

# 7. Referral to Attorney General's Office or County Prosecutor

A referral occurs when a serious violation is not resolved at the administrative level or cost recovery is pending from a responsible party. In general, the department director or the environmental protection commissions may refer environmental cases to the Attorney General's Office or a county prosecutor. The environmental protection statutes identify whether the director, commission or both have this authority. In general, a referral is made by an environmental commission where both a commission and the department director share this authority. If time is of the essence, the department director may act in place of the commission.

Requests to refer a case will proceed through approval by the program director and the division director. Information contained in the referral request includes a memorandum summarizing the situation and describing the compliance assistance activities that have occurred in the pursuit of achieving compliance. The request will also include where appropriate the injunctive relief sought, a proposed penalty calculation, and other information as appropriate, e.g., a cost recovery summary. Proposed referrals of cases with multimedia environmental violations should be sufficiently broad to allow the prosecutor to address all of the violations. For those statutes in which an environmental commission will be requested to make the referral, the matter will be presented to the commission at the next available opportunity.

After a referral is made, file information is promptly assembled and transmitted. The cover letter requests the receiving office prosecute the matter on behalf of the department or commission and seek specific goals in handling the case. Programs should use one of the following two form letters for transmitting matters to the Attorney General's Office (one for department only referrals; one letter for department/commission referrals). This file information includes the same information presented earlier to explain the case, as well as any additional documents developed in response to questions or to support deliberation. File material transmitted with the referral should extend from the present back in time to the beginning of the statute of limitations for penalties. Earlier file material may be relevant to recover past due fees or to support an allegation that the party referred is a habitual violator. In addition, local legislators are informed by email of the referral. News releases are also publicized when the referral is made. (See Forms for template documents for letters and news release.)

Each program may establish specific criteria for referring cases to the Attorney General's Office, and some are listed below. In general, any serious, on-going violation with an accompanying environmental impact will be promptly referred to the Attorney General's Office unless it reaches timely resolution at the administrative level.

In addition to referrals, employees or commissions also make other requests of the Attorney General's Office. These requests may include the review of a settlement agreement before it is presented to a third party or an interpretation of a statute, regulation, or policy from the Attorney General's Office in either a formal or informal opinion.

## 7.1 Air Pollution

[www.dnr.mo.gov/env/apcp/AirAdvisory/policy\\_manual/letters\\_of\\_warning.pdf](http://www.dnr.mo.gov/env/apcp/AirAdvisory/policy_manual/letters_of_warning.pdf)

## 7.2 Drinking Water

By the time a public water system has sufficient violations to become a significant non-complier or serious monitoring violator, the regional office should have completed all the preparatory steps outlined in the Public Drinking Water Branch's Escalation Policy, including conference, conciliation and persuasion, to generate adequate documentation for successful litigation. The regional office's Drinking Water Unit chief and the regional director will review the case to ensure adequate documentation. When the case documentation appears adequate, the regional office will submit an enforcement action request to the Public Drinking Water Branch's Compliance/Enforcement Section. The referral will include a completed enforcement action request form and a copy of the water system file. Upon receipt, the Public Drinking Water Branch's Compliance/Enforcement Section will check the Enforcement Action Request for completeness and to ensure that the non-compliant facility has been satisfactorily worked through the Escalation Policy, if applicable, and has been well documented by regional office employees.

Procedures for developing an enforcement case not involving Maximum Contaminant Level or monitoring violations are similar. The regional office's Drinking Water Unit chief and the Public Drinking Water Branch's Enforcement Unit chief will discuss each case, and if there is mutual agreement on enforcement referral and litigation, the regional office will submit the case using the same enforcement procedure as noted above.

At a minimum, the enforcement action request must include:

- File summary
- Copy of water system file, which must include
  1. Notices of violation
  2. At least two recent inspection reports (including one inspection within six months of referral).
  3. Precise physical location of the water system.
  4. Names and addresses of owners and operators.
  5. Documentation of regional office efforts to bring system into compliance.
  6. Specific rule citation for each violation.
  7. Enforcement action recommended by regional office.

After reviewing the referral and conferring with the regional office person who submitted the enforcement action request, the Public Drinking Water Branch's Compliance/Enforcement Section staff will confirm or modify the recommendations contained in the enforcement action request. Public Drinking Water Branch staff has final control over referrals and will act on each enforcement action request within 30 days. Public Drinking Water Branch will fully evaluate each enforcement action request and determine the appropriate course of action regarding formal enforcement, per the options described previously in this manual.

