

**HAZARDOUS WASTE ACT
ENFORCEMENT RESPONSE PROTOCOL**



**HAZARDOUS WASTE BUREAU
NEW MEXICO ENVIRONMENT DEPARTMENT**

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HAZARDOUS WASTE ACT ENFORCEMENT RESPONSE PROTOCOL

The Hazardous Waste Act Enforcement Response Protocol (Protocol) describes the civil and administrative enforcement options that the New Mexico Environment Department (Department) Hazardous Waste Bureau (HWB) may pursue for violations of the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 *et. seq.*, and its implementing regulations, the Hazardous Waste Management Regulations (HWMR), 20.4.1 NMAC, so as to expedite correction of those violations and promote compliance. This Protocol is consistent with the U.S. Environmental Protection Agency's (EPA) December 2003 *Hazardous Waste Civil Enforcement Response Policy*.

I. INTRODUCTION

The goal of the HWA and the HWMR, the state equivalent of the federal Resource Conservation and Recovery Act (RCRA) and its implementing regulations, is to attain and maintain a high rate of compliance within the regulated community with hazardous waste management regulatory requirements. Establishing a comprehensive monitoring and inspection program and addressing the most serious violators with timely, visible, and effective enforcement actions are major components of the HWB's strategy to accomplish 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 Protocol sets forth the response parameters for violations occurring pursuant to the HWA and the HWMR where the HWB intends to pursue an enforcement action, including administrative or judicial action. In so doing, this Protocol defines how the HWB will respond, and establishes timeframes in which this response will occur. Through implementation of this Protocol, the HWB will endeavor to provide fair and equitable treatment of all violators.

This Protocol is intended solely for the guidance of HWB personnel. It is not intended and cannot be relied upon to create rights, substantive or procedural, that are enforceable by any person party in litigation with the Department. The HWB reserves the right to be at variance with this Protocol. The HWB also reserves the right to change this Protocol at any time.

This Protocol is one of several documents that, considered together, define the administrative portion of compliance assurance in the hazardous waste program within the Department. This Protocol provides a general framework for responding to violations and violators of concern by describing timely and appropriate enforcement responses to non-compliance. This Protocol should be read in conjunction with the EPA's *Hazardous Waste Civil Enforcement Response Policy* and with other Departmental policies and guidance including:

- (1) the Department's *Hazardous Waste Act Civil Penalty Policy*;
- (2) the Department's *Hazardous Waste Enforcement Memorandum of Understanding* (MOU) with EPA Region 6; and

(3) the Department's *Memorandum of Agreement between the State of New Mexico and the United States Environmental Protection Agency Region 6 (MOA)* for administration of the RCRA hazardous waste program.

This Protocol 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 Protocol does not address violations determined to be potentially criminal in nature and investigated and prosecuted pursuant to federal or state criminal authorities.

II. EFFECTIVE DATE

The Protocol is effective upon signature by the HWB Chief.

III. CLASSIFICATIONS OF NON-COMPLIANCE

Violators are classified based on an analysis of the facility's overall compliance with the HWMR. This analysis considers prior recalcitrant behavior and/or a history of non-compliance. This Protocol establishes two categories of violators: Significant Non-Compliers (SNC); and Secondary Violators (SV). Facilities that meet any of the SNC criteria will be considered as SNCs. For instance, a facility with substantial deviations from regulatory requirements is a SNC even though it may be a first-time violator.

A. SIGNIFICANT NON-COMPLIERS

SNCs, also known as Class 1 Violators, are those facilities which satisfy one or more of the following criteria:

1. The facility has 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 threatened environmental impact alone is sufficient to cause a facility to be a SNC, particularly when the environmental media potentially affected require special protection (e.g., wetlands or sources of underground drinking water).

2. The facility is a chronic or recalcitrant violator. 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 HWA and HWMR violations. A facility that fails to return to compliance following issuance of an informal enforcement action should be consider a recalcitrant violator.

3. The facility deviates substantially from the terms of a permit, order, agreement, or from HWA statutory or regulatory requirements. Substantial deviation from the regulatory requirements is not just based on the number of violations but is also dependent on the

importance of the particular requirement(s) violated and how substantially the violator failed to comply. For instance, violations that enable a violator subject to Subtitle C to remain outside the scope of the regulatory program (e.g., failure to maintain records, are, by their very nature, substantial deviations from the regulatory program. When applying this principle, it is not necessary to evaluate the percentage of the total applicable requirements that were violated).

B. SECONDARY VIOLATORS

SVs, also known as Class 2 Violators, are those facilities which satisfy one or more of the following criteria:

1. The facility is typically a first-time violator of hazardous waste regulations. A facility classified as an SV should not have a history of recalcitrant or non-compliant conduct.
2. The facility poses 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.
3. The facility does not meet the criteria for SNCs.

