DOCUMENT 4

DEMONSTRATION OF PROCEDURES FOR ADEQUATE ENFORCEMENT

To ensure that the State of Missouri has adequate enforcement, EPA requires that the State have certain compliance monitoring and enforcement procedures in addition to the legal authorities discussed in the Attorney General's Statement. The minimum requirements for these compliance monitoring and enforcement procedures are outlined in § 281.22, § 281.40(a)-(g), and § 281.41(a)-(c).

Specifically, § 281.22 states

> "A state must submit a description of its compliance monitoring and enforcement procedures, including related state administrative or judicial review procedures."

Further, the preamble to the federal rule (53 FR 37220) elaborates,

> "The description of compliance monitoring and enforcement procedures must include information on the state's procedures for UST population identification, general compliance monitoring, and general enforcement response. More specifically, the implementing agency must have systems for: Updating and maintaining an inventory of the UST population; collecting and maintaining data on violators and monitoring their subsequent compliance status over time; and exercising legal authorities to take enforcement actions against violators, bring them into compliance, and deter other potential violators."

A. Identifying the Regulated Community

Purpose. The implementing agency must have a system for collecting, updating, and maintaining an inventory of the UST population to ensure compliance with federal notification requirements and provide basic data on the regulated community in order to define priorities for compliance monitoring.

Missouri's program to identify the regulated community has three components: identifying and informing owners and operators of the requirements, identifying unregistered owners and operators, and maintaining an inventory of all registered tanks.

1. *Identifying and informing owners and operators of the requirements.*

The Missouri UST statute, which came into effect on August 28, 1989, required that MDNR inform owners and operators of known UST facilities of their obligation to notify and register their tank systems with the state. In addition, the statute required tank sellers to notify owners and operators of the notification requirements at the time of purchase. Finally, the statute

gave petroleum distributors the responsibility of informing owners and operators of the notification requirements within the first two deliveries after the effective date of the legislation. Occasionally, MDNR will identify a facility whose owner claims ignorance of the registration requirements; in such cases Tanks Section staff will send a warning letter to the appropriate distributor informing them that they did not fulfill their notification duty under the statute.

MDNR's outreach program has been extremely effective in communicating with the regulated community, trade associations, the petroleum industry, and the general public from the inception of the program to the present. MDNR has developed and distributed a number of outreach materials. For example, MDNR has done the following:

- Sent mailings to every tank owner/operator regarding notification and leak detection requirements;
- Sent a series of mailings to all owners and operators regarding the various financial responsibility compliance deadlines;
- Produced and distributed to owners and operators a series of one-page fact sheets on how to implement each release detection method;
- Disseminated, in conjunction with the PSTIF Board of Trustees, key information concerning PSTIF;
- Sent a series of mailings to all owners and operators regarding the 1998 upgrade deadline;
- Mailed hundreds of copies of a video addressing the requirements of the 1998 upgrade deadline;
- Held a series of seminars around the State where Tanks Section staff made available computers loaded with the UST database, and owners and operators were able to review the information and make needed corrections on the spot;
- Distributed news releases coinciding with major milestones in the program;
- Published for nearly a decade a semi-annual MDNR newsletter designed to notify the regulated community of leak detection deadlines, the start-up of PSTIF, and other important program developments;
- Written articles for MDNR's public distribution magazine;
- Contributed articles to publications of the Missouri Petroleum Storage Tank Insurance Fund and Missouri Petroleum Marketers Association.

- Produced closure, corrective action, and site characterization guidelines, and worked to update to those guidelines over time to incorporate new program approaches (e.g., RBCA);

- Made available on the internet basic information on the regulated community (updated at least biweekly); and

- Enlisted the help of the Missouri Department of Agriculture to spread the word about PSTIF, as well as other MDNR requirements.

Some specific examples of outreach and guidance materials developed by MDNR to improve the level of regulated community understanding of and compliance with the UST requirements, and thereby protect human health and the environment, are listed below.

- Technical Bulletins. These documents are a series of issue-specific guides the UST program has developed to help UST owner/operators meet specific technical regulatory requirements. Some examples of such bulletins include "Upgrades for Existing Petroleum UST Systems," "Leak Detection Methods," "Management of Petroleum Storage Tank Wastes," "Suggestions for Transaction of Properties with USTs," and "Fuel Spill Cleanup."

- "Tank Wise" Newsletter. This document is a free biannual newsletter prepared jointly by MDNR's Environmental Assistance Office (EAO) and Hazardous Waste Programs. This newsletter provides the UST regulated community with important information about proper tank maintenance and major program developments (e.g., status of PSTIF, new program contacts, initiation of the EPA USTFields initiative).