### Action by the Attorney General

Upon receipt of a case from the department, the Attorney General will initiate legal action with a letter to the non-compliant facility indicating that the facility has been referred for litigation and providing the facility an opportunity to come into compliance immediately to avoid litigation. If this effort is not successful, the Attorney General's Office will proceed with litigation to recover costs, obtain penalties, and secure a judgment and order of injunction from the circuit court of the county in which the facility is located. In some cases, it may be necessary for the regional office staff to provide additional support to the enforcement case after it has been referred to the Attorney General's Office, such as participating in depositions, consent decree negotiations, trial testimony, and verification of compliance with the judgment and order of injunction.

## 7.3 Hazardous Waste

Referral to the Attorney General's Office is a request from the program for legal action to compel compliance, to collect monetary penalties or to take other actions as needed. The Hazardous Waste Program will request referral to the Attorney General's Office when an inspector documents acute violations or if the facility does not correct high priority violations or class I violations. For underground storage tank facilities, a referral to the Attorney General's Office will be requested when violations are not corrected. The

request will ask for action to compel compliance or collect monetary penalties and costs to the extent they are recoverable.

### **High Priority and Class I Violations**

Referral of high priority and Class I violation cases to the Attorney General's Office will need to be approved by the section, program and division management, the Enforcement Review Board and the Hazardous Waste Management Commission or department director. Referral is generally sought on cases that have not made progress with resolving violations, repeat violators or repeated violations that are still under terms stated by a settlement or other agreement.

### **Acute Violations**

Cases with acute violations will be referred quickly to the Attorney General's Office. After the Hazardous Waste Program sends the certified letter to the facility outlining enforcement expectations, the penalty will be calculated. Referral of acute violation cases to the Attorney General's Office will need to be quickly approved by the section, program and division management, the enforcement review board and the department director.

## **7.4 Land Reclamation**

### **Industrial Minerals**

The Land Reclamation Law authorizes specific remedies that may be sought in an industrial minerals enforcement case, including the following:

- 1. Injunction**- The regulatory authority has the ability to refer appropriate cases to the Attorney General's Office for injunctive relief. An injunction is a court order compelling the permittee to take some action or to cease some action. Failure to do so would constitute contempt of court, and therefore, be enforced by the court through penalties or possibly incarceration. An injunction can be obtained when the permittee
  - Fails to comply with any order or decision of the regulatory authority.
  - Interferes with the regulatory authority when carrying out the provisions of the law.
  - Refuses to admit an authorized representative of the regulatory authority.
  - Refuses to furnish requested information or reports.
  - Refuses to allow access to and copying of records.
- 2. Criminal Action** - When a person willfully or knowingly makes any false statement, representation or certification, or knowingly fails to make any statement representation, or certification in any document filed or required to be maintained, he or she is subject to criminal action. If any director, officer or agent of a corporation willfully and knowingly authorized, ordered, or carried out any refusal, violation or failure of any cessation order, that person is subject to criminal action. For such actions, imprisonment will not exceed one year and fines generally will not exceed \$10,000.

It is very difficult to prove knowing and willful actions in court because of lack of substantiating evidence clearly demonstrating willful and knowing intent beyond a reasonable doubt. Due to court calendars and the difficulties associated with proof, this form of alternative enforcement is seldom used. The inspector should work closely with his/her supervisor in following the regulatory authority's policies in any alleged criminal action.

### **Coal**

The Land Reclamation Law authorizes specific remedies that may be sought in a coal mining enforcement case. The remedies include those listed below.

- 1. Injunctions** - This referral is made to the Attorney General whenever the operator:
  - Violates or refuses to comply with a final order from the commission or director.
  - Interferes with or hinders the carrying out of the provisions of the law.
  - Refuses entrance to the mine by the commission or its representatives.

