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COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT HAZARDOUS MATERIALS AND WASTE MANAGEMENT DIVISION

HAZARDOUS WASTE

CIVIL AND ADMINISTRATIVE ENFORCEMENT RESPONSE POLICY

This policy describes the enforcement options that the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division, may pursue for violations of the Colorado Hazardous Waste Act and its implementing regulations so as to expedite correction of those violations and promote compliance.

original /s/ by Gary W. Baughman

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Division Director

Date

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I. INTRODUCTION

The goal of the Colorado Hazardous Waste Act and its implementing regulations, the state equivalent of the federal Resource Conservation and Recovery Act, is to attain and maintain a high rate of compliance within the regulated community with hazardous waste regulatory requirements. Establishing a comprehensive monitoring and inspection program, and addressing the most serious violators with timely, visible, and effective enforcement actions accomplish this goal, in part. A timely and effective enforcement action will return the facility to compliance as expeditiously as possible, as well as deter future non-compliance, both at the subject facility as well as at other facilities. This Enforcement Response Policy sets forth the response parameters for violations occurring pursuant to the Colorado Hazardous Waste Regulations where the Hazardous Materials and Waste Management Division (the "Division") intends to pursue an enforcement action, including administrative or judicial action. In so doing, this Enforcement Response Policy sets out how the Division will respond, and defines timeframes in which this response will occur.

Through implementation of this Enforcement Response Policy, the Division will endeavor to provide fair and equitable treatment of all violators.

The policies and procedures set out in this document are intended solely for the guidance of Division personnel. They are not intended to and cannot be relied upon to create rights, substantive or procedural, enforceable by any person or party in litigation with the Division. The Division reserves the right to be at variance with this policy. The Division also reserves the right to change this policy at any time with appropriate publication.

II. RELATIONSHIP TO OTHER AGENCY POLICY AND GUIDANCE

The Enforcement Response Policy is one of several documents that, considered together, define the administrative portion of compliance assurance in the Hazardous Waste Program within the Division. The Enforcement Response Policy provides a general framework for responding to violations and violators of concern by describing timely and appropriate enforcement responses to non-compliance. The Enforcement Response Policy should be read in conjunction with other Division and Departmental policies and guidance including:

1. The Division's *Hazardous Waste Penalty Policy*;
2. The Department's *Supplemental Environmental Projects Policy*;

3. The Department's *Environmental Audit and Immunity Law Implementation Policy*, still in draft; and
4. The Division's *Memorandum of Agreement between the State of Colorado and the Region VIII Office of the USEPA for Administration of the RCRA Hazardous Waste Program*, dated 9/22/00.

All of these documents are available on the Department or Division web pages. These pages are:

Division Web Page	www.cdphe.state.co.us/hm
Department Web Page	www.cdphe.state.co.us
EPA Web Page	www.epa.gov

This Enforcement Response Policy does not address the use of an administrative compliance order to compel corrective action; the use of an order to compel monitoring, testing and analysis; or the use of an administrative compliance order to address situations that may present an imminent and substantial endangerment to human health or the environment. In addition, this Enforcement Response Policy does not address violations determined to be potentially criminal in nature and investigated and prosecuted pursuant to Federal or State criminal authorities.

III. DEFINITIONS

1. Enforceable means the instrument creates an independent, affirmative obligation to comply and imposes sanctions for the prior failure to comply.
2. Evaluation Date is the first day of the inspection or record review during which a violation is identified, regardless of the duration of the inspection or the stage in the inspection at which the violation is identified.
3. Formal Enforcement is an action that mandates compliance and initiates a civil, criminal, or administrative process that results in an enforceable agreement or order.
4. Informal Enforcement is those actions other than formal enforcement that notify the facility of its non-compliance and establish a date by which the non-compliance is to be corrected.
5. Facilities will be deemed to have Returned to Compliance when they are in full compliance with regulatory and/or statutory requirements or when they are in full compliance with a compliance schedule established in a formal enforcement action (either an order or an agreement).
6. Sanctions include penalties as well as other tangible obligations, beyond returning to compliance, that are imposed upon the violator.

IV. CLASSIFICATIONS OF NON-COMPLIANCE

Violators are classified based on an analysis of the facility's overall compliance with the Colorado Hazardous Waste Regulations. This analysis considers prior recalcitrant behavior and/or a history of non-compliance. This Enforcement Response Policy establishes two categories of violators: Significant Non-Compliers (SNC), also known as Class 1 Violators; and Secondary Violators (SV), also known as Class 2 Violators. Facilities that meet any of the SNC criteria may be considered SNCs. For instance, a facility with substantial deviations from regulatory requirements may be a SNC even though they may be a first-time violator. However, the Division's decision to take formal enforcement against a violator does not necessarily constitute a finding that the violator is a SNC.

