

**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 (NMED) Hazardous Waste Bureau (HWB) may pursue for violations of the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 to -14, 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 HWB's strategy to accomplish this goal. A timely and effective enforcement action will return a facility to compliance as expeditiously as possible, as well as deter future noncompliance, 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 HWB intends to pursue an enforcement action, including administrative or judicial action. In so doing, this Protocol defines how HWB will respond, and establishes timeframes in which this response will occur. Through implementation of this Protocol, 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 or party in litigation with NMED. HWB reserves the right to be at variance with this Protocol. 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 NMED. 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:

- NMED's *Hazardous Waste Act Civil Penalty Policy*; and
- NMED'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 administrative compliance 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 NONCOMPLIANCE**

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).

**A. SIGNIFICANT NON-COMPLIERS** are those facilities which satisfy one or more of the following criteria:

- 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).
- 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 considered a recalcitrant violator.
- 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.

**B. SECONDARY VIOLATORS** are those facilities which satisfy one or more of the following criteria:

- 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.
- 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.

- 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 noncompliance, 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** comprises those actions other than formal enforcement that notify the facility of its non-compliance and establishes a date by which the non-compliance is to be corrected.

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. HWB considers this action a preliminary notice and facilities are advised that final determination of violations is subject to review by HWB management. The inspection report does not qualify as an informal enforcement action because it does not involve establishing a return to compliance schedule.

1. COMPLIANCE ADVISORY NOTICE (CAN) - HWB may issue a CAN to a facility with minimal non-compliance and the facility is otherwise in good standing with HWB. When HWB deems a CAN is appropriate, the CAN is issued via certified mail or electronically verified email shortly after the inspection. The CAN is the minimally appropriate enforcement response for SVs. The CAN includes a listing of the non-compliance conditions discovered during the inspection and requires that facilities provide a satisfactory resolution of the conditions or a detailed plan of corrective action acceptable to HWB within a specified time period after the CAN issuance.

The objectives of the CAN are to compel the facility to cease its noncompliant activities and to ensure that full compliance is achieved in the shortest possible time frame, without issuing an NOV, usually within 30 days. HWB will deem a facility to have returned to compliance when the facility is in full compliance with regulatory and/or statutory requirements. If a facility is unable to meet the assigned compliance deadline, it must immediately notify HWB and provide documentation supporting the inability to correct out of compliance conditions by the prescribed compliance date. A decision to extend the compliance date should be made by HWB only when supported by sufficient documentation.

If a facility fails to achieve full compliance in a timely manner or fails to notify HWB of the inability to correct out of compliance conditions by the compliance date specified in the CAN, HWB may escalate its enforcement response. For an SV that fails to return to compliance following issuance of a CAN, HWB will evaluate whether

to issue an NOV (see Section IV.A.2), or pursue a formal enforcement action (and possible facility re-classification as a SNC). 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 HWB.

2. NOTICE OF VIOLATION (NOV) - Facilities where a large number of violations are discovered may be issued an NOV via certified mail or electronically verified email. If a facility is found to be in violation, but is not designated an SNC, it is automatically designated an SV. 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 HWB within a specified period of time after issuance of the NOV.

The objectives of an NOV are to compel the violator to cease its noncompliant activities and to ensure that full 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. HWB will deem a violator to have returned to compliance when the facility is in full compliance with regulatory and/or statutory requirements. If a violator is unable to meet the assigned compliance deadline, it must immediately notify 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 HWB of the inability to correct violations by the compliance date specified in the NOV, HWB may escalate its enforcement response. For a SV that fails to return to compliance following issuance of an NOV, HWB will evaluate whether to re-classify the facility as a SNC, and/or pursue a formal enforcement action against the SV depending on the circumstances of the case. 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 HWB.

HWB, in its discretion, may choose to forego issuing a routine NOV to a SV and issue an NOV with proposed penalties (NOVP) or an Administrative Compliance Order (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.

3. NOTICE OF VIOLATION WITH PROPOSED PENALTIES (NOVP) - While the NOV is primarily reserved for SVs, HWB, in its discretion, may issue an NOVP to both SVs and SNCs. This type of NOV is identical to item A.2 above, but a proposed penalty assessment is included. The proposed penalties are issued in a separate document and are subject to the same confidentiality restrictions as formal settlement

negotiations. An NOV is intended to expedite finalization of certain cases. In these cases, HWB has reason to believe that extended settlement negotiations may not be necessary or desired by the violator. The NOV 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, refute violations, ask questions, and begin negotiating a settlement. The NOV always results in a formal enforcement action: either a Stipulated Final Order if the matter is settled, or an Administrative Compliance Order if the matter is not resolved through the NOV process.

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

**B. FORMAL ENFORCEMENT RESPONSE** comprises actions that mandate compliance and initiate a civil, criminal, or administrative process that result in an enforceable agreement or order. As necessary, any formal enforcement response should seek injunctive relief that ensures the non-compliant facility expeditiously returns to full compliance. HWB usually reserves recommendations for formal enforcement for SNCs.

An enforcement response against an SNC will typically include 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 NMED's *Hazardous Waste Act Civil Penalty Policy*.