- Closure Guidance Document. This guidance document helps UST owner/operators and their contractors perform complete, technically sound UST closures. The document describes in a step-by-step manner each specific task that UST owner/operators and contractors must complete in order to achieve a closure that is acceptable to the State. The document also provides a number of appendices that contain useful references, forms, contacts, and guidance materials to assist in the closure process.

- Site Characterization Guidance Document. This guidance document presents the department's site characterization requirements for tank releases. It describes when a site characterization is required and the steps required to perform it, including compilation of background and historical information, field screening, sample collection, sample analysis, and reporting requirements. It also provides appendices with sample forms, references, and more detailed guidance on the topics addressed in the document.

- Corrective Action Guidance Document. This guidance document helps UST system owner/operators understand the requirements and procedures for corrective actions. The document describes the following elements of the corrective action process: notification and approvals, corrective action interim measures, corrective action plans, monitoring and reporting of progress, and project closeout/final reporting. The document also provides flowcharts, checklists, and a contact list to facilitate the corrective action process.

One of MDNR's primary outreach tools in recent years has been its web page, which provides an overview of the UST/LUST program and information on the requirements with which UST owners and operators must comply. MDNR also conducts outreach through its non-regulatory Environmental Assistance Office web page. The purpose of the EAO is to inform people about environmental requirements and foster compliance with environmental requirements. The program also provides assistance to businesses, farmers, local governments, and individuals interested in controlling or preventing pollution. The EAO web page provides answers to specific questions about environmental issues and regulations.

In order to reach the widest audience possible, MDNR has always had significant contact with major trade organizations, such as the Missouri Petroleum Marketers Association (MPMA) and the Missouri Oil Council. Over time, MDNR has provided the MPMA with letters informing it of major program requirements, as well as sample letters to send to its members informing them of those requirements. MDNR staff also have made presentations at numerous MPMA meetings. In addition, MDNR staff have set up booths at the annual PACE convention, the State Fair, and other settings where large groups of owners and operators, or representatives of their trade associations, are likely to be in attendance.

In addition to making available to the regulated community news releases, videos, written information, and electronic data, MDNR receives numerous telephone inquiries from the regulated community and the public on a daily basis. MDNR uses these inquiries as an opportunity to further educate the regulated community and the general public about UST program requirements.

Members of the service community, such as tank testers and installers, help to inform owners and operators of the requirements by regularly providing information on available services and products, often with the aid of information from the MDNR database. Most contact between the service community and MDNR has been between individuals and either the central or regional offices; no formal program to certify or license them has yet been undertaken (although the State is currently considering draft legislation addressing this issue).

Other groups also are aiding MDNR's efforts to bring UST facilities into compliance. For example, banks and real estate agencies are working together to ensure that UST sites are declared clean before allowing real estate transactions to occur. In addition, the MPMA has begun an initiative to analyze two or three months of an owner or operator's statistical inventory reconciliation (SIR) data in order to enable the owner or operator to certify compliance with the

release detection requirements for the entire year. PSTIF also conducts occasional facility inspections to ensure compliance with underwriting requirements.

2. ***Identifying unregistered owners and operators.***

For operating facilities, the rate of compliance with registration requirements is well over 90 percent, although the rate for out-of-service facilities and abandoned tanks is significantly lower. Out-of-service facilities typically represent frustrating enforcement cases, as owners are often difficult to identify.

In some instances, inspectors have identified unregistered owners and operators through hard file and database review, which are routine activities. Inspectors also occasionally identify an unregistered facility when out in the field for another reason. The UST database (see below) allows inspectors to determine whether any sites they encounter in the field are registered with MDNR. In some of the larger urban areas of the state, inspectors have conducted street-by-street, drive-by inspections in an effort to identify all potential facilities in the area.

In addition, inspectors often receive complaints of non-compliance from owners and operators of regulated facilities who feel that if they are being held responsible by MDNR for compliance with all of the technical requirements, their competition should be held to the same standards. If the person making the report is willing to submit a formal complaint, inspectors will investigate the situation and proceed with enforcement, if appropriate. This process also may lead to the identification of unregistered facilities.

3. ***Keeping an inventory of the status of all registered tanks.***

MDNR began collecting information on tanks and facilities, and certifying tanks, on August 28, 1989, when the State UST statute went into effect. At the end of 1989, MDNR sent to facilities a printout of the information they had submitted on the federal notification form, asking them to provide any necessary updates or corrections. When an owner or operator properly notifies MDNR of the existence of tank systems and pays all applicable registration fees, MDNR issues an UST certification, which is valid for five years. Updated information on facilities is collected continually through database review, facility compliance inspections, and the registration fee collection process.

