

ENVIRONMENTAL PROTECTION COMMISSION[567]

Amended Notice of Intended Action

Pursuant to the authority of Iowa Code section 455B.105, the Department of Natural Resources (Department) hereby gives notice of additional public hearings for new Chapter 17, “Compliance and Enforcement Procedures,” Iowa Administrative Code. Further, in response to public comments already received, the Department is providing more information about how the Department intends to implement Chapter 17.

The original Notice of Intended Action for proposed Chapter 17 was published in the Iowa Administrative Bulletin on March 21, 2012, as **ARC 0051C**, and a public hearing was held on April 23, 2012. An Amended Notice of Intended Action was published in the Iowa Administrative Bulletin on May 16, 2012, as **ARC 0126C**, extending the public comment period to August 16, 2012. The Department is not proposing any changes to the rule language proposed for Chapter 17 as published in **ARC 0051C**.

The Department is holding three additional hearings to allow the public further opportunity to provide input. The public hearings will be held as follows:

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| July 18, 2012 | 1 to 2:30 p.m. | Kirkwood Community College
Iowa City Campus, Room 263
Credit Center, Main Campus Bldg.
1816 Lower Muscatine Road
Iowa City, Iowa |
| July 31, 2012 | 1 to 2:30 p.m. | North Iowa Area Community College
Conference Center Bldg.
Rooms NC180 E & F
500 College Drive
Mason City, Iowa |
| August 7, 2012 | 1 to 2:30 p.m. | Des Moines Area Community College
Carroll Campus, Rooms 142-144
906 N. Main Street
Carroll, Iowa |

Any person who intends to attend a public hearing and has special requirements, such as those related to hearing or mobility impairments, should contact Christine Paulson at (515)242-5154 or by E-mail at christine.paulson@dnr.iowa.gov to advise of any specific needs.

Any person may make written suggestions or comments on proposed Chapter 17 on or before August 16, 2012. Written comments should be directed to Christine Paulson, Department of Natural Resources, Air Quality Bureau, 7900 Hickman Road, Suite 1, Windsor Heights, Iowa 50324; fax (515)242-5094; or by E-mail to christine.paulson@dnr.iowa.gov. All comments must be received no later than 4:30 p.m. on Thursday, August 16, 2012.

As described in the original Notice, the purpose of proposed Chapter 17 is to affirm the variety of compliance and enforcement options the Department may consider in responding to possible violations of environmental statutes, rules, permits, licenses, certifications, and plans. The Department has used these or similar procedures for many years, and this chapter simply formalizes this practice.

During the comment period and at the public hearing held on April 23, 2012, the Department received comments asserting that the proposed chapter weakens the Department’s ability to enforce environmental requirements. The commenters expressed concern that the proposed rules favor large industrial or agricultural interests and that the Department will not fine or penalize those who violate rules or permits established to protect public health and the environment. The commenters were particularly concerned about manure spills, fish kills, and impacts to water quality but also expressed concern about weakened enforcement of all environmental regulations.

The Department intends to continue taking appropriate enforcement action in response to violations, including entering into administrative consent orders or issuing administrative orders that assess penalties and require corrective action, and recommending that the Environmental Protection Commission (Commission) refer violations to the Attorney General. The proposed chapter simply illustrates how the Department already works with regulated entities to ensure that regulated entities understand how environmental requirements apply to them; how to comply with these requirements; and what the consequences are if they violate these requirements.

As noted in the preamble of the original Notice and in proposed Chapter 17, the compliance and enforcement activities listed in Chapter 17 in no way preclude further enforcement specified in 567—Chapter 10, referral to the Attorney General or other Department enforcement actions specified under Iowa statute. The listed activities are not intended to be a hierarchy of the Department’s actions in response to a specific violation or enforcement case, nor are these activities intended to be mutually exclusive. The listed activities are meant to be tools that the Department may use, and use of these tools is solely at the Department’s discretion.

If the Department has information that an environmental violation has occurred, the Department needs to ensure that there has in fact been a violation and procure the pertinent facts in the case. Investigating a possible violation may include meeting with the responsible party(ies) or sending a letter. As appropriate or as specified under Iowa statute, the Department may issue a Notice of Violation to the responsible party(ies). In these meetings or letters, the Department will typically request that the responsible party(ies) initiates corrective action as expeditiously as possible. Meeting with regulated entities or sending letters in no way precludes the Department from taking the formal enforcement actions prescribed in Chapter 10 or from recommending referral to the Attorney General. In some cases, such as a case that involves a clear and serious violation or a repeat violation, the Department may forego meetings or letters and take administrative action or recommend an Attorney General referral.