**1. ADMINISTRATIVE ORDER** - The most common type of formal enforcement response used by NMED is the administrative order. Two primary types of administrative orders used by NMED are:

- **Administrative Compliance Order (ACO)**: NMED commonly uses the ACO as its initial formal enforcement action. The ACO can take several forms. An ACO issued by NMED to a violator may include compliance requirements, assess a civil penalty, or contain both elements. This initial enforcement is usually taken by NMED unilaterally without prior settlement negotiations with the violator. The ACO offers the violator to either request a formal hearing or request a settlement conference with HWB. If the violator agrees to the conditions in the ACO, this may also serve as a final enforcement action.
- **Stipulated Agreement and Stipulated Final Order (SFO)**: The SFO, also known as a Consent Order, is a document finalized through settlement negotiations between HWB and the violator, either after the issuance of an NOV or ACO, or independently. In the SFO, NMED and the violator agree upon the final compliance requirements and civil penalty. The penalty 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 non-compliances?, permit decisions, and permit suspension or termination 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 NMED to file a civil action against a violator. In such cases, there is always a serious extenuating circumstance, such as repeated recalcitrance or on-going violations that requires stronger action or injunctive relief that is administratively unavailable to NMED.

3. CRIMINAL REFERRAL - If HWB discovers potential criminal activity during an inspection or investigation, HWB may refer the case to the U.S. Environmental Protection Agency Criminal Investigation Division, state Office of the Attorney General or other state or federal enforcement agency.. In these cases, an administrative enforcement action may be pursued in addition to any criminal proceedings. All criminal referrals must be reviewed and approved by the NMED Office of General Counsel and the appropriate NMED Division Director before submittal to the appropriate criminal investigatory agency.

4. REFERRALS TO EPA REGION 6 – HWB may refer certain enforcement cases to EPA Region 6. This may include, but are not limited to, violations of portions of the federal regulations for which NMED is not yet authorized to enforce or where NMED’s authority is limited, such as matters 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 HWB to adhere to these guidelines does not 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** triggers each standard response time guideline and is defined as the first day of any inspection or record review during which a 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 HWB. In the case of a referral from EPA, Day Zero will be considered the date of the referral to HWB. In the case of SVs issued NOV that are reclassified as SNCs for failure to return to compliance, 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** is a date by which HWB first determines that a violation has occurred. Date Determined is a date no later than the date of the initial enforcement action. In most routine cases involving SVs, Date Determined is the same as the Evaluation Date. However, in more complex cases, Date Determined may be the date of the Case Development Review meeting (as defined in Section C below) or as late as the initial enforcement action. In cases where a SV is reclassified as a SNC, the date of the reclassification is considered Date Determined for the purpose of escalating the NMED's enforcement action to a formal enforcement response. HWB should have determined the facility's compliance with the regulations and then determined whether the violator is an SNC or SV by Date Determined.

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

- C. CASE DEVELOPMENT REVIEW** is to be conducted no later than Day 90. HWB will determine whether or not to use formal or informal enforcement through a Case Development Review. Many times, classification of a facility as a 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 an 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 NMED's Office of General Counsel may also participate in this initial formal Case Development Review or in a subsequent case development meeting.

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

- E. FORMAL ENFORCEMENT RESPONSE** – A decision will be made at the formal Case

Development Review meeting if a formal enforcement action is necessary, or as soon thereafter as is feasible. NMED should issue its ACO to the SNC, or SV if appropriate, by Day 240. ACOs that follow NOV or NOVPs are considered initial orders in this instance. HWB may schedule a settlement negotiation meeting(s), if requested by the violator, as soon as practical after an initial order is issued. NMED will strive to enter into SFOs or other final administrative orders by Day 360.

Enforcement responses involving the filing of a civil action in the appropriate legal venue, a criminal referral, 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, 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. 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 HWB from meeting the standard response times. So long as 80 percent of HWB's initial enforcement actions are initiated prior to the timeliness guidelines presented above, HWB will consider itself timely.

## **G. RETURNING TO COMPLIANCE**

1. **INFORMAL ENFORCEMENT ACTIONS** - SVs that have not returned to compliance, including not submitting a plan of corrective action, or that are not complying with an HWB-approved compliance schedule within 30 days after issuance of the NOV, will be issued a Notice to Comply letter requesting a response within 15 days of receipt. 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 HWB and provide documentation supporting the inability to correct the violations identified by HWB. If SVs have not returned to compliance by Day 210, HWB may re-classify the violator as a SNC. Failure to return to compliance in a timely manner or failure to notify HWB of the inability to return to compliance may result in an escalation to formal enforcement.

2. **FORMAL ENFORCEMENT ACTIONS** - SNCs receiving formal enforcement in the form of an ACO have a right to request a hearing pursuant to the HWA and NMED's Adjudicatory Regulations. Any ACO issued pursuant to the HWA shall become final unless the violator submits a written request to NMED for a public hearing no later than thirty days after the order is received. Violators may request to schedule private settlement negotiations before the requested hearing, or in lieu of a public hearing.

While ACOs state the nature of the required corrective action or other response measure and specify a time for compliance, 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 to implement the federal RCRA programs, excluding tribal lands, 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 between New Mexico and EPA Region 6 to notify 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 HWB decides to refer a case to EPA Region 6 for federal enforcement, 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**

\_\_\_\_\_  
John Kieling  
Hazardous Waste Bureau Chief

\_\_\_\_\_  
Date

## APPENDIX A

### DEFAULT ENFORCEMENT RESPONSE DEADLINES

<b>*DAY#</b>	<b>ENFORCEMENT RESPONSE</b>
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+ 30	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

\*DAY is defined as calendar days.