IV. APPROPRIATE ENFORCEMENT RESPONSE

The selection of an appropriate enforcement response is an integral component of the HWA 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.

A. INFORMAL ENFORCEMENT RESPONSE

Informal enforcement response comprises 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.

The HWB provides facilities with a copy of the inspection report that identifies potential violations or areas of concern at the closeout meeting concluding the inspection, or shortly thereafter. The HWB considers this action a preliminary notice and facilities are advised that final determination of violations is subject to review by HWB management. This action does not qualify as an informal enforcement because it does not involve establishing a return to compliance schedule.

1. NOTICE OF VIOLATION

The HWB's informal enforcement mechanism is the Notice of Violation (NOV). Most facilities where violations are discovered are issued an NOV via certified mail shortly after the inspection or otherwise learning of the violation. If a facility is found to be in violation, but is

not designated a SNC, it is automatically designated a SV. The NOV is the minimally appropriate enforcement response for all SVs. The NOV includes a listing of the violations discovered during the inspection and requires that facilities provide a satisfactory resolution of the violation(s) or a detailed plan of corrective action acceptable to the HWB within a specified period after issuance of the NOV. The NOV 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.

The objectives of an NOV are to compel the violator to cease its noncompliant activities and to ensure that full physical compliance is achieved in the shortest possible time frame. In general, the date included in the NOV requiring a full return to compliance will be within 30 days or less of the NOV issue date. A violator that has corrected its violations on or before the assigned compliance date is considered to have returned to compliance. The HWB will deem a violator to have returned to compliance when the facility is in full physical compliance with regulatory and/or statutory requirements. If a violator is unable to meet the assigned compliance deadline it must immediately notify the HWB 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.

If a violator fails to achieve full compliance in a timely manner or fails to notify the HWB of the inability to correct violations by the compliance date specified in the NOV, the HWB will consider the need to escalate its enforcement response. For a SV that fails to return to compliance following issuance of an NOV, the HWB will evaluate whether to re-classify the facility as a SNC, pursue a formal enforcement action against the SV depending on the circumstances of the case, or both. The appropriate enforcement response for a recalcitrant SV or reclassified facility is the immediate escalation to formal enforcement. Taking a formal enforcement action against an SV is a decision wholly within the discretion of the HWB.

The HWB, in its discretion, may choose to forego issuing a routine NOV to a SV and issue an NOV with proposed penalties or an ACO as the initial enforcement action if the violator was put on notice of potential violations at the conclusion of the inspection and was recalcitrant in coming into compliance.

2. NOTICE OF VIOLATION WITH PROPOSED PENALTIES

While the NOV is primarily reserved for SVs, the HWB, in its discretion, may issue an NOV with proposed penalties to a SNC. This type of NOV is identical to item A.1 above, but a proposed penalty assessment is included. The proposed penalties usually are issued under a separate civer and are subject to the same confidentiality restrictions as formal settlement negotiations. An NOV with proposed penalties is intended to expedite finalization of certain cases with small numbers of easily correctable violations and/or lower penalties. In these cases, the HWB has reason to believe that extended settlement negotiations may not be necessary or desired by the violator. The NOV with proposed penalties includes an invitation for the facility to meet with HWB staff in a preliminary settlement conference. These conferences are an opportunity for the facility to provide additional information, rebut violations, ask questions, and

begin negotiating a settlement. The NOV with proposed penalties always results in a formal enforcement action.

The HWB may also use the NOV with proposed penalties as an initial enforcement response for first-time violators with significant deviations from the regulatory requirements.

B. FORMAL ENFORCEMENT RESPONSE

Formal enforcement response comprises actions that mandate compliance and initiate a civil, criminal, or administrative process that result in an enforceable agreement or order. Any formal enforcement response should seek injunctive relief that ensures the non-compliant facility expeditiously returns to full physical compliance. The HWB usually reserves recommendations for formal enforcement for SNCs.

An enforcement response against a SNC will usually include economic sanctions in the form of monetary 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 Protocol but is explained in the NMED's *Hazardous Waste Act Civil Penalty Policy*.

