

APPENDIX L

**ACCESS AND RIGHT-OF-ENTRY
and
ENFORCEMENT GUIDANCE FOR PENALTIES**

Access and Right-of-Entry

GUIDANCE SUMMARY AT-A-GLANCE

- The following steps should be taken when entering onto private property:
 1. Inform the property owner of your right under Section 178 of Article 12 of the Navigation Law to enter his or her property.
 2. Ask the property owner to sign a property access consent form (Exhibit 2).
 3. If the property owner does not sign the consent form, ask him or her for verbal permission to enter the property.
 4. If the property owner is not present, enter the property only if it is critical to protecting human health and the environment or to assessing the extent of the suspected release.
 5. If the property owner denies you access to the property, assess whether the situation is an emergency.
 6. In emergency situations when the owner denies you access, consider the following alternatives: contacting your Regional Environmental Conservation Officer for assistance; contacting other regional uniformed personnel such as state police, sheriffs, or fire marshals; or contacting your Regional Attorney.
 7. In non-emergency situations when the owner denies you access, contact your Regional Attorney's office and have them notify the owner of the Department's legal right to enter the property.
 8. If after taking the above steps you still fail to gain access to the property, contact your Regional Attorney to obtain a court order to enter the property.

This section addresses the right of NYSDEC personnel to enter private property on which a spill has occurred or is suspected, for the purpose of investigating, containing, and/or cleaning up the spill. It covers your legal rights to enter property and the procedures to follow to ensure that no charges of trespassing are brought against the Department. Steps for gaining access to private property are summarized in Exhibit 1.

Exhibit 1

Steps in Gaining Access to Private Property to Investigate Spill

insert Freelance drawing - 3 pages

Exhibit 1

**Steps in Gaining Access to Private Property to Investigate Spill
(continued)**

Exhibit 1

**Steps in Gaining Access to Private Property to Investigate Spill
(continued)**

1. Access Procedures - Owner is Present and Consents

STEP 1: Obtain the Owner's Written Consent

Before entering the property, tell the property owner or authorized agent who you are, why you are there, and that you have authority to enter his or her property under the Navigation Law (Section 178). Be prepared to quote or show a copy of the Section 178 language. If possible, have the property owner sign a property access consent form (Exhibit 2).

STEP 2: Obtain the Owner's Verbal Consent

If the property owner refuses to sign the consent form, but will give his or her verbal consent, immediately record in your field notes the circumstances surrounding the consent. Include in your notes the identity and description of the person giving consent, the time and place of the conversation, and as verbatim an account as possible of the conversation. If at all possible, have a third party witness the verbal consent and sign your field notes.

2. Access Procedures -- Owner is Not Present

When the property owner is unavailable or cannot be ascertained (e.g., a late night spill response), proceed to enter the property if your entry is necessary to protecting human health and the environment or to assessing the extent of a release.

3. Access Procedures - Owner is Present and Denies Access

When the property owner or agent denies you access, your next step depends on whether an emergency situation exists. An emergency situation is defined as any situation that immediately threatens public health or safety and/or the environment, and in which action must be taken at that time to prevent harm from occurring or to mitigate potential adverse effects on public health.[1] For example, an emergency situation would include those where immediate action is necessary to prevent a petroleum spill from reaching surface waters or flowing into a sewer and causing a potential explosive vapor situation. If you have reason to believe that an emergency exists, your immediate entry onto the property is justified. If you have any doubts about whether you have an emergency situation, confer with your Regional Attorney. If your actions could be deferred long enough to allow you to obtain a court order, with no harm to public health or the environment, then it is not an emergency situation. If an emergency situation does exist and the property owner denies access to the site, consider taking the following actions. The actual steps taken and the order in which you take them will depend on your evaluation of the situation:

Exhibit 2

Property Access Consent Form

[Date]

Spill #: _____

[Addressee]

[Address]

Dear []:

The Department of Environmental Conservation is investigating and/or remediating a petroleum spill that has occurred on or near your premises.

Pursuant to section 178 of the Navigation Law, the Department and its contractors are authorized to enter onto property for these purposes. A copy of section 178 is enclosed for your information.

The Department would prefer to act in cooperation with private parties. Therefore, it is requested that you sign this form acknowledging and consenting to the Department's right of entry onto your property.

(For non-spiller property)

If you believe that your property has been damaged as a result of the Department's activities, and the damage has not been corrected by the time these activities are completed, you have a right to file a claim. Please feel free to direct any questions you may have on this matter to me at # _____.

