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General Compliance Procedures

Introduction

This chapter provides guidance¹ on the compliance procedures that DEQ staff use to notify responsible parties of alleged violations of enforceable environmental requirements.²

DEQ staff use a full range of compliance procedures and select the most appropriate level of communication to notify a responsible party based on the facts and circumstances of each case. The procedures are generally listed in increasing order of severity. While compliance staff begins with the least adversarial method appropriate to the circumstances, the selection of a procedure lies wholly within DEQ's discretion, law, and regulation. DEQ encourages the public to have an open discussion during the compliance process to ensure that compliance actions support the goals and mission of the Department of Environmental Quality.

Notifying Responsible Parties

Notice of Alleged Violation

Virginia statutes establish the elements of a Notice of Alleged Violation (NOAV).³

These are written communications by the Department that must include:

- A description of each alleged violation (the observations);
- The specific provision of law, regulation, permit, order allegedly violated (the legal requirements); and
- Information on the process for obtaining a final case decision from the Department on whether or not a violation has occurred.

Any written correspondence by the agency that includes the statutory elements listed above may be considered an NOAV.

¹ Guidance Document means any document developed by a state agency that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations. Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. *See*, Va. Code [§ 2.2-4001](#).

² "Enforceable environmental requirements" or "environmental requirements" mean the statutes, regulations, case decisions (including but not limited to permits and orders), decrees, or certifications that are enforceable by one of the three citizens' boards (State Air Pollution Control Board, State Water Control Board (SWCB), or Virginia Waste Management Board) or by DEQ.

³ *See*, Va. Code §§ [10.1-1309\(A\)\(vi\)](#) (Air); [10.1-1455\(G\)](#) (Waste); and [62.1-44.15\(8a\)](#) (Water).

DEQ staff has two stages of procedures to notify responsible parties⁴ of alleged violations, informal compliance and formal compliance. NOAVs drafted at the either stage are generally drafted by compliance staff. NOAVs drafted at the formal compliance stage mark the transition from compliance to enforcement. Compliance, enforcement, and (as needed) permitting and program staff should collaborate before initiating formal compliance. Specific media program guidance may supplement these procedures or modify the timelines established in this guidance.

By statute, the issuance of an NOAV is not a case decision under the Administrative Process Act. Compliance staff must not make a case decision when issuing a NOAV.

Under the Administrative Process Act (APA), [Va. Code § 2.2-4001](#):

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit (emphasis added).

An NOAV should not state that a responsible party “has violated” or “is in violation of” an environmental requirement, because that might imply incorrectly that DEQ has made a case decision. The responsible party is entitled to notice and a process to dispute alleged violations before a case decision is made or a corrective action imposed.

Informal Compliance

Circumstances for Informal Compliance

DEQ staff use informal compliance to notify the responsible party of alleged noncompliance and to secure compliance when staff expect that alleged noncompliance can be corrected in 30 days or less, unless a higher level response is required by law, regulation, or guidance. If the responsible party completes and documents a satisfactory and durable return to compliance within the time allowed, the matter can be closed without further action. Situations that meet all of the following criteria may be appropriate for informal compliance:

- Issues that can ordinarily be corrected within 30 days;

⁴ DEQ follows Virginia agency law in assigning liability for the acts of an employee. An employer is liable for the act of his employee if the employee was performing his employer's business and acting within the scope of his employment. Generally, an act is within the scope of the employment if (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, “and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account.” When an employer-employee relationship has been established, “the burden is on the [employer] to prove that the [employee] was *not* acting within the scope of his employment when he committed the act complained of.” *Kensington Associates v. West*, 234 Va. 430, 362 S.E. 2d 900 (1987).

- Issues that present little to no risk to human health or the environment, and do not result in actual harm;
- Issues that are not substantial or significant deviations from fundamental components of the regulatory program; and
- Responsible parties / facilities that raise infrequent compliance concerns (varies by program and the degree of regulatory oversight).

