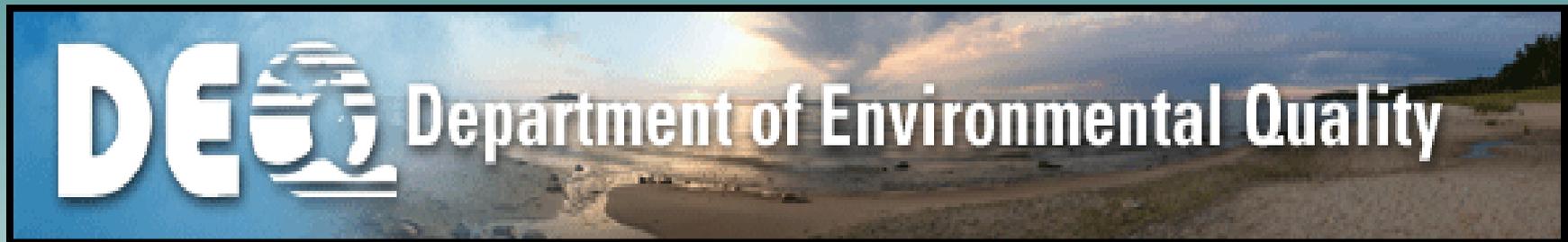


2012 Michigan Environmental Compliance Conference

# **When Compliance Fails:**

**The Escalated Enforcement Process  
for Violation of Water Laws**

Presented by:





## WRD: Enforcement Units

- **Katelyn Wysocki:**
  - Water Quality Enforcement Unit
  - Office in Lansing
  - Contact: 517-373-3473,  
[wysockik@michigan.gov](mailto:wysockik@michigan.gov)
- **Enforcement Units**
  - Water Quality Enforcement Unit
  - Water Resources Enforcement Unit



## Who We Are

- **Water Resources Division (WRD)**
  - A division of the DEQ
  - Est. in 2010: combining of the former Water Bureau and Land and Water Management Division.
  - Protects and monitors Michigan's waters
  - Swimmable, fishable, fish safe to eat and healthy aquatic ecosystems.



# Compliance vs. Enforcement

- **Compliance Activities**
  - WRD Field Staff
  - Permitted and Non-permitted Activity
- **Enforcement Activities**
  - WRD Field Staff and Enforcement Unit
  - Permitted and Non-permitted Violations
- **Enforcement Threshold**
  - Based on Egregiousness, length of time in violation and cooperation.



# Escalated Enforcement

- ***Definition:***

The enforcement process required to resolve unsettled violations of laws and permits that results in an administrative agreement or civil litigation and contains a compliance program and appropriate civil fine. Escalated enforcement may also include criminal prosecution.



## Escalated Enforcement, cont'd

- **Determine: *What to Enforce:***
  - law, violations
- **Determine: *Who is responsible***
  - Ownership, liability
- **Determine: *How to resolve violations***
  - Formal resolutions, including administrative agreements, litigation and prosecution.



## Waters of the State

- **WOS are protected for legal uses, including:**
  - Public Health; Domestic; Commercial; Recreational; Agricultural; Riparian uses; Livestock and Wild Animal uses; and Fish and Game.
- **Examples of WOS:**
  - Groundwater; Surface Water; Wetland; Storm Water Discharge Points; Most County Drains and Ditches; Streams, Rivers, Ponds, Lakes, and all other Watercourses and Waters (ephemeral or not), including the Great Lakes, within the jurisdiction of the State.



## Discharges to WOS

- **Any Direct or Indirect Discharge (Release) of:**
  - Any Waste;
  - Waste Effluent;
  - Wastewater;
  - Pollutant; or
  - Combination thereof into any of the WOS or upon the ground.



# Site Ownership

## OWNER:

- Legal owner of the property.
- Person in legal possession of the property and who is responsible for the activities conducted onsite.



