

OHIO ENVIRONMENTAL PROTECTION AGENCY VERIFIED COMPLAINT PROTOCOL

Revised March 2005
(Replaces DERR-00-DI-023)

Background

This protocol has been developed to achieve the following goals:

- Develop a process to determine whether a complaint submitted to the Ohio EPA is a verified complaint in accordance with Ohio Revised Code (ORC) § 3745.08;
- Develop a process to effectively determine if there are multi-media issues alleged in a verified complaint; and
- Ensure consistent handling of and eliminate duplication of effort of multi-media verified complaints by Ohio EPA.

If a previously existing district or division verified complaint protocol conflicts with the Agency-wide protocol, it will be superseded by the Agency-wide verified complaint protocol.

What is a Verified Complaint?

A "verified complaint" is a unique type of complaint for Ohio EPA. Ohio Administrative Code (OAC) rule 3745-47-03(O) defines a verified complaint as "a written complaint, verified by the affidavit of the complainant, his agent, or his attorney. The affidavit may be made before any person authorized by law to administer oaths, and shall be signed by the person who makes the affidavit. The person who administers the oath shall certify that the affidavit was sworn to before him and signed in his presence."

Verified complaints are established in ORC § 3745.08. ORC § 3745.08(A) defines who may file a complaint, and that the complaint must allege a past, present, or future violation of a law, rule, standard, order, license, permit, variance, or plan approval. It also specifies the procedure the complainant must follow when filing the complaint with the Director. Under ORC § 3745.08(B), the Director must cause a prompt investigation to determine whether a violation has occurred, is occurring, or will occur. Such investigation must include a discussion of the complaint with the alleged violator(s). Following the investigation, the Director may:

1. Enter orders as may be necessary,
2. Request the Attorney General's Office (AGO) to commence legal proceedings,
or

3. Dismiss the complaint if violations have been terminated and future violations of the same kind are unlikely to occur, or no violation or threatened violation is found.

Before taking any action under ORC § 3745.08, the Director may commence a hearing. 20 days prior to any hearing, the Director shall cause publication of notice of the hearing in a newspaper with general circulation in the county wherein the alleged violation has occurred, is occurring, or will occur, and also shall mail written notice by certified mail, return receipt requested, to the person who filed the verified complaint and to the alleged violator.

Procedure For Processing a Potential Verified Complaint (See attached flowchart)

All complaints alleging to be verified complaints will be forwarded to the Deputy Director for Legal Affairs (or designee). The Deputy Director for Legal Affairs will review the complaint and determine if it alleges violations in more than one program. If the complaint does allege violations in more than one program, the Deputy Director for Legal Affairs will consult with the Enforcement Coordinators of the affected divisions to determine who will be the lead division for purposes of the initial processing of the complaint. Once a lead division has been chosen, a copy of the complaint will be forwarded to the Enforcement Coordinator and the Supervising Attorney of the lead division. If the Deputy Director for Legal Affairs determines that the complaint alleges violations in only one program, he will forward a copy of the complaint to the Enforcement Coordinator and Supervising Attorney of the affected division.

At this time, the Supervising Attorney (or designee) will evaluate the complaint to determine if the complaint is a verified complaint pursuant to ORC § 3745.08(A) and OAC rule 3745-47-03(O). Criteria to consider in making this determination include:

- Is the complainant (1) an officer of an agency of the state or a political subdivision acting in his/her representative capacity or (2) a person?
- If a person, does the complaint and supporting material demonstrate that the person is aggrieved or adversely affected by a violation that has occurred, is occurring or will occur?
- Is the complaint verified? A verification requires that the complainant, his agent, or attorney state under oath that the factual assertions made in the verified complaint are true and accurate, with such verification signed in the presence of a notary public.
- Does the complaint allege that another person has violated, is violating, or will violate any law, rule, standard, order, license, permit, variance, or plan approval?

- Is there an affidavit verifying the complaint? If so, is the affidavit made from personal knowledge?

If the complaint is determined not to be a verified complaint, the Enforcement Coordinator will forward the complaint to the appropriate District Office for routine processing. The Supervising Attorney (or designee) will then write a letter to the complainant informing him/her that the complaint is not a verified complaint and that it has been forwarded to the appropriate District Office.¹ The Supervising Attorney will copy the Deputy Director for Legal Affairs on this letter for tracking purposes.