MDNR uses a PC-based, Access data management system to maintain information on the regulated community. The database originally started out with three main files related by tank identification numbers: owners, facilities, and number of tanks. Over the years, MDNR has added several more files, including tank installation certification, fee payment status, notification of closure, status of corrective action/releases, regional office staff compliance monitoring efforts, financial responsibility status, enforcement data, and mail log for closure and remediation documents.

The State has undertaken several efforts in recent years to upgrade and update the information in its database. During 1995-96, the UST program hired about a dozen interns to review every tank file on records and update all of the information contained in the file. The interns coordinated printouts and mailings of tank and facility data to owners and operators, with a request for any updates or corrections. In addition, during 1999-2000, the UST program followed up with all owners and operators to verify and update their financial responsibility information. Finally, the annual fee collection process is one of the UST program's most successful methods of acquiring updated tank system and facility information. As a result of all of these efforts, the UST program has been able to gather much new and corrected data, and is more certain than ever that the information is reliable.

As a result of these efforts, the database has been expanded to track information such as owner information, tank type, type of tank and piping protection, fee payment status, financial responsibility mechanism, certificate status, inspection schedule/results, pending enforcement actions, and closure information. The database also is used as a project management tool for ongoing cleanups. MDNR also has been adding GPS data for all UST sites to the database; this provides not only another program management tool but also a consistent location for each site that will not change even if rural route numbers change, as they often do. Inspectors take GPS readings at all sites they visit; one staff person is dedicated to using those numbers to generate maps and other tools that help the UST program better understand its regulated universe (e.g., relationship of facilities to wells, waterways sensitive geological areas; clusters of problem tanks or facilities).

As stated above, inspectors use the database to identify unregistered sites and conduct investigations of those sites. The State also has posted all non-confidential information from the database on its web site, where the regional offices and the public can access it. UST program staff can readily extract from the system any information that they need, and are constantly improving the system to make it more useful for daily operations.

The UST database is maintained and managed by Tanks Section personnel with support from HWP Budget and Program staff, and is designed with screens for data entry, updates, and reports. Staff can access individual reports pertaining to regional office inspections, enforcement, and remediation-related activities. The database does an excellent job of tracking inspection information and providing site-specific reports for UST inspectors to review prior to conducting the actual inspection. The database is updated any time the Tanks Section receives reliable new facility information, which allows the Tanks and Enforcement Sections to track the number of inspections and the number and nature of any violations identified.

MDNR has developed a number of forms to aid its implementation of the UST program and supplement federal forms, such as registration forms, technical bulletins, the insurance fund application, field sheets and chain of custody records, and the UST facility inspection checklist. These forms help the UST program extract pertinent, up-to-date information from UST owners and operators so that the database can be updated and compliance status can be more easily tracked. In order to maintain current facility information and verify recent compliance with

basic UST requirements, MDNR collects updated information from facility owners and operators through several processes. For example, the UST regulations now require that facility owners and operators provide updated information whenever basic facility information changes. This has removed the need for the State to undertake a mass mailing each time it wants to obtain updated information on the UST universe. The burden is now on owners to provide this information. MDNR takes this notification requirement seriously. For instance, MDNR inspectors have actually cited owners for failure to notify MDNR of tank system upgrades.

In addition, the certification process also helps MDNR collect updated information about the active UST universe. During 2001, MDNR began issuing formal Certifications of Registration to owners of qualifying facilities that satisfy the following criteria: (1) tanks are upgraded, (2) leak detection is installed and operational, (3) a valid financial responsibility mechanism is in place, (4) all fees are paid, (5) no enforcement actions are pending, and (6) an inspection of the facility within the past three years has found it to be in full compliance, or violations have been corrected and documented. The Certification, which enables owners and operators to legally operate the facility, is valid for five years. Five years' worth of registration fees ($75/tank, total) are due at the time the Certificate is issued, but once the fees are paid MDNR will not charge fees again until the facility's Certification is up for renewal. MDNR estimates that it may take up to five years to issue all certifications, but at that point it believes it will have nearly complete and accurate data on all active facilities.

MDNR also has developed a template "Welcome to Cleanup" letter that can be modified to suit site-specific conditions and sent to owner/operators of UST facilities where a release has recently been confirmed. This letter requests that facility owner/operators submit cleanup-related information to MDNR and PSTIF as applicable, ensuring that the State has the most up-to-date information available regarding cleanup actions.

