



New Mexico Environment Department

PROTECTING OUR ENVIRONMENT, PRESERVING THE ENCHANTMENT

SUSANA MARTINEZ
Governor

DAVE MARTIN
Secretary

JOHN SANCHEZ
Lt. Governor

BUTCH TONGATE
Deputy Secretary

2012 Enforcement Data and Trends Report

March 22, 2013

Santa Fe, NM

2012 Enforcement Data

The New Mexico Environment Department (NMED) is a regulatory agency tasked with promoting a safe, clean, and productive environment throughout the state. Each year, the Environment Department takes enforcement actions against various entities that violate statutes and regulations. The Environment Department is committed to protecting the environment, assuring accountability in regulated industries, and being responsive to the citizens of New Mexico. This report was assembled in an effort to achieve these objectives and to provide transparency in the Environment Department's enforcement actions.

The Environment Department has thirteen bureaus, eight of which assess and collect fines for violations of state and federal environmental regulations. The data below summarizes the penalties assessed and collected by these bureaus from January 1, 2012 through December 31, 2012. Of these bureaus, four stood out as assessing and collecting the greatest amount of penalties at the end of 2012 (highlighted in the table below). In general, the assessed penalties in the table below are calculated based on the initial review of evidence and using bureau penalty policies. Collected and settled penalties are those that are calculated after further review of the circumstances with input from the company in violation. Each bureau is different in their penalty policy and collection strategies.

More details on bureau penalty policies, compliance procedures and statutory authority, in addition to enforcement trends are also found below.

2012 Enforcement Data

Bureau	2012		2011	
	Assessed	Collected/ Settled	Assessed	Collected/ Settled
Air Quality (AQB)	\$ 8,012,361	\$ 1,745,840	\$ 11,401,737	\$ 2,989,932
Occupational Health and Safety (OHSB)	\$ 279,700	\$ 554,742	\$ 718,850	\$ 350,038
Solid Waste (SWB)	\$ 608,175	\$ 164,787	\$ 131,657	\$ 89,925
Hazardous Waste (HWB)	\$ 28,358	\$ 285,625	\$ 69,000	\$ 14,605
Ground Water Quality (GWQB)	\$ 0	\$ 0	\$ 5,000	\$ 34,000
Petroleum Storage Tanks (PSTB) ¹	\$ 0	\$ 20,665	\$ 0	\$ 4,641
Drinking Water (DWB)	\$ 5,468	\$ 2,800	\$ 13,000	\$ 4,132
Radiation Control (RCB)	\$ 0	\$ 0	\$ 0	\$ 0

¹ Reflects settled penalties, not collected. Settled penalties may have been assessed in a previous year.

Enforcement Trends

Air Quality Bureau

There were fewer settlement offers and Administrative Compliance Orders with penalties issued and cases settled in calendar year 2012. Although in both calendar years significant penalties were assessed in Administrative Compliance Orders, those assessed in 2011 were higher by \$949,225.

In addressing the decline in number of enforcement cases – both settlement offers and cases closed – staffing shortages in both the Enforcement and Compliance Inspections sections should be considered. Staffing in the Compliance Inspection section was greater in 2010 than 2011, but higher in 2012. There is a significant lag time between conducting inspections, discovering violations, and referring a case to the Enforcement section. The average time from violation discovery date (VDD) to the 2011 settlement offer issuances was 359 days, which indicates that the enforcement cases were discovered in 2010, when Compliance Inspection staffing was higher. The average number of days from VDD to the 2012 settlement offer issuances was 271, indicating that a substantial number of the cases were discovered in 2011.

Occupational Health and Safety Bureau

The increase in penalties collected for 2012 is primarily due to settlement of a single major case, which included a payment of \$400,000 for violations following a catastrophic event at a refinery. The \$400,000 settlement is the largest settlement ever achieved in the history of the Occupational Health and Safety Bureau. When the \$400,000 payment is removed, the remaining collected penalties for 2012 are \$154,742, which is similar to the percentage of penalties assessed in 2011 (49% in 2011 and 55% in 2012).