## Types of Ownership

- **Deed**
  - Warranty Deed; Title; Quit Claim Deed
- **Easement Holder**
  - A certain right to use the real property of another without the possession of that property.
- **Landlord and Tenant**
  - Contractual responsibilities



# Liability

- **Individual**

- Natural Person
- Sole Proprietorship (“doing-business-as”)

- **Operator**

- Can be the Owner
- Contracted by the Owner

- **Business**

Corporation (Inc.); Limited Liability Company (LLC); Limited Liability Partnership (LLP)



# Escalated Enforcement Process

**3 Types of  
Enforcement**

**Administrative  
Process**

**Civil  
Process**

**Criminal  
Process**

# **Administrative Enforcement Process**

- **District Actions**

- Identify Potential Civil and/or Criminal Violations
- Violation Notice-1<sup>st</sup>
- Violation Notice-2<sup>nd</sup>
- Determine if “Parallel Proceedings” (Concurrent Criminal Action) are Appropriate\*
- Enforcement Notice
- Administrative Consent Order (District or EU)



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
LANSING



DAN WYANT  
DIRECTOR

*NOTICE No. EN-000\*\*\**

CERTIFIED MAIL

NAME AND ADDRESS OF OWNER

ENFORCEMENT NOTICE

Dear Mr./Ms. :

SUBJECT: **Name of Owner**  
**Address**

THE DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ), WATER RESOURCES DIVISION (WRD), Lansing District Office, has referred this matter (hereinafter "facility") to the Enforcement Unit requesting escalated enforcement actions for violations of law as set forth herein.

PLEASE BE ADVISED that the Owner has failed to comply with *\*List Laws Here\**

YOU ARE **FURTHER** ADVISED THAT the **DEQ**, **WRD** has identified the following violations at the facility: *\*List Violations Here\**

**OWNER** IS HEREBY NOTIFIED that the violations identified in this Enforcement Notice



## **Referral to Enforcement Unit**

- **Enforcement Notice**
- **Settlement Meetings**
  - Part 15 of the NREPA: Duty to offer a meeting
  - Discuss case resolution
    - Factual Allegations
    - Compliance Requirements
    - Penalties; Fines; Relief
- **Enforceable Agreement if Negotiations are Successful**



# Settlement Process

## Enforcement/Settlement Process for a “Mutual Agreement”

- Initial Discussions
- Document Framework Selection
- Negotiation Process
- Final Negotiations include:
  - Factual Recitation; Compliance Requirements; Fine/Penalty Resolution
- Enforceable Agreement: Administrative Consent Order



# Fines and Penalties

- **Civil Fines:**
  - Minimum and Maximum Prescribed by Statute
  - Obtained Through Court Action
- **Other Penalties:**
  - Cost Reimbursement
  - Injunctive Relief, i.e. “temporary restraining order, (TRO)”
  - Preliminary and Permanent Injunctions



# Administrative Consent Orders

- **District ACO (DACO)**
  - Specific to certain programs and violations.  
Negotiated by District Staff
- **General ACO**
  - ACO developed for a specific program or regulated industry. For example, some types of unpermitted discharges can be resolved by the submittal of a “Certificate of Entry” form.
- **Individual ACO**
  - Negotiated by Enforcement Staff, District Staff, Assistant Attorney General and Defendant

THIS DOCUMENT IS FOR SETTLEMENT DISCUSSIONS ONLY AND IS EXEMPT  
FROM FOIA AND NOT ADMISSABLE IN COURT UNDER MRE 408

**STATE OF MICHIGAN  
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT  
WATER BUREAU**

In the matter of:

ACO-SW \_\_\_\_\_ - \_\_\_\_\_

Date Entered: \_\_\_\_\_

Name

Address

City, State Zip Code

\_\_\_\_\_ /

**ADMINISTRATIVE CONSENT ORDER**

This document results from allegations by the Department of Natural Resources and Environment (DNRE), Water Bureau (WB). The DNRE alleges **{Name of violator}** located at **{address, City, State, County}**, is in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 et seq. **{Name of Violator}** is a person, as defined by Section 301 of the NREPA, and is registered with the Michigan Department of Energy, Labor, and Economic Growth as able to conduct business in the State of Michigan under identification number **{number}**. **{Name of violator}** and the DNRE agree to resolve the violations set forth herein through entry of an Administrative Consent Order (Consent Order).