Very truly yours,

Enclosure

Signature _____ Date _____

Print Name _____

Address _____

NOTES

- Notify your regional Environmental Conservation Officer (ECO) and request his or her assistance. Ask the ECO to accompany you to again ask consent of the owner. In many cases, having a uniformed ECO present when you explain the Department's authority to enter private property under the Navigation Law will be sufficient to gain the owner's consent. ECOs have the right to arrest for obstruction of governmental administration. It is solely the decision of the ECO whether an arrest is warranted.
- Request the assistance of other uniformed personnel, such as the state police, sheriffs, or fire marshals. Explain the situation to these personnel, but leave the decision of whether to force entry to them.
- In no case should you risk physical injury to yourself or to others in attempting to gain entry to spill site.
- Ask your Regional Attorney (or, if the Regional Attorney is unavailable, another Department attorney) to call the owner, his or her agent, or attorney and advise them of the Department's legal authority to gain access to spill sites under the Navigation Law.
- If all else fails, refer the situation immediately (by telephone or radio) to your Regional Attorney about other options, including court-ordered access (see subsection 5 below).[2]

If the situation is not an emergency and the property owner denies access, contact your Regional Attorney's office and request that they call the owner and advise him or her of the Department's authority to enter spill sites.

4. Obtaining a Court Order

Obtaining a court order is a last resort for both emergency and non-emergency situations. If the procedures outlined above are unsuccessful, get a court order to obtain access to the site. To obtain a court order you will be required to:

- Contact your Regional Attorney for his or her concurrence that all other avenues have been exhausted, that a court order is necessary, and that there is sufficient information and facts on which to base a request for such an order.
- The Regional Attorney will work with you to develop an affidavit that describes how you know or why you suspect that a spill has occurred. Describe in detail the circumstances leading up to your request, the nature of the emergency situation and/or the necessity

NOTES

for taking immediate action, and the fact that the owner has refused access to the property. You may also have to describe the relief sought (i.e., inspection, testing, monitoring wells, recovery wells, etc.).

5. What to do if Criminal Charges are Lodged

If criminal charges such as trespass or criminal mischief are lodged against you in the course of performing your spill response duties, notify your Regional Director and Regional Attorney immediately. Your Regional Attorney will advise you on the steps to take.

6. What is Criminal Trespass?

Under Section 140.5 of the New York State Penal Law, a person is guilty of criminal trespass when he or she "knowingly enters or remains unlawfully" in or upon premises. Premises include both buildings and land. A person enters or remains unlawfully when he or she does not have the owner's consent to enter or remain on the property and there is no independent legal basis for the person's being on the property (for example, Section 178 of the Navigation Law).

Credible evidence of consent will defeat any claim of criminal trespass. Consent can be explicit, for example, when the owner signs a consent form or verbally consents. It can also be implicit, as would be the case if the owner understands who you are, what your job is, and does not verbally or otherwise deny you access to the property, although he or she does not explicitly give you permission to enter.

You may lawfully enter unimproved and apparently unused land that is neither fenced nor enclosed in a manner to exclude intruders, unless the owner personally communicates to you his lack of consent, or there is a notice posted conspicuously near or on the property. In the event of a charge of criminal trespass, defenses are available to public employees.

REFERENCES

1. New York State Hazardous Material Emergency Contingency Plan, New York State Disaster Preparedness Commission, January 1986. p. III-1.
2. Memorandum on Access to Property, Division of Legal Affairs, March 17, 1988.

Enforcement Guidance for Penalties

GUIDANCE SUMMARY AT-A-GLANCE

The general policy for recommending the imposition of penalties pursuant to Section 192 of the Navigation Law is as follows:¹

- Penalties are recommended for cases in which the PRP/RP refuses to take responsibility for cleanup, thus triggering activation of the Oil Spill Fund or federal funds.
- Penalties are recommended for those cases in which the PRP/RP acts in such a manner as to cause increased environmental damages, which increases clean-up costs and delaying the cleanup.

If you and the RSE choose to make such a recommendation, complete the Penalty Recommendation Form and attach it to the ISR. A sample ISR and penalty recommendation form are found in Exhibits 3 and 4.

Other guidelines and information pertinent to the assessment of penalties for spill cases include the following:

- **Multiplier Provisions.** The Environmental Conservation Law and Navigation Law contain a number of multiplier provisions making each day that action is delayed or act a separate violation under the law.
- **Other Potential Violations.** Examine carefully those cases involving petroleum bulk storage or spill response violations for potential violations in other program areas. If spill of petroleum has occurred, there is the distinct possibility that violation of fish and wildlife, wetlands, water and hazardous waste laws may have also occurred.
- **Statute of Limitations.** The "statute of limitations" for administrative enforcement action is governed by the State Administrative Procedure Act 301 and is a test of reasonableness. The DEC Commissioner may dismiss enforcement actions by staff that are brought after an unreasonable amount of time has passed since detection of the violation. However, the requirement that certain inventory and other records be maintained by facilities for a period of five years does not, as a matter of law, preclude DEC staff from charging an offender with a non-recordkeeping violation that occurred more than five years

¹ Information concerning penalty recommendation procedures is taken from the Draft Enforcement Guidance Memorandum (Exhibit 6). This document, and therefore the information from this document, is confidential and not for public distribution.