The Department has long-standing procedures for each environmental program area to ensure appropriate enforcement actions. The Department continues to improve these procedures to ensure consistency within environmental program areas and in the field. However, the Department must also have enforcement discretion to respond appropriately to the different circumstances of each violation. As proposed in Chapter 17, the types of compliance activities the Department may use to respond to possible environmental violations are:

Informal Meeting: As needed or upon request, the Department will meet with company representatives, organizations, members of the public, consultants, or other interested stakeholders about any issue the Department oversees. In fact, the Department frequently corresponds with regulated entities to answer questions, explain regulations, request information, and make recommendations. Meetings are often helpful to the regulated party(ies) because the meetings facilitate clear communication and provide compliance assistance. Further, meetings are often an important step for the Department to determine if a violation has, in fact, occurred.

Some examples of the informal meetings that may occur between the Department and a regulated party include, but are not limited to, the following:

- General: An “exit interview” with facility staff following an onsite inspection;
- Animal feeding operations: A meeting with the owner or operator to explain manure management plan and construction permit requirements;
- Animal feeding operations: A meeting with the owner or operator of a proposed facility to determine if the facility is classified as a “medium” or “large” operation, if the facility is required to obtain a National Pollution Discharge and Elimination System (NPDES) permit, or if the facility satisfies minimum manure control requirements;
- Air quality: A conference call with a facility manager and company consultant to explain the emissions monitoring and record-keeping requirements of a new air construction permit;
- Solid waste: A meeting with the owner or operator of a sanitary disposal project to discuss the regulatory requirements (e.g., special waste authorizations, monitoring and record keeping); and
- Underground storage tanks: A meeting with an underground storage tank owner to discuss certification requirements, spill prevention or proper tank closure.

The examples provided are meant to illustrate the types of meetings the Department may have with regulated entities and are not an exhaustive list of the kinds of meetings that may occur. Holding meetings with owners or operators of regulated facilities does not prevent the Department from pursuing administrative penalties or other enforcement actions to address environmental violations.

Letter of Inquiry (LOI): The Department may send a letter of inquiry to request additional information from an owner or operator if the Department suspects that a violation has occurred, especially if a meeting would be impractical or is insufficient. If there is already sufficient information to determine that a violation has occurred or is occurring, the Department may not send an LOI. If, following the LOI, the Department verifies that a violation exists, the Department may proceed with issuing a letter of noncompliance, notice of violation, or administrative order or may proceed with other enforcement action.

Some examples of instances in which the Department would send an LOI include, but are not limited to, the following:

- Animal feeding operations: To determine the regulatory status of a confinement feeding operation, the Department may send an LOI requesting that the owner or operator provide information on the facility ownership, the facility's animal unit capacity, or the initial construction date(s) of buildings at the facility;
- Animal feeding operations: The Department may send an LOI to request information from a confinement feeding operation about updates to the operation's manure management plan;
- Air quality: A company informs the Department that the company has switched spray coatings on one of its facility's paint lines and is now using a coating with a higher volatile organic compound (VOC) content. The Department may send an LOI to request material safety data sheets and usage records to determine if the facility is in compliance with its permitted VOC limit;
- Air quality: A company submits emissions inventory data showing actual air emissions greater than the potential to emit listed in the permit. The Department may send an LOI to inform the owner or operator of this issue and to request additional information;
- Solid waste: The Department receives a Notice of Cancellation on a financial assurance mechanism for a sanitary disposal project. The Department may use an LOI to inform the facility of this issue and to request additional documentation to ensure that adequate financial assurance is maintained;
- Solid waste: Following an investigation or inspection, the Department may send an LOI requesting that an owner or operator of a sanitary disposal project verify proper solid waste disposal by providing the Department with documentation of the origin of waste and the waste disposal receipts;
- Underground storage tanks: The Department may send an LOI to request documentation indicating that the vapor recovery system test at a gasoline-dispensing facility has been completed and is in compliance with air quality and underground storage tank requirements; and
- Underground storage tanks: The Department may send an LOI to request financial assurance documentation for an underground storage tank.

The examples provided are for illustrative purposes only and are not an exhaustive list of potential situations for which the Department may send an LOI. Sending an LOI does not limit the Department's enforcement discretion.

Letter of Noncompliance (LNC): The Department intends to use the LNC to respond to a first-time minor violation, such as a late report or missed notification. In most cases, the Department will not use an LNC for a violation that results in documented or predicted harm to public health or the environment, a repeat violation, or a violation that continues for a long period of time.