The significant reduction in assessed penalties from 2011 (\$718,850) to 2012 (\$279,700) is due to several factors. First, OHSB enforcement staff resources decreased in 2012 due to staffing turnover, which decreased the overall numbers of inspections, from 443 in 2011 to 347 in 2012. Second, a greater percentage of establishments inspected in 2012 were found to be in compliance (64%) with OSHA regulations than in 2011 (49%). Third, OHSB cited 17 repeat or willful violations, carrying maximum penalties 10 times greater than for serious violations, in 2011 and only 2 repeat or willful violations in 2012. Other factors for the reduction may include a shift in inspection targeting to service sectors following adoption of federal emphasis programs, such as nursing care facilities, which took resources away from manufacturing industries (in 2011, 21% of inspections were conducted at manufacturing facilities compared to 10% in 2012).

Solid Waste Bureau

The Solid Waste Bureau's 2012 enforcement statistics are similar to 2011 in several ways. The SWB pursued issuance of eight Administrative Compliance Orders (ACOs) during 2011, which included four infectious waste actions and two landfill-related actions. The SWB pursued issuance of ten ACOs during 2012, which similarly included five infectious waste actions, and a couple of landfill/solid waste authority-related actions. However, the obvious difference is the collection of only 27% of the assessed penalties during 2012 as compared to the collection of 68% of the assessed penalties during 2011. This

difference can be attributed to the pursuit of two separate enforcement actions during 2012 – one involving a controversial compost facility operation and another involving a very large tire dump upon land under the jurisdiction of New Mexico’s State Land Office. Abatement (or planned abatement) required in these cases tended to be quite expensive to the respondents. In both cases, the Department determined that it was better for the respondents’ limited resources to be utilized for abatement. Accordingly, both cases were settled with assurances of complete site abatement and allowed for reductions in penalties based on certain milestones being achieved during the abatement process. Overall, there is a positive enforcement trend during 2012.

Hazardous Waste Bureau

The 2011 and 2012 dollar amounts for penalties assessed and penalties collected/settled in the table below reflect standard procedures of the bureau, including; the implementation of HWB’s June 2007 Enforcement Response Protocol, implementation of HWB’s March 2007 Civil Penalty Policy, normal operations identifying significant non-complying facilities, and penalties associated with a failure to abide with a Compliance Order on Consent for specific environmental restoration projects. The dollar amounts also reflect expected lapses in time to collect assessed penalties and assessed penalties being offset by the performance of restoration activities. The dollar amounts do not reflect a change in enforcement strategy by the HWB.

Bureau Enforcement Trends, Policies, and Procedures

Air Quality Bureau

The mission of the NMED's Air Quality Bureau (AQB) is to protect the inhabitants and natural beauty of New Mexico by preventing the deterioration of air quality. This includes: strategic planning to ensure that all air quality standards are met and maintained, issuing air quality construction and operating permits, and enforcing air quality regulations and permit conditions.

Inspection/Compliance Program

The Air Quality Bureau Compliance Section verifies compliance with state and federal regulations, and permit conditions by performing on-site inspections and reviewing reports submitted by the regulated entity. The section typically conducts about 270 inspections annually. Any potential violations are referred to the Enforcement Section, which initiates appropriate enforcement actions.

Penalties

The Enforcement Section initiates formal or informal enforcement actions by issuing Notices of Violation, Notices of Corrective Action, or Compliance Orders with assistance from the Office of General Counsel. The section assures the return to compliance with federal and state regulations and permit conditions by identifying corrective actions that a facility must take and calculates civil penalties for violations in accordance with the Air Quality Bureau's Civil Penalty Policy. The Civil Penalty Policy, which was crafted by the Office of General Counsel and closely mirrors the EPA policy, is utilized to calculate penalties that are less than the statutory maximum, in a fair and consistent manner. The section conducts meetings with the company to negotiate a settlement, and oversees the facility's return to

compliance. The bureau first attempts to deal with violations at the lowest possible level and reserves the issuance of an Administrative Compliance Order or court action for the most egregious violators, or when the statute of limitations becomes an issue.

Statutory Authority

20.2 NMAC, Air Quality Control Act, 74-2 NMSA 1978. The Air Quality Control Act, 74-2-12 A 1, gives authority to the Department to issue a Compliance Order within one year after the violation becomes known, and to assess a civil penalty. This section of the act also authorizes the use of field citations and establishes a maximum penalty for such.

Occupational Health and Safety Bureau

The Occupational Health and Safety Bureau (OHSB) is a state regulatory agency that is part of the New Mexico Environment Department. It has the responsibility of enforcing Occupational Health and Safety Regulations within New Mexico. The state has adopted the federal OSHA Regulations and has promulgated some state specific regulations. The scope of NM OHSB's jurisdiction includes all private industry and public entities such as city, county, and state government; excluding federal employers.

