

**Department of Environmental Quality
Agency Policy Statement No. 8-2005**

SUBJECT: Process for Early Dispute Resolution of Notices of Alleged Violation and Notices of Deficiency

REFERENCE: Chapter 706, 2005 Acts of Assembly

EFFECTIVE: September 1, 2005

I. Purpose and Background

It is important for DEQ to have open dialogue with the regulated community and those impacted by its programs. In the course of implementing the Commonwealth's environmental regulations and programs, sometimes there are disagreements with DEQ over the interpretation of statutes, regulations, permits, orders and facts. In order to afford an additional informal process that can assist in resolution of disagreements with DEQ concerning the issuance of notices of alleged violation or notices of deficiency, the department is establishing the Process for Early Dispute Resolution as directed by SB 1089 (2005).

A notice of alleged violation is a written notice to a person informing them that they may be in violation of a law or regulation, for example, inspection reports where a violation is alleged, Warning Letters or Notices of Violation. A notice of deficiency is a written notice to a person informing them that they appear not to have met or completed the requirements for obtaining a right or benefit, for example, a permit.

Prior to utilizing the Process for Early Dispute Resolution, the first and often most effective step for resolving a disagreement with DEQ is for a person to meet with appropriate DEQ staff and engage in open and constructive dialogue concerning their interpretation of the facts, applicable laws or standards. This step should not be bypassed. However, such informal discussions may not always resolve the disagreement over DEQ's issuance of a notice of alleged violation or notice of deficiency. In that case, a person may use the Process for Early Dispute Resolution as a second mechanism to attempt resolution of the disagreement. People are also encouraged to take advantage of the opportunities for using third-party neutrals to facilitate the resolution of disputes as spelled out in 9 VAC 20-15-10, 9 VAC25-15-10, and 9 VAC 5-210-10.

The Process for Early Dispute Resolution does not interfere with the rights of any person under the Virginia Administrative Process Act (§ 2.2-4000 *et. seq.*) or the Alternative Dispute Resolution Regulations, but instead provides an additional opportunity for full dialogue with DEQ through an informal, less adversarial channel. The use of the Process for Early Dispute Resolution may be a more productive and more cost effective way for DEQ and a person to settle their disagreement and identify better solutions. The Process for Early Dispute Resolution is intended to be used where there is an actual case or controversy and may not be used to obtain advisory guidance or speculative opinions.

II. Statement of Policy

The steps in the Process for Early Dispute Resolution are as follows:

1. A person wishing to use the Process for Early Dispute Resolution should submit written information to the regional director and the appropriate DEQ division director detailing the facts, the applicable rules, the information supporting their position, the steps taken to resolve the issue with DEQ staff, and asking for their assistance in resolving the issue through the use of the Process for Early Dispute Resolution. Such submissions may include information showing how other DEQ regional offices, state agencies or federal agencies have interpreted the regulatory requirements, background documents regarding the standard or rule, any relevant facts not considered, or other information demonstrating that the issuance of the notice of alleged violation or notice of deficiency should be modified or withdrawn. A person utilizing the Process for Early Dispute Resolution is strongly encouraged to request a meeting with DEQ to discuss details concerning the information provided.
2. Within 5 business days of receipt of the request for resolution or as soon as possible thereafter, the regional director and appropriate division director will determine the best way to proceed and one of them will provide a written response to the person requesting the resolution detailing their plan for evaluating the claim. The plan may include consultations with other DEQ staff, the person requesting the resolution, or other state and federal agencies and will include a timeframe for evaluating the claim. It is DEQ's goal to provide a resolution within 30 days of receipt of the request for resolution, however, longer periods of time may be necessary depending on the complexity of the matter and the availability of information. DEQ will research the situation surrounding the claim and will identify any similar situations and the handling of those situations, and evaluate them for consistency and appropriateness.
3. Upon completion of their evaluation, the regional director and division director will notify the person who requested the resolution of DEQ's decision to affirm, amend or retract the notice of alleged violation or notice of deficiency and the basis for that determination. DEQ will also provide guidance to staff within the relevant program regarding interpretation or application of the requirements under review and will make the results publicly available.

Notices of alleged violation, notices of deficiency, and the resolution of disputes provided under the Process for Early Dispute Resolution are intended to provide further guidance and information regarding the general applicability of laws and regulations administered by DEQ and are not intended to be final determinations or case decisions under the Virginia Administrative Process Act. As a condition to utilizing the Process for Early Dispute Resolution, the parties acknowledge that the resolution of a dispute provided through this process is not a case decision. Case decisions are final determinations made by DEQ after providing an opportunity for an informal fact finding or hearing. If a recipient of a notice of alleged violation or notice of

deficiency completes the Process for Early Dispute Resolution and is not satisfied with the resolution, he may request in writing that DEQ take all necessary steps to issue a case decision in accordance with the Virginia Administrative Process Act where appropriate. The Process for Early Dispute Resolution may not be used to resolve a dispute after the issuance of a case decision.

During the time that the Process for Early Dispute Resolution is being utilized, DEQ will continue to perform all necessary inspections and record potential violations or deficiencies but will not, except in cases of emergency, issue Notices of Violation to the person requesting a resolution for the same or related alleged violation or deficiency that is the subject of the Process for Early Dispute Resolution. Upon conclusion of the Process for Early Dispute Resolution, DEQ may issue new Notices of Violations based on such inspections as appropriate. Time frames for reviewing permit applications will also be suspended during the time required to resolve a dispute regarding a notice of deficiency related to the permit application.

Participation in the Process for Early Dispute Resolution does not prohibit or limit in any way DEQ's ability to issue a case decision and does not limit any other remedies available under law. DEQ may elect to proceed directly to an informal fact finding proceeding or hearing pursuant to § 10.1-1186, the Virginia Administrative Process Act or other applicable law in lieu of processing a dispute under the Process for Early Dispute Resolution. If DEQ decides to pursue this course, the person requesting the Process for Early Dispute Resolution will be notified.

II. Recision

There are no previously issued documents that will be replaced by this policy. This Policy shall be reviewed for effectiveness on year after its effective date and may be revised based upon the agency's experience with implementation, comments received from the public, and an evaluation of whether or not the Policy is achieving the goals of the policy.

Approved:



Robert G. Burnley, Director

August 31, 2005

Date