Informal compliance is not to be used for alleged violations meeting the criteria for formal compliance or those responsible parties designated as High-Priority Violators (HPVs) in the Air Program, or Significant Non-Compliers (SNCs) in the Hazardous Waste or Water VPDES Programs.

Elements of Informal Compliance

Informal compliance is initiated through the informal communications such as phone conversations, e-mail, or an inspection report that identifies one or more areas of alleged noncompliance. Informal compliance may suggest a corrective action, but cannot require or impose a corrective action (e.g., “It is suggested that RP implement the actions it proposed...” or “9 VAC 25-210-116(C)(2) provides...”, but not “RP must...”, “RP shall...” or “RP is required to ...”).⁵

Process for Informal Compliance

DEQ compliance staff convey any concerns regarding alleged noncompliance to the responsible party promptly after discovering an issue or concern. DEQ staff may contact the responsible party by telephone to discuss the issue, e-mail, or hold an informal meeting at the regional office or onsite. Usually, the responsible party informs staff what steps it is undertaking and when they will be completed. Unless the responsible party provides reliable written or electronic verification of its actions, DEQ staff should verify the responsible party’s action onsite. Staff document all contacts, requests to the responsible party, and responsible party actions in the DEQ file and the relevant database and may send an acknowledgement (Attachment 2-1). If the responsible party does not return to compliance within 30 days (or longer time as prescribed in program guidance), staff should issue a Warning Letter.

⁵ The benefit of making a suggestion should be balanced against the risk of making an unintended “case decision” or a suggestion that does not return the responsible party to compliance.

Formal Compliance

Elements of a Notice of Alleged Violation

The elements of a Notice of Alleged Violation are listed as follows:

- A named responsible party verified through the State Corporation Commission, land records, or other appropriate means. The name may or may not match the name on the permit;
- The facility or source name and its permit, registration, or pollution complaint/incident response number;
- A statement that DEQ has reason to believe that the responsible party may be in violation of applicable laws, regulations, or permit requirements at the facility or source;
- Disclaimer that the Warning Letter is not a case decision under the Administrative Process Act;
- A description of each alleged violation (the observations) – what was seen by DEQ staff, stated by facility representatives, or reported by the facility or source. The observations should correlate with the legal requirements that follow. Observations are not speculations, opinions or conclusions. In particular, Warning Letters should not conclude that the observed or reported condition “has violated” or “is in violation of” an environmental requirement;
- The specific provision of law, regulation, permit condition, order or enforceable certification that has been allegedly violated (the legal requirements). This includes a citation to the requirement and a concise quotation of the applicable portion of the requirement (not paraphrased), both in **bold font**. Legal requirements are set out adjacent to the related observations;⁶
- Statement of the enforcement authority and options available to DEQ;
- Statement of future actions and a request that the responsible party respond within a specified time period,⁷ detailing the corrective action it has or will take;⁸
- Request that the responsible party advise DEQ staff of any disputed observations or other pertinent information;
- The process for obtaining a case decision or fact finding on whether or not a violation has occurred, including the Process for Early Dispute Resolution (PEDR); and
- DEQ contact information.

⁶ The legal requirements, including citations, are labeled separately from the observations and set in **bold font** to make clear that both observations and legal requirements are included, that they are separately identified for each alleged violation, and that a specific provision has been cited for each legal requirement.

⁷ The specified time period for a responsible party to respond is 20 days of the date of a Warning Letter, and 10 days of the date of a Notice of Violation.

⁸ The authority to require production of information is provided by separate authority, so a Warning Letter by itself is not an information request. See Va. Code §§ [10.1-1314](#) (Air); [62.1-44.21](#) (Water); [42 USC § 6927\(a\)](#) (Hazardous Waste); Va. Code [§ 10.1-1402\(6\)](#) (Solid Waste). See also Chapter 8.

When available, staff should attach supporting documentation that support the observations made in the NOAV to assist the responsible party in understanding the alleged violations. These materials can include inspection reports, photographs, maps, and copies of relevant regulations or laws.

