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Colorado Department
of Public Health
and Environment

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

FINAL AGENCY-WIDE POLICY ON SETTling ADMINISTRATIVE AND/OR CIVIL PENALTIES AGAINST COUNTIES AND MUNICIPALITIES

Signed 6-27-03

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Signed 6-30-03

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COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT AGENCY-WIDE POLICY ON SETTLING ADMINISTRATIVE AND/OR CIVIL PENALTIES AGAINST COUNTIES AND MUNICIPALITIES

I. INTRODUCTION

A. Purpose and Intent

This policy sets forth how the Colorado Department of Public Health and Environment (CDPHE) expects to reach settlement with counties and municipalities for administrative and/or civil penalties.

Counties and municipalities confront unique constraints in complying with environmental requirements:

- Public financing typically is more cumbersome than for regulated entities in the private sector;
- Municipal functions can trigger large environmental obligations, which may overwhelm county or municipal tax bases; and
- Despite noncompliance, some services provided by a county or municipality are essential and must often continue to operate (e.g., provision of water and sewer service).

Despite the unique constraints typically experienced by counties and municipalities, every county and municipality is required to comply fully with the statutes and regulations administered by CDPHE, and will be regulated in a manner consistent with regulated entities in the private sector to the fullest extent possible. In recognition of the unique constraints experienced by counties and municipalities, this policy is intended to achieve statewide consistency in responding to noncompliance by counties and municipalities by providing guidance to CDPHE staff.

B. Definitions

“County” means those political, governmental or administrative subdivisions of the State of Colorado listed in Article 5 of Title 30 of the Colorado Revised Statutes.

"Municipality" means a city or town or a city or town incorporated prior to July 3, 1877, whether or not reorganized, and any city, town, or city and county which has chosen to adopt a home rule charter pursuant to the provisions of article XX of the state constitution (section 31-1-101(6), C.R.S.).

C. Applicability and Legal Effect

This policy applies to all administrative enforcement actions against a county or municipality within Colorado, regardless of whether the noncompliance was detected through a CDPHE inspection, report from the public, a self-report resulting from regulatory or permit requirements, compliance assistance, a county or municipal environmental audit or documented, systematic due diligence, or otherwise self-disclosed.

As with any other regulated entity, counties and municipalities that have conducted a voluntary self-evaluation and discovered potential noncompliance issues, have the ability to use the Environmental Audit Privilege and Immunity Law. (See “Policy Regarding Implementation of the Colorado Environmental Audit Privilege and Immunity Law sections 13-25-126.5, 13-90-107, 25-1-114.5, and 25-1-114.6, C.R.S.”.)

This policy applies to all such actions commenced after the effective date of this policy. This policy supplements the principles and presumptions in the “Colorado Department of Public Health and Environment Agency-wide Supplemental Environmental Projects Policy” and in each environmental division’s enforcement policies, and should be read in conjunction with these policies.

This policy does not apply to settlements of claims for stipulated or suspended penalties for violations of consent orders or other settlement agreement requirements.

II. ADMINISTRATIVE PENALTY CALCULATION AND SETTLEMENT

CDPHE, through its Air Pollution Control Division, Water Quality Control Division, and Hazardous Materials and Waste Management Division, periodically conducts inspections of county and municipal entities to determine compliance with environmental laws. If any violations are discovered that are considered serious violations or otherwise warrant the assessment of an administrative penalty, CDPHE will consider the assessment of a penalty that is consistent with those assessed against regulated entities in the private sector for violations of the same or similar requirements.

CDPHE will not waive an administrative penalty simply because the regulated entity is a county or municipality. However, CDPHE, at its sole discretion, may exercise flexibility in settling administrative penalties against counties or municipalities as follows:

A. Penalty Calculation

As provided in each division’s penalty calculation policies, CDPHE staff will calculate all upward adjustments to the penalty base numbers on the basis of all facts known about the violations (aggravating factors). CDPHE will then calculate any downward adjustments based on relevant facts to mitigate the penalty (mitigating factors) and arrive at an appropriate final penalty amount.

B. Penalty Settlement

1. A county or municipality may claim an inability to pay the full penalty, or claim other financial constraints. The burden is on the county or municipality, in these cases, to demonstrate why such constraints result in an inability to pay a full penalty or significantly impede its ability to comply or perform a remedial measure. CDPHE will not accept claims of, or assume, financial constraints on a county or municipality without detailed substantiation from a county or municipal official, normally the chief municipal officer, with direct responsibility for the county’s or municipality’s financial status. (See EPA’s Munipay Model for guidance on demonstration of an inability to pay.)

2. If a county or municipality satisfactorily demonstrates an inability to pay the penalty, in whole or in part, CDPHE staff should first consider the use of an alternative payment plan to obtain an appropriate penalty prior to considering suspension or waiver of a penalty. CDPHE staff should consider suspending or waiving a penalty based solely on inability to pay only when a county or municipality satisfactorily demonstrates that payment of any penalty would result in an inability to comply with, or perform, a remedial measure.
3. CDPHE should consider whether implementation of a supplemental environmental project by the county or municipality is an appropriate mechanism with which to resolve some, or all, of the administrative penalty. Implementation of a supplemental environmental project shall be in accordance with the procedures and requirements set forth in the “Colorado Department of Public Health and Environment Agency-wide Supplemental Environmental Projects Policy” (www.cdphe.state.co.us/hm/seppolicy.pdf).

CDPHE may resolve the entire administrative penalty (including the economic benefit portion of the penalty) against a county or municipality through the completion of a SEP, provided that all of the following conditions are satisfied within the terms of an administrative consent order. The county or municipality:

- i. Agrees to return to compliance promptly and remedy any adverse impacts of noncompliance within a reasonable period of time;
- ii. Has not been found to have committed serious violations, which are defined as follows:
 - a) Violations that are prone to cause significant impact to human health or to the environment;
 - b) A pattern of violations that demonstrate management systems are not adequate to address environmental issues; or
 - c) Convictions for violations of environmental laws or out-of-court settlements of formal charges of such criminal violations.
- iii. Demonstrates a good faith intention to maintain future compliance with all applicable environmental requirements, including, but not limited to, conducting periodic compliance audits; and
- iv. Agrees to investigate pollution prevention, source reduction and resource conservation opportunities, and implement them, as established to be feasible by the county or municipality and agreed to by CDPHE.

If a county or municipality does not satisfy all of the conditions for mitigation described above, CDPHE will not settle the entire penalty through a SEP, but may mitigate the penalty consistent with the degree to which the conditions are satisfied, and with the factors set forth in each division’s penalty policy.