1. Significant Non-Compliers (SNCs) are those facilities which:
 - a. Have caused actual exposure or a substantial likelihood of exposure to people or the environment from hazardous waste or hazardous waste constituents. The actual or substantial likelihood of exposure should be evaluated using facility-specific environmental and exposure information whenever possible. This may include evaluating potential exposure pathways and the mobility and toxicity of the hazardous waste being managed. It should be noted that environmental impact alone is sufficient to cause a facility to be a SNC, particularly when the environmental media affected require special protection (e.g., wetlands or sources of underground drinking water.);
 - b. Are chronic or recalcitrant violators (Facilities should be evaluated on a multi-media basis; however, a facility may be found to be a chronic or recalcitrant violator based solely on prior Colorado Hazardous Waste Regulation violations.); or
 - c. Deviate substantially from the terms of a permit, order, agreement, or from the Colorado Hazardous Waste Act or regulatory requirements.

2. Secondary Violators (SVs) are facilities which:
 - a. Are typically first time violators of hazardous waste regulations (A facility classified as an SV should not have a history of recalcitrant or non-compliant conduct.);
 - b. Pose no actual threat or a low potential threat of exposure to hazardous waste or constituents (Violations associated with an SV should be of a nature to permit prompt return to compliance with all applicable regulations. "Prompt return to compliance" should be less than 30 days.); or
 - c. Do not meet the criteria listed above for SNCs.

V. APPROPRIATE ENFORCEMENT RESPONSE

The selection of an appropriate enforcement response is an integral component of the Colorado Hazardous Waste Act enforcement and compliance assurance program. An appropriate response will achieve a timely return to compliance, serve as a deterrent to future non-compliance, and eliminate any economic advantage received by the violator. This section establishes the criteria for determining when formal and informal enforcement responses are appropriate.

1. INFORMAL ENFORCEMENT RESPONSE

The Division's informal enforcement mechanism is the Compliance Advisory. Every facility at which significant violations are discovered is issued a Compliance Advisory at the closeout meeting concluding the inspection, or via mail shortly thereafter. The Compliance Advisory includes an invitation for the facility to meet with Division staff in a meeting called an "Informal Conference." Informal Conferences are an opportunity for the facility to provide additional information, rebut violations, and ask questions.

If a facility is found to be in violation, but is not designated a SNC, it is automatically designated a SV. A Compliance Advisory is the minimally appropriate enforcement response for all SVs. A Compliance Advisory includes a recitation of the violations discovered during the inspection and a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable regulations, permits and statutes. Facilities that fail to return to compliance following issuance of a Compliance Advisory will be re-classified as a SNC.

A Compliance Advisory may also present areas of potential violation or concern. These items may be accompanied by a request for further information so that a final compliance determination can be made. It is possible that, after submittal of the requested information, the Division may determine that formal enforcement should be pursued.

The objectives of a Compliance Advisory are to request the violator to cease its non-compliant activities and ensure that full compliance is achieved in the shortest possible time frame. In general, the date included in the Compliance Advisory requiring a full return to compliance will be within 30 days of the Compliance Advisory issue date.

If a violator is unable to meet the assigned compliance deadline it must immediately notify the Division and provide documentation supporting the inability to correct violations by the prescribed compliance date. A decision to extend the compliance date should be made only when supported by sufficient documentation. Failure to achieve full compliance by the compliance date or a failure to notify the Division of the inability to correct violations should result in an escalation to formal enforcement. If the conditions of the Compliance Advisory are not met to the satisfaction of the Division, the date of the inspection is to be considered the evaluation date for the purpose of escalating the action to a formal enforcement response.

Depending on the circumstances of the case, the Division may pursue a formal enforcement action against an SV. Taking a formal enforcement action against an SV is a decision wholly within the discretion of the Division.

2. FORMAL ENFORCEMENT RESPONSE

A formal enforcement response will mandate compliance and initiate a civil, criminal, or administrative process that results in an enforceable agreement or order. Any formal enforcement response should seek injunctive relief that ensures the non-compliant facility expeditiously returns to full compliance. The types of formal enforcement response available to the Division are:

- a. Compliance Order on Consent – This is the most common type of formal enforcement action taken by the Division. A Compliance Order on Consent is a document finalized through settlement negotiations with the violator. The Division and the violator agree upon the Order requirements, the penalty, and the penalty package.
- b. Unilateral Compliance Order with or without penalties – This type of Order is issued by the Division to the violator and includes compliance requirements, and may include penalties. Penalties may also be assessed at a later date. In these cases, the Division believes that the violator needs to return to compliance immediately. The violator is allowed to appeal a Unilateral Order. At the Division's discretion, the violator may be allowed to convert it to a Compliance Order on Consent through the Informal Conference process.
- c. Early Settlement Agreement – An Early Settlement Agreement is intended to expedite finalization of certain cases with a few easily correctable violations and/or small penalties. In these cases, the Division believes that extended settlement negotiations may not be necessary.
- d. Civil Action – Occasionally, it is necessary for the Division to file a civil action against a violator. In these cases, there is always a serious extenuating circumstance, like recalcitrance or recidivism, that requires stronger action than is available to the Division administratively.
- e. Criminal Referral to the Colorado Attorney General's Office or other criminal enforcement authorities – If potential criminal activity is discovered during an inspection or investigation, the Division may refer the case to the Colorado Attorney General's Office or other enforcement agency for criminal investigation and follow up. In these cases, an administrative enforcement action may be pursued in addition to any criminal proceedings.
- f. Referrals to EPA, Region VIII – There are certain cases that, because of extenuating circumstances, the Division may refer the case to EPA Region VIII. This may include, but not be limited to, cases where legal precedent could be

established or where federal involvement is necessary to ensure national consistency or cases involving multi-state “national” violators.

An enforcement response against a SNC will include economic sanctions in the form of penalties. Penalties incorporated in the formal enforcement response must recover the economic benefit of non-compliance and should also include some appreciable amount reflecting the gravity of the violation. Determination of the appropriateness or amount of penalties is not within the scope of this policy, but is explained in the Division’s *Hazardous Waste Penalty Policy*.

Many times, the Division will settle a formal enforcement action with the facility. Settlement includes agreement on the language in the formal enforcement document, as well as agreement on the penalty amount and penalty package. The “penalty package” defines the portion of the penalty to be paid in cash, and may include a portion offset by the facility’s agreement to implement one or more Supplemental Environmental Projects (SEPs), and any other alternative punitive measures or sanctions agreed to be implemented by the facility. “Other punitive measures or sanctions” includes, but is not limited to, such items as permit decisions, “in-kind” contributions, suspension and debarment proceedings. This policy is not intended to define how the Division approaches or implements settlement of enforcement cases.

The Division may issue the formal enforcement document unilaterally. In these cases, the formal enforcement document may include penalties. The amount of any penalties included will have been calculated in a manner consistent with the *Hazardous Waste Penalty Policy*. If the unilateral formal enforcement document does not include penalties, then the Division reserves its right to assess penalties for the violations at a later date.

VI. RESPONSE TIME GUIDELINES

This section establishes response time guidelines for formal and informal enforcement actions. The guidelines are designed to expeditiously return non-compliant facilities to compliance with all applicable requirements of the Colorado Hazardous Waste Regulations. A timeline depicting these guidelines is attached.

1. EVALUATION DATE

The evaluation date, which triggers each standard response time guideline, is defined as the first day of any inspection or record review during which a violation is identified, regardless of the duration of the inspection or the stage in the inspection at which the violation is identified. For violations detected through some method other than record reviews or inspection, the evaluation date will be the date upon which information (e.g., 3007 letter response, self-reported violations) becomes available to the Division. In the case of a referral from EPA, the evaluation date will be considered the date of the referral to the Division. In the case of facilities that are reclassified for failure to return to compliance (see Section V.1

above), the evaluation date will be considered the first day of discovery of non-compliance with the compliance schedule established through the informal enforcement response.

2. INFORMAL ENFORCEMENT RESPONSE TIME

The issuance of a Compliance Advisory should occur during, or shortly after, the inspection. The standard response time guideline for issuing Compliance Advisories will be no later than 10 days after the evaluation date. If additional information is received by the Division, a Compliance Advisory Addendum will be issued within 10 days.

3. CASE DEVELOPMENT MEETING

The Division will determine whether to use formal or informal enforcement at a Case Development Meeting to be held no more than 45 days after the evaluation date.

Many times, classification of a facility as an SV is clear and unambiguous. In these cases, the inspector and his/her supervisor will have an informal Case Development Meeting where the SV determination and the informal resolution path will be confirmed.

If the inspector or the supervisor believe a case may warrant a SNC determination or formal enforcement response to an SV, a Case Development Meeting will be convened to determine the appropriate path forward. This will include a review of evidence obtained, a plan to get any evidence still needed, and a determination as to whether formal enforcement action is necessary and appropriate. Generally, attendees at Case Development Meetings will include the lead inspector, the inspector's supervisor, and a Solid and Hazardous Waste Program Legal Assistant. Case Development Meetings will also include the Solid and Hazardous Waste Program Manager, when available.