DEQ staff should provide the NOAVs in a timely and appropriate manner to the responsible party – preferably within 30 days of discovery of the alleged violation unless program guidance provides for a different time. Any DEQ staff with an appropriate written delegation of authority or has as a job duty in an approved Employee Work Profile can sign a NOAV.

Successful delivery of the NOAV is critical to ensuring that the responsible party is aware of the nature and significance of the alleged violations. Copies of an NOAV can be sent concurrently to several persons (e.g., registered agent, Board of Supervisors) in addition to the responsible party contact on file to ensure that the NOAV has reached decision makers. DEQ staff should strategically employ delivery confirmation or delivery receipt methods when receipt by ordinary mail is uncertain. For the majority of cases, staff will know that first class mail has provided the required notice when the responsible party contacts them as directed in the instructions in the NOAV. If no response has been received within 30 days (or sooner as appropriate) from the date of the NOAV, or if the responsible party indicates it is unwilling to resolve the matter by consent, a follow-up letter enclosing a copy of the NOAV should be sent with delivery confirmation or delivery receipt ([Attachment 2-6](#)). If a responsible party refuses delivery, other means, such as service of process or hand-delivery, may be employed.

Warning Letters

Circumstances for Warning Letters

DEQ compliance staff use Warning Letters to notify the responsible party of an alleged violation and to secure compliance when staff expect that the violation can be corrected within 30 to 90 days, unless the alleged violation meet the criteria for a Notice of Violation (e.g., HPVs and SNCs). Specifically, Warning Letters must be issued for oil discharges greater than or equal to 150 gallons but less than 500 gallons, if any part of the discharge reaches the state waters,⁹ unless an NOV is appropriate. If the responsible party completes and documents a satisfactory

⁹ Except: (1) releases from farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes ([9 VAC 25-80-10](#)) (“UST” definition); (2) releases from tanks used for storing heating oil for consumption on the premises where stored (*Id.*); (3) discharges from aboveground storage tanks with a capacity of 5,000 gallons or less containing heating oil for consumption on the premises where stored (Va. Code [§ 62.1-44.34:17\(E\)](#)). Warning Letters for Article 11 oil releases or discharges described in (1) through (3), in the amounts specified **may** be issued but are not mandatory. State Water Control Law prohibits discharges to any waters of the Commonwealth. The guidance is intended to be applied to discharges primarily to surface waters. If the discharge of oil is to ground water, RO staff should consult the program office and DE regarding the proper course to follow.

and durable return to compliance within the time allowed, the case can be closed without further action.

Model Warning Letters

Model Warning Letters for UST, Oil Discharge, and Solid Waste violations are attached ([Attachments 2-2A, 2-2B, and 2-2C](#)). These demonstrate how various types of information can be presented (e.g., on-site observations, data sets, facility reports). [Attachment 2-2D](#) has standard Warning Letter paragraphs with references to authorities for each media program.

Process for Warning Letters

Warning Letters should request that the responsible party verify the corrective action has been completed or provide a corrective action plan and schedule for returning to compliance.¹⁰ A meeting may be necessary. If the responsible party's proposal is acceptable:

- No further action memorializing the corrective action plan and schedule need be undertaken if the return to compliance will take 90 days or less from the date of the warning letter.
- If the return to compliance will take more than 90 days but under 12 months, then a Letter of Agreement may be appropriate. *See*, [Attachment 2-13](#).
- If the return to compliance will take longer than 12 months, or if a Letter of Agreement is not appropriate, then a Consent Order must be used to memorialize the corrective action plan and schedule.

After issuing a warning letter, staff track and follow-up on any actions required to ensure a return to compliance. Staff should check every deadline within 30 days of the deadline or as directed in program guidance. To confirm the responsible party has returned to compliance, staff may obtain written or electronic confirmation from the responsible party, conduct a follow-up inspection, or both. Staff document all correspondence and follow-up inspections in the file and the relevant database.

Additional Warning Letters

DEQ compliance staff issue additional warning letters for alleged violations found during subsequent inspections or record reviews, unless the alleged violations demonstrate conditions to support an NOV or program policy requires otherwise. For example, staff in the Water Program issue additional warning letters for each additional point in the Compliance Auditing System unless an NOV is appropriate.