Inspection/Compliance Program

OHSB has the right to enter and inspect workplaces under New Mexico statutes and regulations. Inspections conducted are of two types, programmed and unprogrammed. Programmed inspections are typically selected from those industries with high rates of injuries or fatalities, or are based on emphasis programs where specific hazards, such as amputations or exposure to toxic chemicals, have been identified within an industry.

Unprogrammed inspections are performed in response to referrals, complaints, fatalities and catastrophes, imminent danger situations, or to whistleblower complaints.

Penalties

When compliance inspections are performed, a compliance officer examines the work place for adherence to safety and health standards. If the compliance officer determines that employees are exposed to hazards in violation of standards and regulations, citations with associated penalties are issued to the employer. The procedures for identifying and documenting violations are described in Chapter 4 of the OHSB Field Operations Manual. Employers are required to demonstrate that the hazards have been abated.

Statutory/Regulatory Authority

NMSA 1978 50-9-1 to 50-9-25; NMAC 11.5.1 to 11.5.6.

Solid Waste

The Solid Waste Bureau (SWB) conducts inspections of New Mexico's solid waste facilities and haulers, investigates complaints, and prepares enforcement actions that include Notices of Violation and Administrative Compliance Orders. The SWB also issues hauler registrations, evaluates on-site disposal requests, and reviews solid waste facility operations, special waste disposal management, contingency, waste screening, and waste excavation plans.

Inspection/Compliance Procedure

The SWB takes enforcement actions to document non-compliant facilities or the mismanagement of solid waste or scrap tires under applicable statutes, rules, and permit or registration requirements, thereby assuring regulatory compliance and providing a deterrent to non-compliance for both the violator and the regulated community. Enforcement actions may be informal or formal. Less serious and non-repetitive violations typically result in the issuance of an informal enforcement action requesting voluntary compliance, while more serious or repetitive instances of violation, or failed attempts at compliance through informal enforcement, may result in the issuance of a formal enforcement action.

Penalties

Formal enforcement action involves the issuance of an Administrative Compliance Order (ACO), as authorized under the Solid Waste Act and/or the Recycling and Illegal Dumping Act. The ACO compels compliance and assesses civil penalties of up to \$5,000 per day, per violation. The SWB's Civil Penalty Policy, which was based upon the federal Resource Conservation and Recovery Act (RCRA) Civil Penalty Policy, is used to determine the proposed penalty amounts. Penalties are assessed based upon the potential for harm to the environment, human health and the regulatory program, and the extent of deviation from the violated regulatory requirement. Penalty assessment also includes consideration of multiple or multi-day violations, appropriate upward or downward penalty adjustments, and any economic benefit derived through non-compliance.

Statutory/Regulatory Authority

New Mexico Solid Waste Act (SWA), NMSA 1978, §§ 74-9-1 to 74-9-42; the New Mexico Solid Waste Rules (SWR), 20.9.2 – 20.9.10 NMAC; the New Mexico Recycling and Illegal Dumping Act (RAIDA), NMSA 1978, §§ 74-13-1 to 74-13-20; and the New Mexico Recycling, Illegal Dumping and Scrap Tire Management Rule (RIDSTMR), 20.9.20 NMAC.

Hazardous Waste Bureau

The Hazardous Waste Bureau (HWB) provides regulatory oversight to ensure compliance with the New Mexico Hazardous Waste Act, its associated regulations, and associated permits. The bureau's mission is to assure the state's residents that hazardous waste is managed, and contaminated sites are cleaned up, in a manner that is safe and protective of human health and the environment. Entities that the bureau regulates include: the state's hazardous waste generators; facilities that treat, store, and dispose of hazardous waste; transfer facilities; and transporters of hazardous waste. In addition to hazardous waste, the bureau regulates the management of universal wastes and used oil. The bureau also ensures abandoned hazardous substances are handled safely and that complaints from the public are addressed.

Inspection/Compliance Procedures

The HWB's Permits Management Program reviews permit applications to ensure compliance with the hazardous waste regulations and technical standards, and drafts permits accordingly. This Program reviews corrective action documents to ensure compliance with associated permit requirements.

The HWB's Compliance & Technical Assistance Program conducts inspections of all regulated entities, collecting field data and information to determine whether violations of the hazardous waste regulations or permits have occurred. This Program typically conducts 130 inspections per year.