B. Compliance Monitoring

Purpose. The implementing agency must have compliance monitoring procedures for collecting and maintaining data on violators and monitoring their subsequent compliance status over time.

The objective of Missouri's compliance monitoring program is to ensure compliance with the statutory and regulatory requirements by the highest possible percentage of regulated facilities. Once MDNR determines a baseline of regulated community compliance status, it must continually monitor the regulated community in order to ensure that compliance with state requirements is continued. The state accomplishes this goal through the registration process, as well as through the enforcement of requirements for new installations, release detection, upgrades, and closures.

In response to the 1998 upgrade deadline, the MDNR Tanks Section has focused on compliance and enforcement of the upgrade requirements, with support from the six regional offices and the Enforcement Section.

MDNR's five regional offices, in conjunction with the central office, provide statewide compliance monitoring coverage through an integrated program. Compliance monitoring is achieved by the central office in Jefferson City through maintenance of the MDNR database containing detailed facility information, including notifications from owners and operators of installations, upgrades, and closures. In addition, MDNR reviews facility records to track compliance with release detection, upgrade, financial responsibility, and corrective action requirements. Regional office staff provide an inspection presence in the field related to the entire set of technical regulations, primarily release detection, installation, upgrade, and closure requirements. Regional office staff also provide an inspection presence at corrective action sites to ensure compliance with corrective action plans and all relevant regulatory requirements, while central office staff provide overall corrective action project management. Both the central office and regional offices encourage public participation to identify potential areas of non-compliance and set priorities for inspections and enforcement actions.

MDNR relies on inspections and subsequent resolution of issues as the primary focus of its compliance monitoring program. MDNR inspectors use the database as a vital tool for planning and conducting inspections; the first item on the inspector's checklist is a verification that the information in the database is supported by the results of the inspection. Inspectors conduct several types of inspections: installation, compliance, closure, LUST/remediation, complaint investigation, and temporary closure. The major components of a facility's operation examined during an inspection are leak detection, upgrade, financial responsibility, mechanical operation, and closure. Each type of inspection is briefly described below.

- Complaint Investigation. A complaint investigation fundamentally consists of site investigation to determine the validity and source of, or reason for, a complaint. The inspector also attempts to determine whether or not a release has occurred and to gather general and specific information about the site.

- Compliance Inspection. When conducting a compliance inspection, the inspector evaluates the complete operation of a facility for compliance with the UST statute and regulations. The major areas evaluated during an inspection include leak detection, evidence of unreported leaks, compliance with upgrade standards, equipment defects, evidence of ongoing leaks, equipment deficiencies, and financial responsibility.

- Closure Inspection. A closure inspection is similar to a compliance inspection, except that during a closure inspection the facility is either in the process of closing or is inactive (i.e., the facility is no longer receiving deliveries of a regulated substance and no longer dispensing regulated substances). Therefore, the inspector is not checking the facility for operating requirements. If a facility is only closing a subset of its tanks with other tank systems remaining active, all tank systems are inspected, and the

inspection is classified as a compliance inspection. Also, if a facility is in temporary closure, a temporary closure inspection (see below) will be conducted. Closure inspections are a priority for the Tanks Section due to the number of releases discovered at closure and the need to initiate remedial action at those sites.

- Follow-up Visit and Re-inspection. The follow-up visit and the re-inspection are variations of a similar activity. In both cases, an original compliance inspection has been completed and some compliance follow-up and conference, conciliation, and persuasion (CC&P) have been conducted by MDNR. To be a re-inspection, the inspector must be in the field and physically visit and inspect the facility. If an inspector does not conduct an inspection, complete a checklist, or write an inspection report, the activity is considered a follow-up visit and not a re-inspection. Follow-up visits are considered to be part of the original inspection.

- New Installation Inspection. A new installation inspection is similar to a compliance inspection, except that during a new installation inspection the facility is in the construction phase and the inspector is not checking the facility for operating requirements. . Owners are required to notify the department prior to a new installation so that an inspector can be on site. Work practices and recommended procedures not covered by UST law and regulations are not cited as violations, but the inspector may comment on them as appropriate, however API and PEI standards are referenced in state UST regulations.

- LUST Site Visit/Field Inspection/Monitoring/Oversight. LUST site visits may be performed on any state or responsible party lead sites. During such site visits, the inspector essentially conducts a check to see whether the owner/operator is complying with the requirements regarding closure, investigation, or remedial activities directed by the Department. The inspector also checks to see that any mechanical remedial equipment (e.g., blowers, vent fans, water pumps) is plugged in and/or operational.