¹⁰ Warning Letters and NOV's should state a date by which the regulated party is to respond, and avoid stating new dates for compliance, which might be seen as authorizing noncompliance until that date.

Subsequent Actions

If the RP agrees to, completes, and documents a satisfactory and durable return to compliance, staff should send an acknowledgement (see Attachment 2-3) and close the matter. If the RP fails to adequately respond to the Warning Letter within 30 days or fails to return to compliance within 90 days, staff should promptly issue an NOV and refer the case for enforcement action, or take other action as specified in program guidance.

If an RP cannot meet a date in its plan to return to compliance, the RP should notify DEQ immediately and provide documentation why it is unable to do so. DEQ may extend the date for RP action for good cause if the RP has notified the DEQ as soon as those circumstances became apparent. Extensions must be documented to the file and may require an LOA or consent order. The extension should clearly state that it does not relieve the RP from its obligation to comply with applicable environmental requirements. If an RP misses a deadline without good cause or fails to notify DEQ, staff should promptly issue an NOV and refer the case for enforcement action, unless program guidance requires a different action.

NOTICES OF VIOLATION

DEQ staff use a Notice of Violation (NOV) to notify the responsible party of an alleged violation(s) and to signify that the alleged noncompliance is ongoing, persistent, severe, or of such significance that the case is appropriate for further enforcement action and may warrant a civil charge or civil penalty.¹¹ NOVs mark the transition from compliance to enforcement. If the alleged violations are confirmed, DEQ usually resolves NOVs by Consent Order, Executive Compliance Agreement, or other formal enforcement tool. NOVs request the responsible party to contact DEQ within 10 days to discuss the alleged violations, the steps necessary to return to compliance, a prompt meeting date, and possible future enforcement actions.

Circumstances for NOVs

Typical circumstances warranting NOVs include, but are not limited to:

- Alleged violations that present an imminent and substantial hazard to human health or the environment. An Emergency Order or Court Action, and statutory notice to the local government of the alleged violation may be warranted;¹²
- Alleged violations that present substantial risk of any potential or actual harm to human health or the environment;

¹¹ The Virginia Code does not define civil charges or civil penalties. The authorizing statute identifies which term to use. In general, civil charges are assessed with the consent of the responsible party in administrative actions, while civil penalties are assessed in nonconsensual administrative actions conducted pursuant to the Administrative Process Act or judicial actions.

¹² See, Va. Code §§ [10.1-1310.1](#) (Air), [10.1-1407.1](#) (Waste), and [62.1-44.15:4\(A\)](#) (Water).

- Alleged violation of an essential program element that is fundamental to the integrity of the regulatory program and DEQ's ability to monitor and protect human health and the environment, e.g., no permit;
- Alleged violations of Consent Orders, APA Orders, or Court Orders or Decrees;
- Priority noncompliance, including HPVs (Air), SNCs (Hazardous Waste and Water VPDES), and Severity Level III violations (Solid Waste);
- Alleged violations that staff expect to take more than 90 days to return to compliance;
- Ongoing or persistent noncompliance, including repeated or continuing alleged violations by the responsible party despite previous compliance activity or informal actions;
- Seasonal violations that need quick elevation when consistent with program guidance;
- Emissions violations in the Air Program;
- In the Water Program, when four points are accrued based on the point assessment criteria in the Compliance Auditing System, or when cumulative violations of program requirements, not necessarily repeated or continuing, for a single parameter or type that trigger action;
- Discharge of oil of 500 gallons or more, if any portion reaches state waters;¹³
- Discharge of oil, regardless of the amount of the discharge and whether or not the discharge reaches state waters, if:
 - the discharge is the result of willful or grossly negligent action(s);
 - the discharge is part of a pattern of chronic behavior;
 - the discharge impairs any beneficial uses;
 - the responsible party refuses to clean up the discharge; or
 - the discharge adversely impacts human health;
- Failure to report significant violations where such reporting is required;
- Failure to pay civil charges or required fees or costs, where collection procedures have been unsuccessful;
- Failure to take timely and appropriate required action in response to a spill or other release to the environment;
- Alleged falsification of certifications, reports, or other documents submitted to DEQ, and alleged violations that appear to include gross negligence and/or that appear to be knowing or willful (consider notifying of possible criminal activity); or
- Other noncompliance as identified in program guidance.