Valid Verified Complaint Notice and Distribution

If the complaint is determined to be a valid verified complaint (VC), the Enforcement Coordinator of the affected division (or lead division, if a multi-media VC), will forward the VC to the division's Records Management Officer (RMO).

Within 15 days of receipt of the VC at the Agency, the RMO will perform the following activities:

1. Assign a tracking number to the VC;
2. Create a division file;
3. Enter the VC information into a tracking log maintained by the RMO;
4. Prepare a public notice for publication in an appropriate newspaper and in Ohio EPA's Weekly Review;
5. Send an acknowledgment letter to the complainant and copy the Deputy Director for Legal Affairs on this letter for tracking purposes.;
6. Send the VC and a transmittal letter to the appropriate District Office Chief (or designee), requesting prompt and thorough investigation of the VC and the submittal of an Investigative Report and Recommendation to the Enforcement Coordinator(s) of the affected division(s); and
7. If a multi-media VC, send a copy of the VC and the transmittal letter to the Enforcement Coordinator(s) of the other affected division(s).²

District Office Investigation

¹As set out above, if Ohio EPA determines that a complaint is not a verified complaint, it should still investigate the allegations contained therein. For example, ORC § 6111.05 requires the Director to investigate any "written complaint" and "make any inquiries that are required."

²If the multi-media VC involves alleged air violations which will be investigated by staff of a local air agency (LAA), the District Chief will transmit the VC to the LAA requesting investigation and the preparation of an Investigative Report and Recommendation. If the VC alleges only air violations, the RMO will transmit the VC directly to the LAA.

The following procedure is for District Office investigation of a VC submitted to the Agency, pursuant to ORC § 3745.08. The guidelines also specify the information that should be included in the Investigative Report and Recommendation.

Note: In some instances, VC's are investigated by Central Office staff (e.g., Underground Injection Control (UIC), Wetlands staff) or by staff not in Ohio EPA (e.g., staff of a LAA). In instances where Central Office staff is investigating a VC, the Enforcement Coordinator(s) of the affected division(s) will need to coordinate with this staff and other affected parties. In instances where a LAA is involved in a multi-media VC, the District Office Chief (or designee) will transmit the VC to the LAA and request an investigation be conducted and prepare an Investigative Report and Recommendation, which will be forwarded to the District Office Chief (or designee).

1. **Interviews.** Personal or telephone interviews must be conducted with the alleged violator(s) and may be conducted with the complainant(s), any person(s) who filed an affidavit concerning the VC, and any other individuals claiming a personal knowledge of the alleged violations. If a telephone interview is conducted, a written telephone memorandum must be made as a record of the interview.
2. **Record Review.** A thorough review must be made of all applicable records maintained by the Agency (or by an approved health district or LAA, where applicable), and by the alleged violator(s) concerning the facility, property, or area that is the subject of the VC.
3. **Inspection.** An inspection of the facility, property, or area that is the subject of the VC must be conducted. If the VC alleges violations in more than one program, the affected divisions (and Central Office and/or LAA, if applicable) should attempt to conduct their inspections concurrently, if possible.
4. **Documentation.** Samples and photographs should be taken whenever possible. Additionally, if the VC alleges a public nuisance, or as other conditions warrant, the investigator should conduct a survey of the area through discussions with surrounding residents. If access to the site is refused at any time during the investigation of the VC, the inspector should contact an Agency staff attorney promptly.
5. **Inspection Documentation.** If violations are observed during an inspection of the facility, property, or area that is the subject of the VC, the District Office inspector(s) of the affected division(s) (and Central Office or LAA personnel, if applicable) shall promptly send a Notice of Violation (NOV) letter to the violator(s), outlining the violation(s) observed and requesting a response to the

NOV. (In the event that an NOV is issued, it should be sent to the violator well in advance of the completion of the Investigative Report).

