

J. Smith

**OHIO DEPARTMENT OF NATURAL RESOURCES
DIVISION OF RECLAMATION**

**POLICY/PROCEDURE DIRECTIVE
LEGAL 93-1**

REPLACES LEGAL 90-1 (REMOVE FROM PPD FILE)

Subject: Alternative Enforcement

Effective: June 23, 1993

Purpose: The purpose of the alternative enforcement program is to secure abatement of any unabated violation which remains unabated following the capping of civil penalties after 30 days of assessment for non-compliance. See OAC 1501: 13-14-03 (D) (2).

Whenever a failure to abate cessation order (FTACO) is received by the Inspection & Enforcement section, the section's secretary submits a copy of the FTACO to the assessment officer to be processed. The FTACO is logged manually and by computer. Every unabated violation which remains unabated at the end of the 30 day assessment for non-compliance shall be re-inspected by the inspection staff on the next work day following the end of the 30 day assessment. If the violation remains unabated at the time of the inspection, the inspector shall request alternative enforcement through his or her supervisor. The supervisor shall direct a completed copy of the attached Alternative Enforcement Action form to the Inspection & Enforcement manager and request one of the following forms of alternative enforcement:

- A. Injunctive Relief (Civil Action) (ORC Section 1513.15)
 1. May be used when operator, corporate or individual(s), receives a Notice of Violation (NOV) for an on-site violation that is not merely procedural or administrative in nature. The Division also would pursue injunctive relief in imminent harm cases well before the expiration of any thirty day period of non-compliance. Criteria which would support a referral for injunctive relief include:
 - a) Operator continues to mine after issuance of a failure to abate cessation order issued for non-compliance to a violation;

- b) Serious environmental harm results, either on or off the permit, from the underlying violation;
 - c) Off-permit damage results from the unabated violation; or
 - d) Public health or safety is threatened by the unabated violation.
2. Recommendations for injunctive relief are referred to the Attorney General. An assistant attorney general is to file for injunctive relief within 30 days following a referral.
- B. Criminal Action (ORC Section 1513.17)
- 1. May be used only in extreme or serious situations involving knowing or willful conduct. Criteria which would support a referral for criminal action include:
 - a) Wildcat operation;
 - b) Habitual violator, serious violation;
 - c) Actions or failures to act which are willful or of such a flagrant nature to shock and which cause serious environmental harm or endanger's public health or safety; or
 - d) Falsification of documents.
 - 2. Recommendations for criminal action are referred to the Attorney General for transmission to the local county prosecutor.
- C. Suspension or revocation of the permit based on pattern of violations (ORC Section 1513.02 (D)(3))
- 1. Patterns identified under rule 1501: 13-14-02, including patterns based on failures to comply, will support a recommendation and decision to pursue revocation or suspension of a permit. This option should be pursued in a timely manner and be considered for active operations. Revocation or suspension of an inactive operation may have little effect on gaining abatement. Recommendations for suspension/revocation of permit are not referred to the Attorney General but are processed by the Inspection & Enforcement Section.

2. Whenever a cessation order is issued due to failure to abate, the permittee's history of violations shall be reviewed to determine whether a pattern of violations exists. Cessation Orders are to be considered along with Notices of Violation instead of only Cessation Orders or only Notices of Violation. For example, if there are two Notices of Violation and one of the Notices went to Cessation Order, this constitutes a pattern of violations. However, one Notice of Violation going to a FTACO does not constitute a pattern of violations.

3. When it is determined that a pattern of violation exists that was caused by the permittee willfully or through unwarranted failure to comply, a show cause order shall be issued.

D. Individual Civil Penalties (ORC Section 1513.40)

1. May be used in the event a corporate permittee receives a Notice of Violation (NOV) or fails or refuses to comply with an NOV upon the direction or authorization of an officer, agent, or director. Recommendations for individual civil penalties are not referred to the Attorney General but are processed by the Inspection & Enforcement Section.

2. Proposed individual civil penalty assessments are issued to each officer of a corporate permittee each time that permittee receives a failure to abate cessation order. The proposed individual civil penalty becomes a final individual civil penalty when the violation remains unabated 30 days after the proposed individual civil penalty is received by the officer. Additional alternative enforcement action is to be considered on a case by case basis.

E. No Referral

1. The criteria which would not support a referral for alternative enforcement action include:

a) Administrative violation only;

b) Cessation order is under administrative review with temporary relief granted;

- c) Documentation exists showing the permittee likely lacks the financial ability to abate the violation or to pay individual civil penalty assessments due to net worth considerations.
2. Sound reasoning must be used and documented in writing when there is a decision not to pursue alternative enforcement. For example, documentation must include formal asset determinations or other documentation to demonstrate the financial status of the permittee has been reviewed and considered. At a minimum, it should be documented that injunctive relief was considered, justified why it was not pursued, and a basis for the decision should be provided.

All unabated violations are to be reviewed and evaluated for alternative enforcement, with consideration given to which method of enforcement is best suited to secure abatement of the violation in question. Bond forfeiture is not a substitute for alternative enforcement action.

A copy of the cessation order, the notice of violation and any other pertinent information, e.g. inspection reports, should be attached to the Alternative Enforcement Action form. The Inspection & Enforcement manager shall monitor the cessation orders to assure timely receipt of the district recommendations and to assure that the recommendations include the required information.

Decisions on alternative enforcement recommendations and referrals will be issued in a timely manner. Decisions should be reached within 60 days of issuance of the cessation order. Alternative enforcement action is not to be postponed except under extraordinary circumstances. For example, the fact a permit is in the process of being transferred is not a reason to postpone alternative enforcement action.

Upon receipt, the manager of Inspection & Enforcement shall review requests for alternative enforcement with the Division's General Counsel and other legal staff as appropriate. Each situation will be reviewed on a case by case basis taking into account:

- A. Which form of alternative enforcement is best suited to gain compliance; and
- B. Which type of alternative enforcement will strengthen the overall enforcement program.

After the violation is evaluated, the Inspection & Enforcement manager in conjunction with the legal staff will determine which type of alternative enforcement mechanism is appropriate and will advise the field supervisor. If a criminal or civil action is appropriate, General Counsel will coordinate additional information from the Division's field staff. If permit suspension or revocation, or individual civil penalties are appropriate, the Inspection & Enforcement manager will coordinate the enforcement mechanism with field staff.



Glen G. Kizer, Chief