Model NOVs

Model NOVs for Air, Solid Waste, Water DMR, and Oil Discharge, respectively, are attached ([Attachments 2-4A, 2-4B, 2-4C, and 2-4D](#)). These demonstrate how various types of information can be presented (e.g., on-site observations, data sets, facility reports). [Attachment 2-4E](#) has standard NOV paragraphs with references to authorities for each media program.

¹³ This mandatory NOV for discharge of oil is subject to the same exceptions as in footnote 6 on page 2-3. NOVs for Article 11 oil releases or discharges described in (1) through (3) of the footnote in the amounts specified here may be issued but are not mandatory. The same statements regarding discharges to surface water and ground water apply.

Process for NOVs

NOVs request that the responsible party respond within 10 days to set up a prompt meeting. The meeting with the responsible party should take place within 30 days of the date of the NOV. Compliance, enforcement and (as needed) permitting and program staff should consult in drafting the NOV to help ensure that the NOV provides a sound basis for further action. In unusual circumstances, the regional office staff should also consult with central office staff when preparing an NOV as needed:

- If the case is unique or sensitive;
- If there have been serious or significant environmental or regulatory impacts (e.g., HPV or SNC);
- If the injunctive relief is expected to be expensive;
- If the civil charge (gravity or economic benefit) is expected to be large; or
- If there is a significant history of non-compliance.

If the responsible party has already returned to compliance and the consent order is for penalties only, a consent order can be prepared and sent with the NOV. In such cases, the responsible party should be notified in advance.

Additional NOVs¹⁴

Additional NOVs usually document continued or additional alleged violations based on subsequent inspections, reports, or other information. Program guidance usually provides standards for issuing additional NOVs. The Central Office Adjudications Manager must be consulted when drafting subsequent NOVs in anticipation of a formal hearing.¹⁵ Additional NOVs are not issued where the responsible party has executed a proposed consent order for the same issues that is pending approval by a Board.

Subsequent Actions

Ordinarily, a case is referred to enforcement with the NOV. If the NOV is successfully challenged or if for other appropriate, documented reasons no consent order or further DEQ action is warranted, the case should be closed. If the NOV is not successfully challenged,

¹⁴ While Process for Early Dispute Resolution is being utilized, DEQ continues to perform all necessary inspections and record potential violations but does not, except in cases of emergency, issue NOVs to the responsible party for the same or substantially related alleged violation that is the subject of the Process for Early Dispute Resolution.

¹⁵ At least two written notices of alleged violation must be issued for the same or substantially related violations at the same site and at least 130 days have passed since the issuance of the first notice of alleged violation is required prior to moving forward with a formal hearing. See, Va. Code §§ [10.1-1309\(A\)\(vi\)](#) (Air); [10.1-1455\(G\)](#) (Waste); and [62.1-44.15\(8a\)](#) (Water).

enforcement staff usually begins work on an enforcement recommendation plan and a consent order.

Challenges and Corrections to Notices of Alleged Violations

Though NOVs are not case decisions, they represent DEQ staff's view of facility conditions and are frequently reported to EPA and the public. If a responsible party demonstrates that a NOV is clearly erroneous in part, then a "Corrected NOV" should be sent to the responsible party. In the highly unusual case that an NOV is completely in error, then a letter rescinding the NOV should be sent ([Attachment 2-7](#)).¹⁶ NOVs are specifically not exempt from production under the [Virginia Freedom of Information Act](#) as a DEQ enforcement strategy document.¹⁷ If DEQ staff and the responsible party disagree about observations or legal requirements, the responsible party can avail themselves of the Process for Early Dispute Resolution.

