

STATE OF COLORADO

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Dedicated to protecting and improving the health and environment of the people of Colorado

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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 ELIGIBLE GOVERNMENTAL ENTITIES

Signed

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5/9/08

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**COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
AGENCY-WIDE POLICY ON SETTLING ADMINISTRATIVE AND/OR CIVIL
PENALTIES AGAINST ELIGIBLE GOVERNMENTAL ENTITIES**

I. INTRODUCTION

A. Definitions

“Eligible Governmental Entity” means a county, municipality or eligible local governmental district.

“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 that 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.).

“Eligible Local Government District” is defined as a Special District, General Improvement District, Public Improvement District, or Metropolitan Sewage Disposal District that provides one or more of the following services: drinking water utilities, waste water utilities, solid waste disposal or collection and transportation of solid waste.

“Special District” means a quasi-municipal corporation and political subdivision organized or acting pursuant to Article 1 of Title 32, C.R.S.

“General Improvement District” means a quasi-municipal corporation and political subdivision organized or action pursuant 31-25-601 C.R.S.

“Public Improvement District” means a quasi-municipal corporation and political subdivision organized or action pursuant to the Colorado Public Improvement District Act of 1968 (30-20-501 C.R.S.).

“Metropolitan Sewage Disposal District” means a district formed under 32-4-501 C.R.S.

“Department” means the Colorado Department of Public Health and Environment.

B. Purpose and Intent

This policy sets forth the department’s approach to reaching settlement with eligible governmental entities for administrative and/or civil penalties.

Eligible governmental entities 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 an eligible governmental entity are essential and must often continue to operate (e.g., provision of water and sewer service).

Despite the unique constraints typically experienced by eligible governmental entities every eligible governmental entity is required to comply fully with the statutes and regulations administered by the

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department, 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 eligible governmental entities, this policy is intended to achieve statewide consistency in responding to noncompliance by eligible governmental entities by providing guidance to department staff.

C. Applicability and Legal Effect

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

As with any other regulated entity, eligible governmental entities 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 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

The department, through its Air Pollution Control Division, Water Quality Control Division, and Hazardous Materials and Waste Management Division, periodically conducts inspections of eligible governmental 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, the department will assess a penalty that is consistent with those assessed against regulated entities in the private sector for violations of the same or similar requirements.

The department will not waive an administrative penalty simply because the regulated entity is an eligible governmental entity. However, the department, at its sole discretion, may exercise flexibility in settling administrative penalties against these entities as follows:

A. Penalty Calculation

As provided in each division’s penalty calculation policies, department staff will calculate all upward adjustments to the penalty base numbers on the basis of all facts known about the violations (aggravating factors). The department 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. An eligible governmental entity may claim an inability to pay the full penalty, or claim other financial constraints. The burden is on the eligible governmental entity, in these cases, to

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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 an eligible governmental entity without detailed substantiation from an eligible governmental entity official, normally the chief fiscal officer, with direct responsibility for that entity's financial status. (See EPA's Munipay Model for guidance on demonstration of an inability to pay.)

2. If an eligible governmental entity satisfactorily demonstrates an inability to pay the penalty, in whole or in part, department 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.
3. The department should consider whether implementation of a supplemental environmental project by the eligible governmental entity 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/el/cross_media/seps.html).

The department may resolve the entire administrative penalty (including the economic benefit portion of the penalty) against an eligible governmental entity through the completion of a SEP, provided that all of the following conditions are satisfied. The eligible governmental entity:

- 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 eligible governmental entity and agreed to by the department.

If an eligible governmental entity does not satisfy all of the conditions for mitigation described above, the department 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.