1. ADMINISTRATIVE ORDER

The most common type of formal enforcement response used by the Department is the administrative order. There are two primary types of administrative orders used by the Department:

a. Administrative Compliance Order (ACO): The Department usually uses the ACO as its initial formal enforcement response. The ACO takes several forms. An ACO issued by the Department to a violator may include compliance requirements, assess a civil penalty, or contain both elements. This initial enforcement is usually taken by the Department unilaterally without prior settlement negotiations with the violator. The ACO offers the violator to either request a formal hearing or request an informal conference with the HWB to pursue a settlement. If the violator agrees to the conditions in the ACO, this may also serve as a final enforcement action.

b. Stipulated Agreement and Stipulated Final Order (SFO): The SFO, also known as a Consent Order, is a document finalized through settlement negotiations between the HWB and the violator. The Department uses the SFO to formally settle ACOs and NOV's with proposed penalties. In the SFO, the Department and the violator agree upon the final compliance requirements and civil 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, and any other alternative punitive measures or sanctions agreed to be implemented by the facility. Alternative punitive measures or sanctions include, but are not limited to, such items as corrective or mitigative actions, permit decisions, "in-kind" contributions, and suspension or debarment proceedings. The SFO may also include stipulated penalties for failure to comply with compliance conditions in the agreement.

2. CIVIL ACTION

Occasionally, it may be necessary for the Department to file a civil action against a violator. In these cases, there is always a serious extenuating circumstance, like repeated recalcitrance, that requires stronger action than is available to the Department administratively.

3. CRIMINAL REFERRAL

If the HWB discovers potential criminal activity during an inspection or investigation, the HWB may refer the case to the state Office of the Attorney General or other state or federal enforcement agency, such as the EPA Criminal Investigation Division, for criminal investigation and follow up. In these cases, an administrative enforcement action may be pursued in addition to any criminal proceedings.

4. REFERRALS TO EPA REGION 6

There are certain cases that, because of extenuating circumstances, the HWB may refer to EPA Region 6. This may include, but not be limited to, violations of portions of the regulations for which the Department is not yet authorized or where Department authority is limited; cases where legal precedent could be established or where federal involvement is necessary to ensure national consistency; or cases involving multi-state "national" violators.

V. 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 HWA, the HWMR, a permit, or an order. Response times are divided into two categories, those for informal enforcement actions and those for formal enforcement actions. Any failure by the HWB to adhere to these guidelines does not to impart a right to the violator to demand dismissal of an enforcement action. Appendix A summarizes the response times discussed in this section.

A. DAY ZERO (EVALUATION DATE)

The Day Zero, 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, Day Zero will be the date upon which information (e.g., responses to information requests, self-reported violations) becomes available to the HWB. In the case of a referral from EPA, Day Zero will be considered the date of the referral to the HWB. In the case of SVs issued NOV that are reclassified as SNCs for failure to return to compliance, the Day Zero will be considered the first day in exceedance of the compliance date established in the NOV or the first day of discovery of non-compliance with the compliance schedule established through the informal enforcement process. In most cases, Day Zero is the date used as the Evaluation Date in RCRAInfo.

B. DATE DETERMINED

The Date Determined is a date by which the HWB first determines that a violation has occurred. The Date Determined is a date no later than the date of the initial enforcement action. In most routine cases involving SVs, the Date Determined is the same as the Evaluation Date. However, in more complex cases, the Date Determined may be the date of the Case Development Review meeting or as late as the initial enforcement action. In cases where an SV is reclassified as a SNC, the date of the reclassification is considered the Date Determined for the purpose of escalating the Department's enforcement action to a formal enforcement response. The HWB should have determined the facility's compliance with the regulations and then determined whether the violator is a SNC or SV by the Date Determined.

For the purpose of RCRAInfo reporting, the Date Determined is the Evaluation Date unless otherwise specified.

C. CASE DEVELOPMENT REVIEW

The HWB will determine whether or not to use formal or informal enforcement through a case development review to be conducted no later than Day 90. Many times, classification of a facility as an SV is clear and unambiguous. In these cases, the lead inspector and the inspector's supervisor will have an informal case development review to confirm the SV determination and the informal resolution path. This informal review should take place no more than 45 days after the Evaluation Date.

If the inspector or the supervisor believes a case may warrant a SNC determination or formal enforcement response to an SV, a formal case development review meeting with HWB management will be convened to determine the appropriate path forward. This meeting, which should take place before Day 90, 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 formal case development review meetings will include at a minimum the lead inspector, the inspector's supervisor, and the HWB Compliance & Technical Assistance Program Manager. The HWB Chief and Department counsel may also participate in this initial formal case development review or in a subsequent case development meeting.

D. INFORMAL ENFORCEMENT RESPONSE

The HWB should notify the facility of violations through an informal enforcement response no later than Day 150. The HWB usually provides facilities with a list of potential violations during, or shortly after, the inspection. While this list of the potential violations will be considered to have put the violator on notice, it is not an informal enforcement response. The HWB will issue a NOV as soon after the inspection as possible. Generally the HWB should issue a NOV to a SV by Day 100. The HWB should issue a NOV or other appropriate notification of violations to those violators designated as SNCs by Day 150 to put those violators on notice of their violations. If the HWB determines that a facility is a SNC, the NOV or other form of notification should advise the facility of its status.