Process for Early Dispute Resolution

The Department of Environmental Quality has developed and implemented an early dispute resolution process to help identify and resolve disagreements regarding what is required to comply with the regulations promulgated by the State Air Pollution Control Board, the State Water Control Board, the Virginia Waste Management Board and any related guidance.¹⁸ The Process for Early Dispute Resolution (PEDR) is optional is available after the issuance of a notice of alleged violation issued by the Department.¹⁹

The steps in PEDR include:

1. The responsible party submits written information to the Regional Director and the appropriate Division Director detailing the facts, the applicable rules, the information supporting its position, the steps taken to resolve the issue with DEQ staff, and asking for assistance in resolving the issue.
2. The Regional Director and appropriate Division Director determine the best way to proceed, a written response is then provided to the responsible party detailing the plan for evaluating the claim(s) raised.

¹⁶ NOV correction or rescission is very unusual, and is only appropriate when the NOV as issued was wrong – it is not to be used as a negotiation tool or where there are genuine disagreements as to interpretation of facts or law.

¹⁷ Va. Code [§ 2.2-3705.7\(16\)](#). Staff should confirm whether another exemption applies before releasing.

¹⁸ [2005 Acts c. 706](#). The requirement for PEDR is found in clause 2 at the end of the Act. It is not codified.

¹⁹ See, Process for Early Dispute Resolution of Notices of Alleged Violation and Notices of Deficiency. [Agency Policy Statement No. 8-2005](#). Issued September 1, 2005.

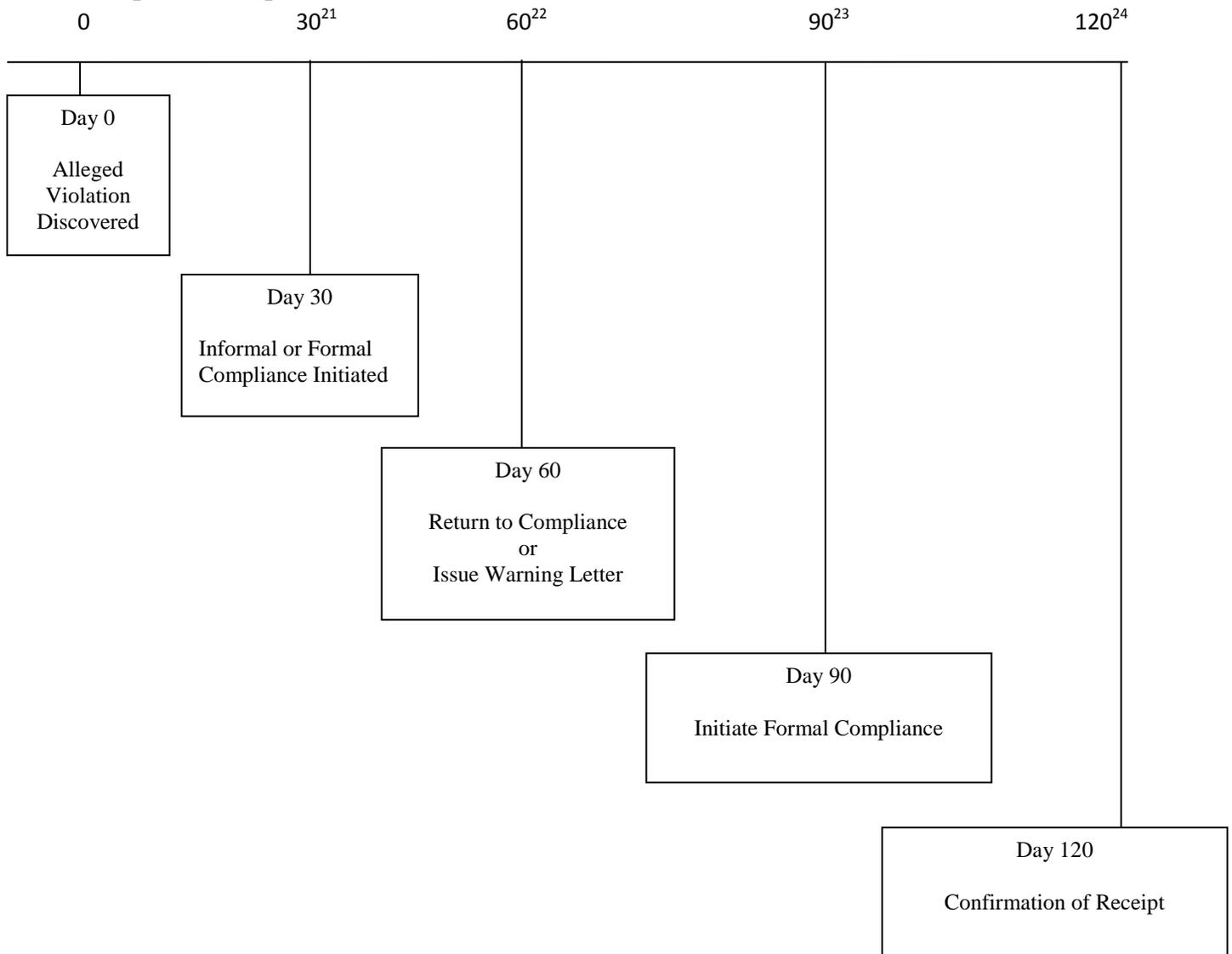
3. Upon completing the evaluation, the Regional Director and Division Director notify the responsible party of DEQ's decision to affirm, amend, or retract the notice of alleged violation and the basis for that determination. The Regional Director and Division Director also provide guidance to staff.

