and review the assistance portion of compliance assurance plans.
- B. Information Management. Review, maintain, and disseminate compliance assistance information among bureaus and information on Department programs to the public and business.

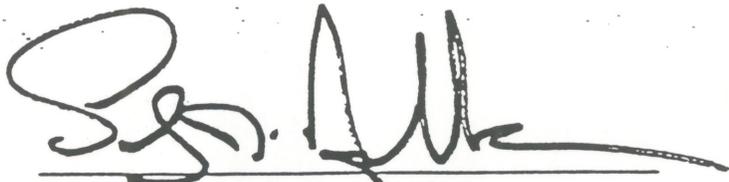
C. Training. Ensure compliance assistance training for the bureaus.

D. Coordination. Facilitate interaction among bureaus; recognize overlaps, redundancies and gaps; guard against inconsistencies; recognize conflicts between media specific approaches; provide continuity and innovation; and coordinate input from stakeholders.

E. Partnerships. Coordinate development of partnerships with businesses and trade associations.

F. Outreach Support. Promote uniformity and provide assistance in mailings, seminar logistics, and development of written materials.

The Air Management Bureau shall work cooperatively with the Water and Waste Bureaus and OLISP through their compliance assurance coordinator. It shall consult with the Office of Pollution Prevention for pollution prevention opportunities in all compliance assistance programs and initiatives. It shall involve the Office of Permits Assistance Ombudsman in its efforts; and seek the comments of the Ombudsman's Office in development and operation of compliance assistance programs and initiatives. Overall policy direction for compliance assistance shall be set by the Assistant Commissioner for Air, Water, and Waste who shall review and approve all compliance assistance programs and initiatives.



Sidney J. Holbrook, Commissioner

23 May 97

Date

This is a discretionary policy document. Its applicability to a given circumstance rests with the discretion of the Commissioner of Environmental Protection or his designee. The policies and procedures in this document are intended solely for the preliminary guidance of employees of the Department. They are not intended to, nor do they, constitute rulemaking for the agency, and they may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department may take an action that is at variance with the policies or procedures contained in this document if the Commissioner considers it appropriate in a specific case.

APPENDIX D

Department of Environmental Protection Civil Penalty Matrix

APPENDIX D

PRIMARY
MATRIX OF ASSESSMENTS
FOR FIRST DAY OF VIOLATION

GRAVITY-BASED PENALTY COMPONENT

EXTENT OF DEVIATION

		MAJOR	MODERATE	MINOR
P O I N T I A F O R H A R M	MAJOR score 11-15	25.000	20.000	15.000
		22.500	17.500	13.750
		20.000	15.000	12.500
	MODERATE score 6-10	12.500	8.750	5.000
		10.625	6.875	4.000
		8.750	5.000	3.000
	MINOR score 1-5	3.000	1.750	500
		2.375	1.125	300
		1.750	500	100

APPENDIX E

DEP Regulatory Bureau Enforcement Data

Table E-1. Air Bureau Enforcement Data

Calendar Year	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
FIELD INSPECTIONS										
PIQ Inspections	429	669	445	483	460	452	531	269	183	234
Stage II Inspections	Program not initiated until 1993									
Title V Inspections	Program not initiated until 1997									
Compliant Inspections	2		442	858	975	808	604	526	479	1341
Multimedia Inspections		3	4	4	6	6	6	8	25	23
Other Types of Inspections	n/a	n/a	245	321	279	530	393	522	469	959
NOV Follow-up Inspections	n/a	n/a	58	99	92	42	17	52	70	51
Order Follow-up Inspections	n/a	n/a	5	4	27	46	19	2	1	1
Autobody Inspections	Program not initiated until 1996									
ADMIN ENFORCEMENT										
NOV's Closed	n/a	n/a	26	37	77	65	92	64	78	23
Stage II NOV's Closed	n/a	n/a					245	516		
"Regular" NOV's Issued	n/a	n/a	122	137	123	111	170	67	92	114
Stage II NOV's Issued	n/a	n/a				245	516			
Instant NOV's Issued	n/a	n/a	0	0	7	8	22	18	26	22
NOV's Referred to Permit/Enforce	n/a	n/a	28	45	61	51	45	24	44	29
NOV's Currently Open	n/a	n/a	0	3	1	6	8	9	32	46
Issued NOV's Closed	n/a	n/a	94	89	68	297	655	52	42	61
# closed in year issued	n/a	n/a	68	54	41	34	70	24	24	34
# closed within 1 year	n/a	n/a	16	23	22	256	548	22	13	27
# closed within 2 years	n/a	n/a	8	7	4	5	30	5	5	0
# closed within 3+ years	n/a	n/a	2	5	1	2	7	1	0	0
Unilateral Orders ISSUED	4	4	4	33	8	8	1	0	2	6
Unilateral Orders Closed	4	8	11	9	19	13	6	1	0	0
Consent Orders Issued	14	5	17	34	53	54	29	27	60	40
Consent Orders Closed	1	1	5	5	39	22	16	6	11	3
Consent Orders w/Penalty	0	1	8	8	21	23	10	5	13	6
Amount of Assessed Penalties	\$0	\$2,800	\$66,102	\$16,000	\$144,800	\$390,700	\$188,025	\$62,482	\$101,900	\$65,850
Amount of Received by DEP	\$0	\$16,445	\$68,321	\$18,549	\$92,903	\$368,323	\$250,500	\$72,810	\$104,272	\$63,850
Cease & Desist Orders Issued	0	0	0	0	1	0	0	0	0	0
AG Referrals	1	1	0	4	6	5	4	4	6	5
EPA Referrals: Civil	0	0	0	0	0	0	0	0	0	0
EPA Referrals: Criminal	0	0	0	0	0	0	0	0	0	0
State's Attorney Referral	0	0	0	0	0	0	0	0	0	0
Amount Judicial Penalty Assessed	\$5,000	\$0	\$7,500	\$0	\$30,000	\$60,000	\$74,000	\$35,000	\$116,000	\$126,200
Amount Judicial Penalty Received	\$10,000	\$0	\$7,500	\$0	\$5,000	\$85,000	\$80,000	\$35,000	\$111,000	\$143,350
Total Number of SEPs	0	0	0	0	2	1	1	1	11	3
Total Value of SEPs	\$0	\$0	\$0	\$0	\$340,000	\$70,000	\$6,000	\$30,000	\$1,331,360	\$34,255