- Refuses to provide any information or report requested by the commission or director.
  - Refuses to permit access to or copying of such records.
  - Refuses to permit inspection of monitoring equipment.
  - Mines or disturbs any land without a permit.
2. **Penalty Collection** - This referral is made when the commission has assessed civil penalties and the employees have been unable to collect them.
  3. **Criminal Actions** - This referral is made when any person willfully and knowingly authorized, ordered or carried out a refusal to comply with any enforcement order incorporated in any final decision issued by the commission, or when a person knowingly makes any false statement, representation or certification. The Attorney General will then work in conjunction with the county prosecutor.
  4. **Permit Revocation and Bond Forfeiture** - This referral is made to the Attorney General to develop a show cause order when:
    - The permittee has failed to abate a notice of delinquent reclamation within time frames established for abatement.
    - The permittee has failed to abate a cessation order within time frames established for abatement.
    - The permittee has financial problems that will no longer allow him or her to continue to operate in compliance.
    - Any other permit has been revoked that was issued to that permittee and the permittee had not completed reclamation on that permit.
    - The permittee has failed to comply with conditions established by the commission concerning a permit suspension or abatement extension on the same issue.
    - A pattern of violations was determined to exist.

## **Metallic Minerals**

The director must approve all investigations into metallic minerals waste management areas in Missouri. If the investigations show that waste disposal is being or is going to be conducted or that a waste management area is being operated without a permit in violation of the law, the director shall request the attorney general to file suit in the name of the State of Missouri, for injunction and civil penalties not to exceed \$1,000 per day from the date of the filing of such action for each day in addition to any other remedies provided by law.

Suit may be filed either in the county where the violation occurs or in the county of Cole if not objected to by the defendant. Any offer of settlement to resolve a civil penalty shall be in writing, shall state that an action for imposition of a civil penalty may be initiated by the attorney general or a prosecuting attorney representing the department under authority of this section, and shall identify any dollar amount as an offer of settlement, which shall be negotiated in good faith through conference, conciliation and persuasion.

## **7.5 Solid Waste**

Solid Waste Management Program will request referral to the Attorney General's Office when a serious violation is not resolved at the administrative level. The request will ask for action to compel compliance or collect monetary penalties and costs to the extent they are recoverable.

1. **Injunctive Relief** - Referral may be made to the Attorney General whenever the department finds that the storage, collection, transportation, processing or disposal of solid wastes subject to provisions of sections 260.200 to 260.245 RSMo. is in violation of any rule or regulation adopted by the department pursuant to sections 260.200 to 260.245 RSMo. or might reasonably be expected to cause pollution of the land, air or waters of the state or is creating a public nuisance or health hazard. The department may order the person to alter its storage, collection, transportation, processing or disposal systems to correct such violation. The director may request, and it shall be the duty of the county prosecuting attorney, or the attorney general, to bring an action in the circuit court to enjoin the acts or practices and to enforce compliance with the this law or any rule or regulation published thereunder.

2. **Criminal Action** - Referral for criminal actions may be made for certain statutes contained in the Solid Waste Management Law Chapter 260 RSMo. Referral is made when any person purposely or knowingly disposes of or causes the disposal of solid waste including demolition, commercial or residential solid waste in violation of applicable Missouri Solid Waste Management Law and Regulations.
3. **Permit Revocations, Suspensions and Denials, Civil or Administrative Penalties and Bond Forfeitures** - Per statute 260.235, any person aggrieved by a forfeiture of any financial assurance instrument, civil or administrative penalty or denial, suspension or revocation of a permit required by section 260.205 or a modification to a permit issued under section 260.205 or any disapproval of the plan required by section 260.220, may within 30 days of notice of such action request a hearing. The department must provide notice in the form of a certified letter and include reasons for the forfeiture, disapproval, denial, suspension, civil penalty or revocation. The department may seek an injunction in circuit court to cease operations until such time as the appeal is resolved or obtain a performance bond in the amount and manner as prescribed by rule. The department's seeking of an injunction to cease operations shall be based on the seriousness of the threat to the environment. The bond shall remain in place until the appeal is resolved. If the department's decision is upheld, the bond shall be forfeited and placed in a separate subaccount of the solid waste management fund.

The hearing shall be conducted by the department director or his designated representative in accordance with the procedures set forth in sections 536.070, 536.073, 536.077, 536.080, and 536.090, RSMo. The decision of the department shall become final 30 days after the delivery of a certified mail copy of the decision to the affected entity. Such decisions may be appealed to the administrative hearing commission pursuant to sections 536.063 to 536.095, RSMo, and shall be subject to judicial review of a final decision as provided in sections 536.100 to 536.140, RSMo.