- Temporary Closure Inspection. Inspections of temporarily closed USTs are similar to UST compliance inspections. As with other inspection procedures, the inspector obtains access and conducts an on-site inspection using applicable inspection procedures. The inspector places emphasis on checking the number, construction, and operational status of USTs and looking for signs of contamination. Each UST system is checked for water and product levels. Compliance with the 1998 upgrade standards also is checked because upgraded USTs can remain in temporary closure indefinitely. Inspectors check on the filing of UST Closure Notices and inquire about the status of contractors (e.g., who they are and when they intend to begin work). Inspectors complete a Temporarily Closed Tank Inspection Form to document the inspection.

In preparation for an inspection, regional office inspectors access the UST database to retrieve facility-specific tank and compliance information. They may also review facility files

prior to the site visit. During inspections, inspectors complete an inspection checklist, which the program developed to document the facility's compliance status. The inspection checklist covers all aspects of UST compliance, including corrosion protection for tanks and piping, tank registration, leak detection, record keeping, spill and overfill prevention, and financial responsibility. The database is updated as needed to reflect the findings of each inspection.

During every site inspection, the inspector follows a standardized procedure that includes filling out the inspection checklist; interviewing the person representing the facility to determine all possible information up-front; filling out the suspected release form if evidence of a release exists; checking the operational and physical condition of site facilities and equipment; checking wells; and completing a site sketch and facility description as appropriate. In FY 02, Missouri conducted inspections of 1,620 UST sites.

A new MDNR initiative over the past two years has been to harmonize the inspection philosophies and procedures of the regional offices with those of central office and each other. Staff from all five regional offices have come together to observe, comment on, and learn from inspections performed by staff from other regional offices. MDNR also has held several workshops to help inspectors refine the consistency of the inspection program. To further ensure the quality and consistency of all inspections conducted by MDNR staff, all regional office staff have attended cathodic protection training by a certified cathodic protection tester. Many senior inspection staff have attended national training and conferences. Monthly conference calls with regional office and central office staff help keep everyone informed of recent developments and compliance issues. An electronic discussion database is also available to tanks staff to discuss compliance issues.

MDNR has implemented a program to inspect tank sites in response to complaints received from the regulated community, the general public, and local or state authorities concerning possible regulatory violations and/or releases. Regional office staff typically are notified of any complaints, and handle the response whenever possible. Where appropriate, MDNR will conduct an inspection and enforce the requirements through its standard enforcement process.

MDNR inspectors conduct inspections without prior notification, unless some site-specific factor makes advance notice necessary. Inspectors use their field notes, checklists and evidentiary documentation collected to prepare a written report of the inspection. Inspectors also attempt to verify and document in the file claims of "above and beyond" compliance in a manner consistent with the "Recognition of Positive Actions Performed by the Regulated Community" policy.

A Tanks Inspection Report documents when an inspection was completed, who was present for the inspection, conditions/findings at the time of the inspection, deficiencies at the time of the inspection, and recommendations and guidance for returning to compliance. Inspection reports are the primary documentation of conditions found by the inspector at the time

of the inspection. Inspection reports can be a pivotal piece of evidence in an investigation, enforcement action, or court case; as a result, inspectors are very careful in preparing the reports.

C. Procedures for Enforcement Response

Purpose. The implementing agency must have procedures to exercise legal authorities for enforcement to take actions against violators, bring them into compliance, and deter other potential violators.

MDNR's Enforcement Philosophy

Enforcement response is the determination of what unresolved violations, if any, are present and the appropriate response to be made in order to uphold the law and regulations and to protect human health and the environment. The goal of the MDNR enforcement response procedures is to seek prompt compliance when violation of environmental regulations may endanger public health or cause substantial environmental harm, and negotiate reasonable compliance with regulations when violations do not immediately endanger the public health or environment.

The MDNR enforcement program seeks to address and resolve violations of the UST statutes and regulations through informal negotiations with owners and operators to encourage voluntary returns to compliance. However, where knowing violations result in releases of regulated substances to the environment, the state relies upon more formal civil enforcement actions, including the possible imposition of penalties. MDNR's basic enforcement philosophy is one of graduated response, with the response being appropriate for the nature of the violation. Increasing the rate of regulated community compliance, not penalty assessment, is the goal of the Missouri UST program.

Summary of the Basic Enforcement Process

In general, the four basic steps of enforcement are: (1) Conduct an inspection; (2) Identify violations and determine the environmental risk of each violation prior to initiating enforcement action; (3) Initiate compliance, conciliation and persuasion (CC&P) as necessary to assist with and encourage compliance; and (4) Initiate and complete the appropriate enforcement response.