6. **Investigative Report and Recommendation.** The District Office (and Central Office or LAA, if applicable) will complete its investigation and provide a detailed Investigative Report and Recommendation to the Enforcement Coordinator(s) of the affected division(s) within 60 days following the District Office's receipt of the VC.³ Each of the following sections should be included in the Investigative Report and Recommendation. If a section is not applicable, the Investigative Report and Recommendation should set out why the section does not apply.

If the VC alleges violations in more than one program, the District Office will combine each program's investigations into one Investigative Report and Recommendation.

Title Page -- include the following information:

- a. VC number;
- b. Name(s) of complainant(s);
- c. List of alleged violation(s);
- d. District Office (and LAA, if applicable) and person(s) responsible for the Investigative Report and Recommendation; and
- e. Date of completion.

Investigative Report - include the following information:

- a. Statement of the VC. Describe what is alleged;
- b. Statement of current facts found upon investigation. Set forth the facts found in chronological order and attach all evidence supporting the facts, including statements made during interviews conducted with the complainant(s) and any other person(s) knowledgeable about the alleged violations;
- c. Statement of whether any laws and/or regulations have been, are, or will be violated and identification as to whether these were violations alleged in the VC;
- d. A record of any correspondence with the alleged violator(s), including any NOV issued, responses to the NOV(s), and specify any action taken by the violator to remedy the violations;

³If the multi-media VC involves alleged air violations which will be investigated by staff of a LAA, the LAA will forward its Investigative Report and Recommendation to the District Office Chief. If the VC alleges only air violations, the LAA will transmit the Investigative Report and Recommendation directly to the DAPC Enforcement Coordinator.

- e. Possible measures to remedy the violations; and
- f. Entity's compliance history.

Recommendation

The Recommendation for VC disposition that accompanies the Investigative Report should be sent in a separate memo to the Enforcement Coordinator(s) of the affected division(s). The Recommendation is considered an enforcement sensitive document, and the transmittal memo should be clearly labeled "**Confidential Law Enforcement Investigatory Work Product.**"

The actions that may be recommended by the District Office include:

- a. Dismissal of the VC;
- b. Findings and orders (unilateral or consensual); or
- c. Referral to the AGO for enforcement action.

Upon completion of the Investigative Report and the Recommendation, the District Office Chief (or his designee) and the investigator(s) will review, sign, and date the cover memo, the Investigative Report, and the Recommendation.⁴

If the VC alleges violations in more than one program, the District Office shall recommend a lead division for the action. This determination should also be included in the transmittal memo. The District Office's selection of the recommended lead division is subject to the approval of the Enforcement Coordinators for each affected division.

Central Office Processing of a VC Following Investigation

The Enforcement Coordinator (or designee) shall schedule the VC for discussion at its enforcement committee meeting, or other appropriate meeting. This meeting shall take place within 30 days of receipt of the Investigative Report and Recommendation. At the meeting, an enforcement approach shall be adopted.

With multi-media VC's, the recommended lead division's Enforcement Coordinator (or designee) shall schedule the VC for discussion at its enforcement committee meeting, or other appropriate meeting, and shall invite the other Enforcement Coordinators (or designees) for the affected divisions to attend and participate. This meeting shall take place

⁴If the VC alleges only air violations which will be investigated by staff of a LAA, the LAA will prepare the Investigative Report and Recommendation and forward it to the DAPC Enforcement Coordinator.

within 30 days of receipt of the Investigative Report and Recommendation. At the recommended lead division's meeting, an enforcement approach for all media shall be adopted and a lead division for the VC action shall be confirmed. The Enforcement Coordinators will communicate back to the District Office (and LAA, if applicable) on whether it approved the recommendation for the lead division. If the Enforcement Coordinators decide to choose as lead division a division different from the initial recommendation, the Enforcement Coordinators will communicate back to the District Office (and LAA, if applicable) on the reasons for that alternate choice.

Enforcement Committee Review and Recommendation

Following review of the Investigative Report and Recommendation, the Enforcement Committee may decide that more information is needed prior to making a final recommendation and will request that the District Office (and Central Office and/or LAA, if applicable) pursue further investigation. If the Enforcement Committee has the information needed to make a final recommendation, the Committee will recommend to the Director one of the following options to resolve the VC:

1. Dismissal;
2. Issuance of Director's Final Findings and Orders; or
3. Referral to the AGO for enforcement action.

With multi-media VC's, one recommended enforcement action will be forwarded to the Director. The lead division will coordinate the preparation of the single recommended enforcement action. The recommended enforcement action will be forwarded to the Director within 75 days of the Enforcement Committee making its recommendation regarding the VC.