4. FORMAL ENFORCEMENT RESPONSE TIME

If formal enforcement is necessary, a decision will be made at the Case Development Meeting, or as soon thereafter as is feasible, as to which formal enforcement mechanism will be utilized: a) a Compliance Order on Consent, b) a Unilateral Compliance Order without penalties, c) a Unilateral Compliance Order with penalties, d) an Early Settlement Agreement, e) a civil action, f) referral to the Attorney General's Office for criminal investigation, or g) referral to EPA Region VIII.

Each of these types of formal enforcement response has different standard response time guidelines as follows:

- a. Compliance Order on Consent-the standard response time guideline for finalizing Compliance Orders on Consent will be no later than 300 days after the evaluation date. If settlement negotiations for a Compliance Order on Consent fail to yield a settlement within 300 days, then the Division will issue a Unilateral Compliance Order with penalties on, or very shortly after, the 300th day.

- b. Unilateral Compliance Order without penalties – the standard response time guideline for issuance of Unilateral Compliance Orders without penalties will be no later than 150 days after the evaluation date, with an additional 30-day appeal period. (section 25-15-308, C.R.S.)
- c. Unilateral Compliance Order with penalties – the standard response time guideline for issuance of Unilateral Compliance Orders with penalties will be no later than 180 days after the evaluation date, with an additional 30-day appeal period **OR** no later than 30 days after settlement discussions terminate, but in no case later than 300 days after the evaluation date. The extra time initially, as compared to Unilateral Compliance Orders without penalties, will be for penalty calculation preparation and review.
- d. Early Settlement Agreement – because the Division uses Early Settlement Agreements only in certain circumstances as a means to expedite finalization of cases with small numbers of violations and/or small penalties, the standard response time guideline for issuance of Early Settlement Agreements will be no later than 180 days after the evaluation date.
- e. Civil Action – the standard response time for filing a civil action in the appropriate legal venue will be no more than 180 days after the evaluation date.
- f. Criminal Referral to the Colorado Attorney General’s Office – the standard response time guideline for criminal referral will be no later than 180 days after the evaluation date.
- g. Referral to EPA Region VIII – the standard response time guideline for referral of a case to EPA Region VIII will be no later than 180 days after the evaluation date.

The attached timeline depicts the standard response times for each type of enforcement action listed above.

For the purpose of applying the standard response time guidelines listed above in this section, the following definitions will apply:

- a. Final or consent orders are those documents for which no appeal remains before the trier of fact. These orders represent the agreement of the parties involved or the decision of a trier of fact.
- b. Unilateral or initial orders are issued by the Division and assert the Division's position that violations have occurred. However, the respondent/defendant is afforded the opportunity to appeal the agency's determination of violations to a trier of fact for 30 days after receiving the Division-issued Unilateral Order.

- c. A referral to the State Attorney General's Office occurs when the matter is officially transmitted to that office for civil action.

5. EXCEEDANCE OF FORMAL ENFORCEMENT RESPONSE TIME

Every effort will be made to adhere to the response times articulated in the previous section. However, circumstances may dictate an exceedance of the standard response times. EPA Region VIII allows Colorado a ceiling of 20% exceedances per year for consideration of cases involving unique factors that may preclude the Division from meeting the standard response times. However, rather than using a percentage of cases to determine timeliness, the Division will use average number of days. This will be determined separately for each type of action (Compliance Advisories, Compliance Orders on consent, Unilateral Compliance Orders, Early Settlement Agreements, etc.) on a six- and twelve-month basis. So long as the average number of days is less than the timeliness guideline presented below, the Division will consider itself timely.

VII. EPA ACTION IN AUTHORIZED STATES

EPA has authorized Colorado for implementation of the Resource Conservation and Recovery Act because of the demonstrated equivalency of the Colorado Hazardous Waste Act and the Colorado Hazardous Waste Regulations to the Resource Conservation and Recovery Act and its implementing regulations. In deciding to take direct action in Colorado, EPA will use the criteria presented in the *Memorandum of Agreement (MOA) between the State of Colorado and the Region VIII Office of the USEPA for Administration of the RCRA Hazardous Waste Program*, dated 9/22/00.

The above-referenced MOA details the process EPA will use to notify the Division of EPA's intent to initiate an independent enforcement action. The EPA Region VIII office may need to conduct its own case development inspection, and prepare additional documentation before proceeding to initiate an enforcement action.

If the Division decides to refer a case to EPA Region VIII for federal enforcement, the Division will provide all case development information to the Region as part of the referral package. This should facilitate a reduction in the time needed for Federal case development.

ATTACHMENT 1

ENFORCEMENT RESPONSE POLICY TIMELINES

ENFORCEMENT RESPONSE TIMELINE