Both Programs prepare enforcement actions, including deficiency letters, Notices of Violation, and Administrative Compliance Orders. The number, degree, and repetitiveness of violations determine the level of the enforcement action.

Penalties

The HWB uses the NMED Hazardous Waste Civil Penalty Policy and the EPA RCRA Civil Penalty Policy in determining the civil penalty for violations of the statute, regulations, permits, and compliance orders. The bureau typically conducts meetings with the violator to negotiate a settlement, and oversees the return to compliance.

Statutory/Regulatory Authority

The New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 et. seq., and its implementing regulations, the Hazardous Waste Management Regulations, 20.4.1 NMAC.

Ground Water Quality Bureau

The role of the Ground Water Quality Bureau (GWQB) is to protect the quality of New Mexico's ground water resources as mandated by the Water Quality Act and the Water Quality Control Commission (WQCC) regulations; and, to identify, investigate, and clean-up contaminated sites that exceed WQCC standards.

Inspection/Compliance Procedures

GWQB pursues a strategy of achieving voluntary compliance through progressive enforcement actions with and without assessment of civil penalties. Typically, a letter from GWQB staff to a facility is issued, notifying them they are out of compliance with a permit or an abatement plan and requesting voluntary compliance.

If non-compliance continues, the Bureau Chief sends a Notice of Violation letter notifying the facility that they are out of compliance with a permit or abatement plan and seeks compliance within a specified time period.

Penalties

Administrative Compliance Orders (ACO) with civil penalties are under the signature authority of the Resource Protection Division Director and have been reserved for recalcitrant violators where the informal enforcement measures discussed above are unsuccessful. Historically, the GWQB has done little enforcement.

Regulatory/Statutory Authority

NMSA 1978 74-6, 20.6 NMAC - Water Quality Chapter, 20.6.2 NMAC - Ground and Surface Water Protection, 20.6.3 NMAC - Voluntary Remediation, 20.6.6 NMAC - Supplemental Permitting

Requirements for Dairy Facilities, Clean Water Act, Program Delegation between NMED and Oil Conservation Division.

Petroleum Storage Tanks Bureau

The Petroleum Storage Tanks Bureau (PSTB) is responsible for protecting human health and the environment by preventing releases and overseeing the clean-up of releases to reduce, mitigate, and eliminate threats to the environment posed by petroleum products and other materials released from under- and above-ground storage tanks. Most gas stations are regulated by PSTB.

Inspection/Compliance Program

A Notice of Violation (NOV) is issued by PSTB for violations of tank construction and installation regulations, tank registration, fee payments, and operating requirements. The PSTB routinely documents violations using NOVs. On January 3, 2012 the Environmental Improvement Board approved revisions to regulations including the adoption of delivery prohibition rules. These rules ensure compliance with required preventative measures in accordance with House Bill 81 adopted in the 2010 NM Legislative Session and the federal Energy Policy Act of 2005. The new rules became effective on March 17, 2012.

The bureau's goal is to reduce the number of violations that could potentially result in delivery prohibition by ensuring that tank owners and operators are aware of and correct violations within the allowable time-frames. Notices of Violation may also be issued for other violations of the PSTB rules, such as corrective action at contaminated sites.

Penalties

Delivery prohibition is only authorized for significant violations of prevention rules regarding: spill prevention; overfill protection; leak detection; and corrosion protection equipment. The rules provide specified times that allow owners and operators to correct the violations. The bureau staff will work with owners and operators to correct serious violations as soon as possible. However if a facility fails to correct cited violations within the allowable time periods, the PSTB will put red tags on the tanks with violations, post a notice at the facility that it may not receive any delivery or deposits of fuel, and will list the facility on its Delivery Prohibition List on the PSTB webpage. The red tags will be removed once the facility has demonstrated it is in compliance with applicable rules.

Regulatory/Statutory Authority

NMSA 74-4-10 of the Hazardous Waste Act authorizes compliance orders and penalties. Compliance orders are issued infrequently by PSTB. Because compliance status determines owners' and operators' eligibility to access the Corrective Action Fund to clean up releases, owners and operators of leaking underground storage tank facilities generally remedy the violations and enter into settlement agreements with the Department. Notices of Violation under 20.5.1 through 19 NMAC are issued when owners are not in compliance with release detection and release prevention requirements. A Notice of Violation or Compliance Order may also be issued when a release has occurred and the responsible party is not performing corrective action as required by 20.5.12 NMAC.