During the inspection, the inspector normally spends some time providing technical assistance (e.g., talking to the owner/operator and describing what general steps need to be taken to return to compliance; providing written technical guidance). However, inspectors do not prescribe exactly how compliance should be achieved. After the inspection, the inspector prepares an inspection report documenting the inspection by highlighting deficiencies and providing recommended actions to rectify any violations discovered. The inspector then sends a copy of the inspection report and checklist to the facility owner/operator.

Minor Violations. Minor violations are sometimes classified as Class II inspections. These are violations for where there is no immediate threat to human health and the environment and no knowing disregard for regulations. The normal enforcement response for a case in which noncompliance is noted and an NOV is not issued at the time of the inspection consists of several escalating steps. Throughout this process, if the facility owner/operator adequately responds to the department and regains compliance at any point, the enforcement response is discontinued. The first step entails completion of the inspection package (i.e., checklist and report) and transmittal of the inspection package to the responsible party along with a Letter of Warning (this occurs within 30 days of the inspection). The Letter of Warning establishes time frames for the completion of corrective actions within 30 days, if feasible, or longer if required.

The owner/operator then submits a response to the regional office after taking action to achieve a return to compliance. The regional office reviews the response and then replies to the owner/operator, stating either that compliance has been achieved or that further action is required. Usually, the inspector is able to make a compliance determination based on the information submitted by the owner/operator, although occasionally the inspector may perform a follow-up inspection to aid that determination.

If the owner/operator fails to respond to a Letter of Warning within the prescribed time period, MDNR issues a second letter and Notice of Violation, which requests a response within 15 days and notes that if compliance is not achieved the case will be referred for enforcement. This is the beginning of the process known as conference, conciliation, and persuasion (CC&P). CC&P is a process of verbal or written communications consisting of meetings, written correspondence, telephone conferences, or exchange of documents between authorized representatives of the department and the alleged violator. The theory behind CC&P is that meetings and negotiations with responsible parties often can be effective in encouraging a return to compliance. At a minimum, the CC&P process consists of one offer by the department to meet with the alleged violator. During any such meeting, the department and the alleged violator negotiate in good faith to eliminate the alleged violation and attempt to agree upon a plan to achieve compliance.

If the owner/operator continues to be unresponsive to the second letter and NOV, MDNR offers to hold a CC&P meeting to learn why compliance has not been achieved and persuade the owner to commit to a compliance schedule. If the parties cannot reach a resolution during this meeting, the case may be referred to the Enforcement Section, Petroleum Storage Tanks Enforcement Unit, for review. Administrative penalties are one option available to MDNR at this point. State law requires that if MDNR intends to assess administrative penalties under 319.139 or Chapter 13 of the regulations, it must previously have used CC&P as part of the enforcement process. In practice, however, administrative penalties are rarely used because MDNR has found other enforcement methods to be more effective.

While CC&P may help the parties arrive at a solution without resorting to formal enforcement proceedings or penalties, its use does not preclude such formal enforcement mechanisms from being employed if necessary. CC&P usually consists of at least two

communications, one of which must be in writing, separated by no less than ten calendar days. These communications typically demonstrate MDNR's willingness to forgo formal enforcement in exchange for a rapid return to compliance. MDNR may not assess penalties if the violation is corrected within the time period agreed to by MDNR and the violator.

If the facility owner/operator does not satisfactorily respond to the first NOV or does not meet the compliance schedule set out in the first NOV, the inspector either conducts a re-inspection and issues a second NOV immediately at the conclusion of the inspection or contacts the Enforcement Section for case discussion and issues a second NOV in conjunction with a referral of the case to the central office for enforcement. If the facility does not satisfactorily respond to the second NOV, the case will be referred to the Enforcement Section for elevated enforcement action. Inspection personnel do not issue a third NOV unless they are directed to do so by the Enforcement Section.

Major Violations(Class I). Violations that pose a possible threat to human health or the environment or that demonstrate a blatant disregard for regulations are considered Class I violations. When the inspector notes that a major, Class I violation (i.e., one posing a significant risk to human health or the environment) exists at a facility, the inspector may issue a Notice of Violation (NOV) at the conclusion of the inspection. The NOV formally requests that the recipient respond to the department within 15 days with a description of all corrective actions taken or a schedule for the necessary corrective actions to be taken. The NOV is not a legally binding document and is not equivalent to an order. However, if a facility that receives an NOV does not make an appropriate response, MDNR will take progressive enforcement response steps (including referral to the Enforcement Section) as outlined above.

If the case involves an emergency requiring immediate action (e.g., an ongoing release), ESP will provide guidance on how to resolve the situation. If the problem persists, the case may be referred to the Enforcement Section for further action.