NOTES

before. The length of time that has elapsed since the violation occurred is one of the many factors considered in determining whether to go forward with an enforcement action. It has been determined that the Fund Administrator has six (6) years from expenditure of money to commence an action to recover monies disbursed from the Oil Spill Fund.

Exhibit 3

Sample Investigative Summary Report

insert file APP-L-EX.50 (includes exhibits 3 & 4)

Exhibit 3

**Sample Investigative Summary Report
(continued)**

Exhibit 4

Sample Penalty Recommendation Form

NOTES

- Careful Documentation. Every spill response violation for which an enforcement action is initiated may ultimately be reviewed administratively or judicially. Cases involving violations of the Navigation Law or cost recovery by the state for spill cleanup, may result in judicial pretrial activities such as discovery and examinations before a trial. As a consequence, it is imperative that you conduct every investigation of a spill with that eventuality in mind. Bringing an action against a party for spill response violations often involves working with complex technical data and requires that BSPR bring its utmost professional experience and judgment to bear--in order to achieve proper and effective enforcement or cost recovery. In every case, therefore, document fully the facts in the case and develop a substantial basis for asserting that a violation has occurred.

In short, you should not recommend a penalty unless and until you have on file reasonable documentation to establish that the violation has occurred and the person(s) responsible for the stated violation. Once you satisfy those criteria:

- (a) Mark on the ISR the exact provision of law that the potentially responsible party has violated. Exhibit 5 gives examples of certain laws and the penalties for not complying with those laws (see Appendix M for relevant sections on fines and penalties from the Navigation Law and Environmental Conservation Law).
- (b) When recommending a specific amount of penalty, consider the following: (a) the severity of the danger, or threat of danger, to human health, safety or the environment; (b) the extent of the violation (volume and duration); (c) the level of knowledge or intent of the violator; (d) the prior record of the violator; (e) the financial standing of the violator; (f) the penalty levels established for the violation; (g) the cost of compliance and/or clean-up and/or remediation costs; (h) the strength of DEC's case; and (i) the penalties assessed by DEC and the courts for similar violations.
- (c) Recommend a specific amount of penalty, classify it as minimum, moderate, or severe, and defend your decision with facts from the case file. The magnitude of the penalty should be based on the factors enumerated above, as well as the clean-up costs. Recommendations will contain a specific monetary figure for the penalty based on the guidelines contained in Enforcement Memorandum (Exhibit 6).
- (d) Recommended penalties are to be also shown on Interim ISR's for the following reasons:
 - 1) There is a 3 year statute of limitations from the date of the non-compliance/violation in which a penalty can be imposed.

NOTES

- 2) Penalties can be recommended by Regions for new violations/non-compliance after submittal of an interim ISR. The penalty recommendation page(s) can then be transmitted by memo instead of another ISR.
 - 3) Penalties already recommended on an interim ISR can be increased, if necessary, because of continuing violations.
- (e) Transmit all recommendations for penalties and fines to the Bureau of Spill Prevention and Response along with your rationale. Expedite those ISR's where an environmental lien needs to be implemented. "Environmental Lien" should be clearly noted on the ISR.

Exhibit 5

Examples of Requirements and Penalties

<u>Requirement</u>	<u>Penalty for Not Complying</u>
Release reporting applicable to all spills and releases of petroleum (NL 175 and 17 NYCRR 32.3)	Civil penalty of up to \$25,000 per day of violation (must be assessed through court of competent jurisdiction) (NL 192)
Release reporting applicable to spills/leaks from minor petroleum bulk storage facilities (6 NYCRR 613.8)	Civil penalty of up to \$10,000 per day of violation (ECL 71-1929) Criminal penalties of up to \$25,000 per day of violation and/or up to one year imprisonment for 1st offense (ECL 71-1933)
Release reporting applicable to persons having actual or constructive possession of 1100 gallons or more of petroleum (in liquid form) (ECL 17-1743)	Civil penalty of up to \$2500 plus \$500 per day violation continues, plus cost of remediation (ECL 17-1941) Criminal penalty of up to \$2500 and/or up to one year imprisonment (ECL 71-1943)
Containment and removal of discharge of petroleum by responsible party (NL 176 and 17 NYCRR 30.5)	Civil penalty of up to \$25,000 per day of violation (must be assessed in court of competent jurisdiction) (NL 192)

*NL = Navigation Law

*ECL = Environmental Conservation Law

*NYCRR = New York Codes, Rules, and Regulations

Exhibit 6
Draft Enforcement Guidance

