

# 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 HAZARDOUS MATERIALS AND WASTE MANAGEMENT DIVISION**

### **SOLID WASTE**

### **ENFORCEMENT RESPONSE POLICY**

The attached policy is used by the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division, in evaluating enforcement options that are appropriate for addressing violations of solid waste laws and regulations in Colorado.

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Division Director

August 25, 2011  
Date

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

**SOLID WASTE**

**ENFORCEMENT RESPONSE POLICY**

**I. INTRODUCTION**

The goal of the inspection and enforcement program in the Solid Waste Compliance Assurance Unit is to ensure a high rate of compliance with the requirements of the Solid Wastes Disposal Sites and Facilities Act, at section 30-20-100.5, C.R.S. through 30-20-123, C.R.S., (“the Act”) and the Regulations Pertaining to Solid Waste Sites and Facilities, at 6 CCR 1007-2 (“the Regulations”). Taking timely, visible, and effective enforcement actions against violators will achieve this goal. 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 Solid Waste Enforcement Response Policy provides a general framework for identifying violations and violators of concern and describing timely and appropriate enforcement responses to non-compliance.

This Enforcement Response Policy does not address violations determined to be potentially criminal in nature and which are being investigated and prosecuted pursuant to State criminal authorities.

The policies and procedures set out in this document are intended solely for the guidance of Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division (“the Division”) personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any person 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 Solid Waste and materials Management Program within the Division. The Enforcement Response Policy provides a 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 *Solid Waste Penalty Policy*;
2. The Department’s *Supplemental Environmental Projects Policy*; and

3. The Department's *Environmental Audit and Immunity Law Implementation Policy*, still in draft

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

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|---------------------|--|
| Division Web Page   | <a href="http://www.cdphe.state.co.us/hm">www.cdphe.state.co.us/hm</a> |
| Department Web Page | <a href="http://www.cdphe.state.co.us">www.cdphe.state.co.us</a>       |

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 an action other than formal enforcement that notifies the facility of its non-compliance and establishes a date by which the non-compliance is to be corrected.
5. Facilities will be deemed by the Division 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.

## **II. CLASSIFICATIONS OF VIOLATIONS**

### **A. Class I Violations:**

Class I violations are violations which are determined by the Division to have caused an actual exposure or pose a substantial threat to human health, safety, or the environment. Class I violations include any substantial deviation from critical elements of the Act, the Regulations, an Order, and/or an approved Design and Operations Plan. Examples of Class I violations include:

1. Failure to obtain a Certificate of Designation or approved Design and Operations Plan;
2. Failure to implement a required explosive gas monitoring and mitigation system;
3. Failure to comply with the terms and conditions of an issued Compliance Order; and
4. Failure to maintain any financial assurance in accordance with the Act and the Regulations.

### **B. Class II Violations:**

Class II violations are violations that the Division has determined have not caused actual exposure, but which pose a threat to human health or the environment, and merit an enforcement response to ensure that a facility achieves compliance in a timely fashion. Class II violations include partial deviations from critical elements and substantial deviations from lesser elements of the Act, the Regulations, an Order, and/or an approved Design and Operations Plan. Examples of Class II violations include:

1. Failure to adequately monitor for groundwater contamination or explosive gases;
2. Failure to abate nuisance conditions such as lack of odor or dust control, excessive birds and/or litter, or rodent problems;
3. Failure to submit required documentation regarding closure or corrective actions; and
4. Failure to keep financial assurance mechanism current.

### **C. Class III Violations:**

Class III violations are violations that the Division has determined have not caused actual exposure and which pose a little or no threat to human health or the environment, but need to be corrected in order for the facility to operate in full compliance with the Act, the Regulations, an Order, and/or and approved Design and Operations Plan. Examples of Class III violations include:

1. Failure to accurately document volumes of waste received;
2. Failure to ensure adequate daily cover is placed over a landfill; and
3. Inadequate compaction of waste placed into a landfill.