Referral to Enforcement Section/Escalation of Enforcement

For facilities where violations are documented that may require an enforcement referral (regardless of whether it is a remediation site or not), the referral proceeds as follows. First, the office responsible for the inspection/case must ensure that sufficient documentation exists, that adequate CC&P has been conducted, and that the appropriate enforcement response procedures have been followed. Next, the compliance officer contacts the Enforcement Section Chief or the Chief's designee to discuss the case. The Enforcement Section either agrees to accept the case or provides guidance for the continuation of negotiation and CC&P. Lastly, if an enforcement referral is the agreed option, the referring office submits an enforcement action request from the Regional Director to the Enforcement Section Chief.

Once a referral is made, the Enforcement Section makes an initial evaluation of the case. Based on the evaluation, the Enforcement Section begins the enforcement action or returns the case

to the regional office with a memo listing the reason for the return and recommendations. Upon accepting a case, the Enforcement Section notifies the responsible party by letter that the case has been referred for enforcement and that any questions or contacts concerning the inspection, violations observed, enforcement response, or how the case will be handled should be referred to the Enforcement Section.

If the enforcement referral is accepted, the case is assigned to a case manager who works to achieve compliance through additional CC&P. The case manager will first evaluate the case and identify the actions needed for compliance, and/or determine the appropriateness of assessing civil penalties. The case manager then sends a letter to the facility owner that provides additional guidance on actions needed to achieve compliance and notifies the owner of the potential penalties that MDNR is prepared to assess for failure to comply (as appropriate).

If an owner/operator remains out of compliance after the Tanks Section compliance officer and the Enforcement Section case manager have made all reasonable efforts to achieve compliance, the case manager will refer the matter to the Attorney General's Office. The Attorney General's Office may file suit on behalf of MDNR to persuade compliance and seek appropriate civil penalties as required. Nearly every enforcement case that reaches this point in the process has penalties associated with it; when a case goes this far, it is clear that CC&P has not worked and probably will not work.

When compliance has already been obtained or is imminent, the Enforcement Section issues a letter of warning and/or penalty demand letter in order to document and direct that return to compliance. When compliance is not imminent, it may be necessary to more forcefully direct a return to compliance, or to remove any apparent Department sanctions of past or continuing noncompliance. The Enforcement Section may issue an Administrative (Abatement) Order (AO) to address such circumstances. The AO sets forth findings of fact and a statement of violations and further sets forth specific actions and a required schedule for a return to compliance.

Litigation or the threat of litigation is sometimes necessary to persuade a responsible party to take action when CC&P is not effective, when orders are not obeyed, or when the formality and implicit sanctions of a court action are deemed necessary. When litigation is necessary, the case is usually referred to the Attorney General's office, although cases also may be referred to county prosecuting attorneys.

Some cases, especially those that pose potential threat to human health or the environment, require immediate action. Such situations typically result in an emergency response by the Environmental Services Program or the regional office, as appropriate.

Role of the Compliance Officer

Following a referral to the enforcement section, , a compliance officer is assigned to the case. The compliance officer's primary responsibility is working to get the facility back into

compliance. Most of the time, the compliance officer is able to achieve compliance using CC&P. Upon a return to compliance, the compliance officer issues a "return to compliance" letter.

If compliance is not achieved, the compliance officer may inform the owner/operator that he or she is evaluating whether assessment of penalties is appropriate. If the compliance officer decides to assess penalties, the compliance officer sends out a penalty demand letter, which offers a chance for the owner/operator to negotiate the penalties with MDNR. Note that penalties still may be assessed even if compliance has recently been obtained.

MDNR's Enforcement "Toolkit"

MDNR staff have a number of effective enforcement tools that can be used individually or in combination to compel compliance by UST owners and operators. These tools include:

- Notice of Violation (NOV). This letter formally identifies the violation and what needs to be done to correct it.

- Demand Letter. This letter, following non-response to the NOV, states that if the owner does not take the suggested action to correct the identified violation by a certain date, MDNR will take enforcement action. MDNR has developed a series of template enforcement letters that can be modified to suit site-specific conditions and sent to owner/operators of UST facilities where violations have been noted.

- Settlement Agreement. Often referred to as a "compliance contract," this binding enforcement action negotiated out of court with the owner or operator typically follows the demand letter. It specifies the actions required to return to compliance, and often includes assessment of penalties. MDNR issues the order, which would be defended by the Attorney General's Office if the case went to court.

- Abatement Order. This action requires the owner or operator to immediately correct a violation, and is used if the violation poses an immediate threat to human health or the environment.