Table E-2. Bureau of Water Management Permitting, Enforcement and Remediation Division (PERD) Enforcement Data

Calendar Year	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
FIELD INSPECTIONS										
Inspections (Noncomp.)-Industrial	503	551	564	512	488	478	406	352	288	423
Inspections (Noncomp.)-Municipal	256	296	153	238	225	264	132	67	39	104
Inspections-Complaints all	283	385	364	348	333	317	326	335	316	362
ADMIN ENFORCEMENT										
NOVs Issued-Industrial	0	0	0	0	155	327	221	130	109	441
NOVs Issued-Municipal	0	0	0	0	0	7	14	48	2	0
NOVs Issued-Remediation	0	0	0	4	22	8	13	7	4	9
NOV Issued-Subsurface	0	0	0	0	0	0	0	0	0	1
TOTAL NOV's ISSUED	0	0	0	4	177	342	248	185	115	451
Unilateral Order Issued-Industrial	23	11	4	1	1	2	0	3	1	3
Unilateral Order Issued-Municipal	25	29	16	6	13	9	11	10	3	3
Unilateral Order Issued-Remediation	43	34	22	18	6	2	7	0	5	7
Unilateral Order Issued-Subsurface	14	14	11	4	1	3	3	7	7	6
TOTAL UNILATERAL ORDERS	105	88	53	29	21	16	21	20	16	19
Consent Order Issued-Industrial	24	18	13	7	3	3	2	4	2	18
Consent Order Issued-Municipal	1	4	3	3	17	1	2	2	1	3
Consent Order Issued-Remediation	12	11	7	3	6	1	5	12	7	5
Consent Order Issued-Subsurface	3	4	2	3	2	0	2	5	4	3
TOTAL CONSENT ORDERS	40	37	25	16	28	5	11	23	14	29
Consent Order w/Penalty-Industrial	19	12	23	6	1	1	2	1	2	15
Consent Order w/Penalty-Municipal	0	0	0	0	0	0	0	0	0	0
Consent Order w/Penalty-Remed.	1	2	0	0	0	0	0	0	0	0
Consent Order w/Penalty-Subsurface	1	1	0	4	1	0	0	0	0	0
TOTAL CO W/PENALTY	21	15	23	10	2	1	2	1	2	15
Amount Assessed-Industrial	\$203,550	\$380,400	\$706,983	\$194,125	\$54,050	\$56,000	\$96,000	\$10,000	\$144,368	\$328,088
Amount Assessed-Municipal	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Amount Assessed-Remediation	\$23,500	\$38,000	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Amount Assessed-Subsurface	\$20,000	\$20,000	\$0	\$22,650	\$1,600	\$0	\$0	\$0	\$0	\$0
TOTAL ASSESSED PENALTIES	\$247,050	\$438,400	\$706,983	\$216,775	\$55,650	\$56,000	\$96,000	\$10,000	\$144,368	\$328,088
AG Referrals	75	51	37	27	16	12	16	4	12	12
Amount of Judicial Penalty Assessed	\$803,760	\$940,900	\$1,591,450	\$542,293	\$1,393,000	\$75,000	\$15,000	\$3,175,000	\$558,600	\$2,791,000
State's Attorney Referrals	0	0	0	0	0	0	0	0	0	0
EPA Referrals-Civil	1	0	0	0	0	6	4	1	1	2
EPA Referrals-Criminal	1	0	0	0	0	0	5	3	3	6
Total Number of SEPs	0	1	0	2	2	1	0	1	3	4
Total Value of SEPs	\$0	\$60,000	\$0	\$60,000	\$450,000	\$100,000	\$0	\$42,500	\$410,000	\$170,000