Hearing or Conference Requirement

Before taking any action under ORC § 3745.08, the Director may commence a hearing. 20 days prior to any hearing, the Director shall cause publication of notice of the hearing in a newspaper with general circulation in the county wherein the alleged violation has occurred, is occurring, or will occur, and also shall mail written notice by certified mail, return receipt requested, to the person who filed the VC and to the alleged violator. If the Director enters an order pursuant to ORC § 3745.08 without having commenced a hearing, the Director or his delegate, prior to entry of the order, shall provide an opportunity to the complainant and the alleged violator to attend a conference with the Director or his delegate concerning the alleged violation.

Description of Enforcement Options

1. **Dismissal** -- If the Enforcement Committee recommends dismissal, the Enforcement Unit staff person will draft a letter for the Director's signature that

will include relevant findings of fact and state either no violation has occurred, is occurring, or will occur; or past violations documented in the Investigative Report and Recommendation have been terminated and are unlikely to recur, based upon specific corrective action(s) taken to abate the violation(s).

Dismissal is not an appropriate action where a violation is documented and may be expected to occur again or where escalated enforcement is deemed warranted.

A dismissal of a VC will be public noticed as a final action of the Director in the Ohio EPA's Weekly Review and in a newspaper of general circulation in the county of the alleged violation(s). A copy of the dismissal letter is sent to all involved parties.

2. **Findings and Orders** -- With this option, unilateral or consensual orders may be used. Findings and Orders will be prepared for the Director's signature by the assigned Enforcement Unit and legal staff.

If the Director enters an order without having commenced a hearing, the attorney assigned to the case, prior to journalization of the Findings and Orders, will contact the complainant(s) and the alleged violator(s) and provide an opportunity for a conference.⁵ The Final Findings and Orders and notice of the order will be sent to the complainant(s) and the alleged violator(s) by certified mail.

The orders will be public noticed as a final action in Ohio EPA's Weekly Review and in a newspaper of general circulation in the county of the alleged violation. In the public notice, all parties to the complaint will be advised of their right to an appeal before the Environmental Review Appeals Commission.

3. **AGO Enforcement** -- If the Enforcement Committee recommends referring the VC to the AGO, the Enforcement Unit and Legal will work together in drafting the referral package for the Director's signature. Upon referral to the AGO, all affected parties, including the complainant(s), will be notified.

Withdrawal of VC

If the complainant withdraws the VC at any time prior to the Director taking an action, the division's Enforcement Coordinator will send a letter of acknowledgment to the

⁵One option is to provide such an opportunity before finalizing the Orders. In that case, the division can add a finding to the Orders indicating that the opportunity for a conference was provided and, if appropriate, a conference was held.

complainant(s), the alleged violator(s), the appropriate District Office (and LAA, if applicable), and the RMO, as necessary.

Timeframe for Processing a VC

As can be seen in the attached flow chart, this protocol has set a performance standard of 180 days to process a VC, from the date of receipt to the date a recommended action is forwarded to the Director's Office. It should be noted that one of the Director's enforcement goals is to resolve all VC's (i.e., issuance of dismissal letter, administrative orders or referral to the AGO) so that none is older than two years old.

Communication with the Complainant

Until the VC is resolved, the Enforcement Coordinator (or designee) will send a letter to the complainant at least every six months indicating the current status of the VC. The Deputy Director for Legal Affairs will be copied on this letter for tracking purposes. If the VC alleges violations in more than one program, the lead division's Enforcement Coordinator will be responsible for this task.

Yearly Reporting

By December 31st of each year, the Enforcement Coordinator will send a status report on all verified complaints that were pending at some time during the last calendar year to the Deputy Director for Legal Affairs. For each verified complaint, the report will use one of the following designation:

- Investigation Pending;
- Dismissed (date)
- Invitation to Negotiate Issued (date)
- Findings and Orders Issued (date)
- Referred to AGO (date)