### **III. APPROPRIATE ENFORCEMENT RESPONSE**

The selection of an appropriate enforcement response is an integral component of the Solid Waste Unit's enforcement program. An appropriate response will achieve a timely return to compliance and serve as a deterrent to future non-compliance. 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. Facilities at which one or more significant violations are discovered will typically be issued a Compliance Advisory at the closeout meeting concluding the inspection, or via mail shortly thereafter, unless the Division determines that a formal enforcement response is necessary. The Compliance Advisory includes an invitation for the facility to meet with Division staff in a meeting called a "Compliance Conference." Compliance Conferences are an opportunity for the facility to provide additional information, rebut violations, and ask questions.

A Compliance Advisory includes a recitation of the violations discovered during the inspection and a schedule of requested actions for returning the facility to full compliance with all substantive and procedural requirements of applicable regulations, permits and statutes.

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. The return to compliance date may be adjusted based on the type and duration of the requested actions needed to return to compliance.

If a violator is unable to meet the assigned compliance deadline it must immediately notify the Division in writing 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.

## 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 with the Act, Regulations, and/or approved plans. 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 Compliance 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.

Almost all formal enforcement 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 *Solid 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” include, but are 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 *Solid 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.

#### Class I Violations:

Class I violations should receive the highest priority for enforcement. These violations should receive the swiftest and strongest appropriate enforcement response. Every Class I violation should be subject to a formal enforcement response. A Unilateral Compliance Order, a Compliance Order on Consent or an Early Settlement Agreement are the preferred enforcement responses for facilities with Class I violations. In extreme situations, the Division may request the facility to voluntarily stop operations until the situation is corrected or may issue a Cease and Desist Order, or may seek an injunction in Court.

Appropriate enforcement response against Class I violations will achieve the following:

- a) Compliance with all requirements of the solid waste statute, regulations and approved plans;
- b) A final, enforceable order having compliance terms and schedules; and, if appropriate,
- c) Resolution of any penalty claims against the facility.

#### Class II Violations:

Class II violations should be considered for formal enforcement action on a case-by-case basis. Class II violations represent moderately serious violations and may be resolved through either a Compliance Advisory or a Compliance Order when deemed appropriate. However, escalation to formal enforcement should always occur if an owner or operator with Class II violations fails to meet the requirements of an informal enforcement action.

The decision whether to use formal or informal enforcement against Class II violations should be based upon the following guidelines:

- 1) Formal enforcement should be used if there are numerous requirements to be met or the time frame for returning to compliance is long.
- 2) Formal enforcement should be used if the owner or operator has failed to respond to a Compliance Advisory.
- 3) Formal enforcement must be used if penalties are appropriate.
- 4) Formal enforcement must be used if the owner or operator has repetitive violations.

#### Class III Violations:

Appropriate enforcement response for Class III violations should achieve compliance with all requirements of the Act and the Regulations. Class III violations typically receive an informal enforcement response. Chronic, recalcitrant, or widespread Class III violations should be considered for formal enforcement. Compliance should be achieved as quickly as possible and the violator should be made aware of which requirements need to be met. Escalation to formal enforcement may be appropriate if a violator fails to meet the requirements of an informal enforcement action.

### **IV. ENFORCEMENT RESPONSE TIME GUIDELINES**

This section establishes response time guidelines for both formal and informal enforcement actions. These guidelines are designed to expeditiously return non-compliant facilities to compliance with all applicable solid waste rules and regulations. While recognizing that case specific circumstances may dictate exceedance of response time guidelines, every effort should be made to adhere to the guidelines set forth below.

#### 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.

#### 2. Informal Enforcement:

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 20 days after the evaluation date. If additional information is received by the Division, a Compliance Advisory Addendum will be issued within 10 days following receipt of the additional information.

### 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 violations at a facility as minor or as Class III violations is clear and unambiguous. In these cases, the inspector and his/her supervisor will have an informal Case Development Meeting where the determination and the informal resolution path will be confirmed.

If the inspector or the supervisor believes that a case may warrant a formal enforcement response, 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:

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, or f) referral to the Attorney General's Office for criminal investigation.

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 300<sup>th</sup> 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 30-20-113, 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.