Some examples of violations for which the Department may send an LNC to the responsible party(ies) include, but are not limited to, the following:

- Animal feeding operations: First-time failure of an owner or operator of an animal confinement feeding operation to properly maintain an earthen basin or storage structure or to provide adequate freeboard in a manure storage structure, which does not result in a manure release;
- Air quality: A company voluntarily discloses that it installed a new piece of equipment without obtaining the required air quality construction permit. The disclosure is made before the Department discovers the violation through an inspection or other investigation. It is determined that the installation

was not subject to another air quality program such as Prevention of Significant Deterioration (PSD), Title V, or federal air toxics standards, and there was no predicted impact to ambient air quality standards. It is also the first time the company violated this requirement;

- Air quality: A company is required to operate a continuous emissions monitoring system (CEMS) on an air emissions source, such as a utility boiler. The Department discovers that the CEMS was not operational for greater than 5 percent of the emissions source operating time. However, the source's total operating time was minimal, and the CEMS downtime did not substantially interfere with determining compliance with the emission limit;

- Solid waste: Failure to submit report(s) as required by the date specified in the sanitary disposal project permit or applicable administrative rule;

- Solid waste: Following an investigation or inspection, the Department may send an LNC to notify the public or private agency that applicable separation distances for the burial of farm waste, farm buildings or farm animals were not met;

- Underground storage tanks: Failure to submit a report(s) for tiered site assessment, corrective action, or site monitoring for a leaking underground storage tank site;

- Wastewater: First-time failure of an owner or operator to maintain a wastewater treatment facility provided that the failure does not result in a water quality violation;

- Water supply: First instance of submission of a public water supply (PWS) required report or fee payment a few days after the due date;

- Storm water: First-time failure of an owner or operator to comply with the site's source water protection plan (SWPP) provided that the failure does not cause a water quality violation; and

- Flood plains: First-time failure of an owner or operator to obtain the required flood plain development permit before initiating construction.

These examples are for illustrative purposes only and are not an exhaustive list of potential violations for which the Department may send an LNC. Sending an LNC does not limit the Department's enforcement discretion. In some situations, these violations may result in further enforcement.

Notice of Violation (NOV): An NOV is one of the actions the Department may take to respond to more significant violations or repeat violations or when the regulated party does not respond to an LNC to correct violations. In general, the Department will issue an NOV for a violation of a standard or permit condition that is meant to protect public health or the environment.

Some examples of violations for which the Department may send an NOV to the responsible party(ies) include, but are not limited to, the following:

- General: Violation of any consent decree or administrative order;

- Animal feeding operations: A manure discharge that results in a water quality violation or fish kill;

- Animal feeding operations: An unpermitted or unauthorized manure discharge to waters of the state;

- Animal feeding operations: Failure of a medium or large animal feeding operation to have the required NPDES permit;

- Animal feeding operations: Manure discharged to waters of the state from an overflow from a confinement feeding operation's storage basin or due to misapplication of manure;

- Animal feeding operations: Failure of a confinement feeding operation to submit an annual manure management plan update or failure to submit a complete manure management plan every four years, including providing an updated phosphorus index and updated soil samples;

- Animal feeding operations: Failure of a confinement feeding operation to contain manure between periods of manure application;

- Air quality: Violation of an air pollutant emission limit detected during a stack test;

- Air quality: Violation of an air quality testing, monitoring, record-keeping, or reporting requirement if the violation substantially interferes with the Department's ability to determine compliance with air pollutant emissions limits or air quality standards;

- Air quality: Failure to obtain an air quality PSD or New Source Review permit or failure to apply for a Title V Operating Permit;

- Solid waste: Constructing or operating a sanitary disposal project without a permit or modifying an existing sanitary disposal project without first obtaining the required permit;
- Solid waste: Discovery during a Department inspection or site visit that a business has improperly disposed of solid waste (e.g., trade waste or asbestos);
- Underground storage tanks: Failure to report a petroleum release at an underground storage tank facility;
- Wastewater: A wastewater facility's significant noncompliance with effluent limits;
- Water supply: Violation of the Safe Drinking Water Act standards, including failure to collect required drinking water samples, failure to comply with provisions of a drinking water operation permit, or exceeding maximum contaminant levels in drinking water sample results;
- Storm water: Storm water runoff resulting in a water quality violation; and
- Flood plains: Repeat instance of an owner or operator constructing in the regulatory flood plain without Department approval.

These examples are for illustrative purposes only and are not an exhaustive list of potential violations for which the Department may send an NOV. Sending an NOV does not limit the Department's enforcement discretion. In some situations, these violations may result in further enforcement. The Department may follow an NOV with the administrative procedures specified in Chapter 10, may recommend that the Commission refer the case to the Attorney General, or may pursue any other enforcement action allowed under Iowa statute.

The Department typically finds that no two violations are identical. It is difficult, if not impossible, for the Department to predict what enforcement action will be necessary or appropriate before a violation occurs. This is why proposed rule 567—17.4(455B) clearly reiterates the Department's enforcement discretion in addressing all violations. The Department intends that the procedures described in proposed Chapter 17 inform the regulated community and the public of the possible compliance and enforcement activities that have been, and continue to be, available to the Department.