E. FORMAL ENFORCEMENT RESPONSE

If formal enforcement action is necessary, a decision will be made at the formal Case Development Review meeting, or as soon thereafter as is feasible, as to which enforcement mechanism will be utilized. The Department should issue its initial ACOs to the designated SNCs, or SVs if appropriate, by Day 240. ACOs that follow NOVs are considered initial orders in this instance. The HWB will schedule settlement negotiations, if requested by the violator, as soon as practical after an initial order is issued. The Department will strive to enter into SFOs or other final administrative orders by Day 360.

The enforcement responses involving filing a civil action in the appropriate legal venue, criminal referral to the state Attorney General, or referral of a case to EPA Region 6 should be taken by Day 360.

F. EXCEEDANCE OF ENFORCEMENT RESPONSE TIME

Every effort will be made to adhere to the response times articulated above. However, the HWB recognizes that circumstances may arise where the enforcement response times specified may be insufficient to prepare and initiate the appropriate enforcement response as set forth in this Protocol. The HWB considers it reasonable to allow a ceiling of 20 percent exceedances per year to allow for complex cases involving unique factors that may preclude the HWB from meeting the standard response times. So long as 90 percent of HWB's initial enforcement actions are initiated prior to the timeliness guidelines presented above, the HWB will consider itself timely.

G. RETURNING TO COMPLIANCE

1. INFORMAL ENFORCEMENT ACTIONS

SVs receiving an informal enforcement response are required to at least have a plan of corrective action with an HWB-approved compliance schedule within 15 days after issuance of the NOV. If SVs have not returned to compliance or at least submitted a plan of corrective action or are complying with an HWB-approved compliance schedule within 30 days after issuance of the NOV, the HWB will issue a notice-to-comply letter demanding a response within the next 15 days. SVs should return to compliance no later than 90 days after issuance of the NOV. If a violator is unable to return to compliance, it should immediately notify the HWB and provide documentation supporting the inability to correct the violations identified by the HWB. If SVs have not returned to compliance by Day 210, the HWB may re-classify the violator as a SNC. Failure to return to compliance in a timely manner or failure to notify the HWB of the inability to return to compliance may result in an escalation to formal enforcement.

2. FORMAL ENFORCEMENT ACTIONS

SNCs receiving a formal enforcement response in the form of an ACO have a right to request a hearing pursuant to the HWA and the Department's Adjudicatory Procedures. Any ACO issued pursuant to the HWA shall become final unless the violator submits a written

request to the Department for a public hearing no later than thirty days after the order is served. Violators and the Department may choose to schedule private settlement negotiations in lieu of a public hearing. As soon as possible after completion of the settlement negotiations or hearing officer ruling, the Department shall issue a final formal enforcement action.

While ACOs state with reasonable specificity the nature of the required corrective action or other response measure and specify a time for compliance, the actual times for returning to compliance vary on a case-by-case basis. The HWB will not return the violator to compliance until all assessed civil penalties have been paid and all corrective actions specified in the final enforcement action have been completed.

VI. EPA ACTION IN AUTHORIZED STATES

EPA has authorized New Mexico for implementation of the RCRA programs because of the demonstrated equivalency of the HWA and the HWMR to the RCRA and the federal RCRA regulations. In deciding to take direct action in New Mexico, EPA will use the criteria presented in the MOA and MOU between New Mexico and EPA Region 6 to notify the HWB of EPA's intent to initiate an independent enforcement action. The EPA Region 6 office may need to conduct its own case development inspection and prepare additional documentation before proceeding to initiate an enforcement action.

If the HWB decides to refer a case to EPA Region 6 for federal enforcement, the HWB 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.

VII. PROTOCOL APPROVAL



James P. Bearzi, Chief
Hazardous Waste Bureau



Date

APPENDIX A

DEFAULT ENFORCEMENT RESPONSE DEADLINES

DAY #	ENFORCEMENT RESPONSE
0	Day of Evaluation or Discovery
45	Informal Case Development Review (SV)
90	Formal Case Development Review (SNC)
100	Notice of Violation - code 120 (SV)
150	Notice of Violation - code 125 (SNC)
NOV + 15	Return-to-Compliance Action Plan (SV)
NOV + 45	Notice to Comply (SV)
NOV + 90	Return to Compliance (SV)
210	Escalation Decision for Nonresponsive SV
240	Initial Compliance Order - code 210 (SNC)
360	Settlement Agreement / Final Order - code 310