# Litigation

- **Civil Action**
  - Enforcement Unit refers case to the Department of Attorney General
  - Attorney General Files Complaint
  - Resolution
    - Settle the Allegations with a Consent Judgment “Mutual Agreement”; OR
    - Trial



# Criminal Prosecution

- **Local prosecutor handles most misdemeanor cases**
- **Department of Attorney General handles most felony cases**
- **All statutes have criminal provisions**
  - Knowing violations
  - Strict liability
- **Sanctions**
  - Fines
  - Jail time



## Questions?

- Enforcement Process Questions?
- Others?
- Case Example to show the whole escalated enforcement process:



## Case Example

### Fruit Production and Canning, LLC

- 500 acre commercial apple orchard.
- Sells whole apples in bulk and processes apples for canning.
- The LLC receives metal from a manufacturer with which they create the cans; and then the LLC fills the cans with apple product.



## LLC's violations

- **Regulated Activities and Violations:**
  - The residual dilute apple juice and apple pulp from the production is land-applied as wastewater on a 100 acre parcel. Sometimes, the wastewater is over-applied and discharges to a nearby lake. **(Groundwater Permitting and Part 31 Violations)**
  - Wastewater in the form of contact cooling water and apple wash water is discharged to a nearby stream through a subsurface pipe running from the production area. Sometimes, the effluent limits for BOD are exceeded. **(NPDES permit violations)**



## LLC's Violations, Continued

- 10,000 gallons-per-day (GPD) of high-strength wastewater is sent to POTW after pre-treatment by the LLC. Sometimes, a slug of Nitrogen is sent that exceeds the local limit causing the POTW to violate its NPDES.

### **(Industrial Pre-treatment Program violations)**

- The metal scraps and metal waste from making the cans is kept outdoors in several uncovered mesh containers before the scraps are eventually disposed of in a dumpster.

### **(Industrial Storm Water Program violations)**



## Enforcement Process

- The DEQ's Cadillac District sent the LLC a Violation Notice (VN) on August 30, citing the violations of Part 31 discovered during an inspection.
- The VN requested compliance with Part 31 and a written response by September 30.
- No response was received and upon a second inspection, the DEQ determined that the violations were ongoing.
- A second Violation Notice (SVN) was sent on October 15.



## Enforcement Process Continued

- A written response was required by November 7. No response was received.
- The District office referred the case for escalated enforcement on December 15.
- The Enforcement Unit sent the LLC an Enforcement Notice on January 30 that included an opportunity for requesting a meeting to discuss resolution of the violations.
- The LLC then requested a meeting on February 30.
- The meeting was held in Lansing.



## Enforcement Process Continued

- The LLC agreed to settle the violations through entry of an Administrative Consent Order (ACO).
- The draft ACO was mailed to the LLC for review and comments.
- In a follow-up meeting the parties reached agreement on the terms and conditions of the ACO that included the factual allegations, the compliance schedule and the civil fine.
- The details were finalized and the ACO was executed by the parties on May 1.



## Settlement Results

- The LLC agreed to reduce the land-application rate and conduct monitoring to ensure that agronomic application rates were maintained and no ponding, over-saturation or runoff would occur.
- The underground drainage tiles were broken or removed to prevent further discharges to the stream.



## Settlement Results, Cont'd

- The onsite pretreatment system was upgraded and modified to ensure that no further discharge of excess nutrients to the POTW occurred.
- Structural controls were installed to relocate and cover the metal waste bins to prevent contact with precipitation and leaching to the ground.



## Civil Fines

- The LLC paid a civil fine of \$150,000, \$10,000 in enforcement costs, and \$40,000 in Natural Resource Damages to the stream.

# Questions?



**Sinking...**

**Sinking...**

**Sunk!**

**tow truck**