- Administrative Penalty Order. This order is similar to the Abatement Order, but additionally assesses penalties.

- Referral for Litigation. This action sends the matter to court through the Attorney General's Office and may provide for injunctive relief and civil penalties.

- Revocation of Certificates. The Tanks Section and Enforcement Section are developing procedures for revoking operating certificates as needed in response to non-compliance. This will give the program an additional enforcement tool (when all facilities have received their certificates).

- Automatic Referral for Assessment of Penalties. Several types of violation result in automatic referrals for penalty assessment, including failure to upgrade, failure to have adequate financial responsibility, and failure to investigate a release or submit a corrective action plan.

- Cost Recovery. MDNR also has the authority to pursue cost recovery under Chapters 260 and 319, RSMo., and has an active cost recovery program. One full-time staff member is specifically dedicated to the cost recovery function.

Note that while the UST program has the authority to issue abatement orders and administrative penalty orders as indicated above, these mechanisms are used only infrequently. These methods are not only labor-intensive, but the potential penalty amounts are just a fraction of the civil penalty amounts that can otherwise be assessed. MDNR has developed a penalty assessment protocol, which was modeled after EPA's RCRA penalty policy and modified to conform to Missouri's penalty limits. MDNR calculates penalties by weighing the gravity of the noncompliance and any economic benefits accrued as the result of noncompliance.

Typical Outcome

The most common enforcement outcome is the settlement agreement. This arrangement often is the most workable because all parties are at the table and are able to shape and agree to the terms of the settlement. The agreement is signed by MDNR, the Attorney General's Office and the facility owner. Under a settlement agreement, MDNR agrees not to pursue further enforcement against the cited violations if the owner agrees to promptly comply. If the owner or operator does not adequately demonstrate compliance, the case can still be referred to the Attorney General for litigation. In many cases, the settlement agreement streamlines the enforcement process and eliminates the need for the Clean Water Commission to hear appeals.

Concurrent Enforcement of Multiple Cases

When a facility owner is found to be in violation, the inspector queries the UST database to determine if that owner has other facilities that also require a return to compliance and/or civil penalties. If so, the cases are merged and pursued concurrently. In such cases, the non-compliant owner receives one compliance letter covering several facilities, with an opportunity for the owner to enter into a consent agreement or consent judgment to ensure that steps are taken to bring all of the facilities into compliance within a specified time period. This agreement also would spell out the assessment of any applicable civil penalties or cost recovery arrangements.

An overview of some MDNR UST enforcement activities is provided in Table 4.1 below.

Table 4.1: Overview of MDNR UST Enforcement Cases

Action	Number of Cases
Referrals to Enforcement Section (since beginning of FY 1998)	310
Settlement Agreements reached (since beginning of FY 1998)	91
Cases resolved (i.e., completion date since beginning of FY 1998)	221
Active cases – current, cumulative (i.e., no completion date)	211
Active cases referred to Attorney General's Office (cumulative)	54

Remediation Enforcement

The State requires that all UST releases be reported to the dedicated spill reporting telephone line operated by ESP. Based on the circumstances of the case, ESP staff determine what emergency response and/or abatement actions, if any, need to be taken. Once a spill has been reported and any emergency conditions abated, Tanks Section staff oversee compliance with relevant corrective action requirements. If the responsible party fails to comply with the corrective action requirements, the Tanks Section may initiate an enforcement referral request. At that point, the case would enter the normal enforcement pipeline and follow the procedures outlined above. In short, if the Tanks Section is unable to obtain compliance with the corrective action requirements after CC&P, the case is referred to the HWP enforcement Section and/or the Attorney General's office to pursue compliance.

If the responsible party decides to initiate corrective action immediately, MDNR probably will not pursue enforcement action. If enforcement is necessary, however, it occurs on two simultaneous fronts: under the authority of Chapter 260, RSMo. for cost recovery, and under the authority of Chapter 319, RSMo. for technical compliance. MDNR is authorized to recover up to four times its reasonable costs through enforcement.

Appeals Process

Violators may appeal Administrative Orders and Administrative Penalty Orders to the Clean Water Commission. When a case is under appeal, the order will not be enforced until the Commission issues a final determination. In the appeal hearing, the Commission may sustain, reverse, or modify the executive secretary's order, or take other appropriate action. If an owner or operator does not appeal an order to the Commission within thirty days, the order becomes final and is enforced. Because the Tanks Section is now located within the Hazardous Waste Program, MDNR is seeking legislation to streamline appeals by re-designating all Chapter 319 requirements as being under the jurisdiction of the Hazardous Waste Commission.