## 7.6 Water

Section 644.076 empowers the Executive Secretary (department director) or the Clean Water Commission to refer matters for legal action to either the Attorney General's Office or county prosecutors.

The Compliance/Enforcement Section Chief will present the matter to the Clean Water Commission. The commission will reject or approve the referral or suggest some other action. The department will send letters to the appropriate State Senator or State Representative to inform them of the referral actions taken by the department or commission. The appropriate division director will sign the notification letters.

Once a case is referred to the Attorney General's Office all file materials received by program staff after the referral shall be provided to the Attorney General's Office unless "cc:" information indicates the attorney has been copied. Conveyance of file materials to the county prosecutors will remain the responsibility of the Attorney General's Office. Regional office employees will be copied when their review and comments are requested, when action by the regional office is requested, or when final agreements or resolutions are achieved.

Once a matter is referred, employees should avoid communications with the regulated party regarding the enforcement action. Any written communication to the regulated party or their representatives should be screened by or discussed with the assistant attorney general before it is sent to a party under an enforcement action.

Water Protection Program employees are expected to provide support to the assistant attorney general assigned to the case. Attorneys rely largely on program employees to assist with technical matters and be receptive of the attorneys' requests, giving them priority. The attorney is often held to court responses within legally mandated limitations. Frequently these limitations can only be met if inquiries are promptly handled.

Attorneys must know what data means and how reliable the information is in order to prosecute an effective action. Misleading counsel can seriously undermine the case.

Compliance/Enforcement employees should ask the attorney for the opportunity to review documents produced before they are filed with the court. This process can result in the filing of documents that are legally and technically improved. Employees should also actively participate in penalty negotiations and

settlements. These functions fall largely on Compliance and Enforcement Section staff, but assistance from other program and regional office employees should be sought.

Civil matters regarding the Missouri Clean Water Law will remain the chief responsibility of the Attorney General's Office. Criminal matters may be handled by the Attorney General's Office if the local prosecutor gives the Attorney General's Office authority to act as a special prosecutor or if they act at the discretion of the federal authorities within that court system.

In any case there are several legal actions that can be sought through the courts. Below is a listing of common actions and the circumstances for which each may be sought. These actions are generally used in combination.

1. **Recovery actions for damages and costs** - Section 644.096 authorizes the pursuit of action by the state for actual damages, including all expenses necessary to establish and collect such sums and the costs of restoration of any waters of the state to their original condition. The authority will be cited whenever litigation is used to recover natural resource damages.
2. **Injunctive Relief** - Injunctive relief can be either permanent or temporary. Injunctive relief is provided for in Section 644.076. Temporary relief is sought in an emergency situation where circumstances or nature of the violation represent a significant threat to human health or the environment. This type of relief is rarely sought in Water Pollution Control Program matters because of the difficulties.

Most enforcement actions are against point source discharge facilities. For this reason, our petitions most commonly seek the permanent injunction. The relief desired is of a permanent nature; usually an injunction against future violation of the Clean Water Law or the National Pollutant Discharge Elimination System permit.

3. **Civil and Criminal Penalties** - The assessment of penalties for violation of the Missouri Clean Water Law is provided for in Section 644.076, parts (1), (2), and (3). The maximum penalties provided, range from \$10,000 per day for civil violations to \$50,000 per day for a repeat conviction of criminal provisions.  
Penalties are awarded wholly at the discretion of the Circuit Court Judge if the matter goes to trial. For more efficient handling of cases, the Water Protection Program prefers to negotiate a settlement that is then presented to the court in the form of a consent judgment.
4. **Contempt Citation** - If a court order is issued by the court, either as the result of negotiation or bench ruling, and thereafter is violated, a contempt citation may be sought. Such violations, if found willful or negligent [644.076(3)], can carry severe penalties such as incarceration until the contempt is purged.
5. **Imprisonment** - The Missouri Clean Water Law in Sections 644.076.2 and 644.076.3 contains provisions for imprisonment. Imprisonment is a remedy only used in criminal violations. Development of cases is paramount to successful prosecution because in criminal cases the evidence must prove the parties' guilt "beyond a reasonable doubt."

## 7.A Forms

[Memo to MO Air Conservation Commission](#)

[AGO Referral Letter Template](#)

[News Release for Direct Referral Template](#)

[News Release for Referral through Commission Template](#)