As a condition to utilizing the PEDR, the responsible party and DEQ acknowledge that any resolution provided regarding disagreements about what is required to comply with the regulations is not a case decision. If the responsible party completes the PEDR and is not satisfied, it may request in writing that DEQ take all necessary steps to issue a case decision in accordance with the Administrative Process Act. PEDR may not be used to resolve a dispute after the issuance of a case decision. An example letter for a PEDR resolution is included as [Attachment 2-8](#).

While PEDR is being utilized, DEQ will continue to perform all necessary inspections and record alleged violations but will not, except in cases of emergency, issue subsequent Notices of Violation to the responsible person requesting a resolution for the same or related alleged violation that is the subject of the Process for Early Dispute Resolution. Participation in PEDR, however, does not limit in any way DEQ's ability to issue a case decision nor limit any other remedies available under law. DEQ may elect to proceed directly to an [informal fact finding proceeding](#) or a [formal hearing](#) pursuant to the Administrative Process Act in lieu of resolving any disagreement through PEDR.²⁰

²⁰ Under Va. Code [§ 10.1-1186.3\(A\)](#), the citizens' boards have promulgated regulations for mediation and alternative dispute resolution related to regulatory development and permit issuance. The statute and regulations do not address enforcement. See 9 VAC [5-210-40](#) (Air); 9 VAC [20-15-40](#) (Waste); and 9 VAC [25-15-40](#) (Water). Employing mediation or dispute resolution is discretionary and not judicially reviewable. Va. Code [§ 10.1-1186.3\(B\)](#).

Compliance Response Timeline



²¹Use informal compliance to notify the responsible party of alleged violation(s) and to secure a return to compliance when the alleged violation(s) can be corrected in 30 days or less, unless a higher level response is required by law, regulation, or guidance.

²² Issuance of a warning letter is appropriate when the alleged violation(s) can be corrected within 30 to 90 days, unless the alleged violations meet the criteria for Formal Compliance (*e.g.*, HPVs and SNCs).

²³ Formal Compliance is used to notify the responsible party of an alleged violation(s) and to signify that the alleged noncompliance is ongoing, persistent, severe, or of such significance that an enforcement action and a civil charge may be warranted. The initiation of formal compliance procedures marks the transition from compliance to enforcement.

²⁴ If no response has been received within 30 days (or sooner as appropriate) from the date of the NOV, or if the responsible party indicates it is unwilling to resolve the matter by consent, a follow-up letter enclosing a copy of the NOV should be sent with delivery confirmation or delivery receipt.