Drinking Water Bureau

The mission of the Drinking Water Bureau is to preserve, protect, and improve the state's drinking water quality for New Mexico's present and future generations. Emphasis is placed on upholding state and federal drinking water regulations and providing system oversight, technical assistance, and community outreach.

Inspection/Compliance Procedures

The Drinking Water Bureau (DWB) enforces the requirements of the Safe Drinking Water Act, the New Mexico drinking water regulations, and the Sanitary Projects Act through its Enforcement Program. The Enforcement Program typically follows an escalated approach. Certain violations may first receive one or more Notice of Violation, followed by an Administrative Order (AO) and then followed by an AO with penalties if compliance is not achieved. The DWB will work with a system operator to assist them in returning to compliance. Compliance schedules can be extended as long as the system operator is making a good faith effort to return to compliance. At times the DWB and the system operator may negotiate a Settlement Agreement (SA) in which the two parties agree on an approach and timetable for compliance.

Penalties

If an AO with penalties is issued, the amount of the penalty will depend on the number of violations, the severity of the violations, the number of days the system has been in violation, whether the violator acted in good faith or bad faith, and the system's ability to pay. For violations of the drinking water regulations, the maximum statutory penalty is \$1,000 per violation, per day. For violations of the Utility Operator Certification Act or its underlying regulations, the maximum statutory penalty is \$2,500 per violation, per day. Violations of the Sanitary Projects Act carry a maximum penalty of \$250 for each day of continued noncompliance with an AO.

Regulatory/Statutory Authority

The primary law governing public water systems is the federal Safe Drinking Water Act (SDWA). The New Mexico DWB has primacy for SDWA which means it has the authority to implement and enforce the primary SDWA regulations. In addition, the state Environmental Improvement Act (NMSA 74-1-8) provides the development of regulations in accordance with SDWA. The State Drinking Water Rules (NMAC 20.7.10) include requirements not covered by SDWA.

Radiation Control Bureau

The Radiation Control Bureau (RCB) regulates the beneficial uses of ionizing radiation, while providing for protection against intrinsic hazards that it can pose to workers, the public, and the environment.

The bureau has several programs to regulate materials.

- The Radioactive Materials Licensing Program regulates facilities that possess, use, store, transport, or dispose of radioactive materials in order to ensure that radioactive materials are managed appropriately. The bureau issues radioactive material licenses (e.g., Lovelace Hospital for High Dose Radiation Therapy, for the treatment of breast cancer).

- The Radiation Machine Program regulates facilities that possess, use, store, transport, or dispose of radiation machines in order to ensure that radiation machines are managed appropriately and registers radiation machines (e.g., particle accelerators, used for the treatment of prostate cancer).

Inspection/Compliance Procedures

The bureau performs two types of inspections to ensure licensees and registrants are correctly using radiation and that the citizens of New Mexico are not at risk of receiving unnecessary radiation exposure. Inspections are performed on all radiation activities.

A typical Radioactive Materials Licensing Program inspection consists of a review of licensed activities, including security, procedures, and inventory verification. A verbal summary of inspection findings are provided at an exit interview. If no deficiencies are found, a formal letter is issued within two weeks of the inspection informing the licensee that no deficiencies were identified in the inspection and the licensee meets the Radiation Protection Regulations. When violations are identified, a formal Notice of Violation is issued, indicating the regulation or license condition violated, and the letter is sent via certified mail. The licensee has thirty days to respond to the violations cited and explain the corrective action taken.

A typical Radiation Machine Program inspection consists of a review of the registrant's activities, including equipment testing, radiation exposure measurement, quality control, and patient exam records, and includes a verbal summary of inspection finding, provided at the exit interview. When violations are identified, a formal Notice of Violation is issued to the registrant during the exit interview, indicating the regulation or registration condition violated. The registrant has thirty days to respond to the violations cited and explain the corrective action taken.

Penalties

If the corrective action letter received from the licensee or registrant is inadequate, and the infractions are severe in nature, the violation may escalate to a Compliance Order that may include civil penalties. Historically, the majority of the responses to Notice of Violation are found adequate.

Regulatory/Statutory Authority

The Bureau regulates uses of sources of radioactivity and radiation under the statutory authority of the New Mexico Radiation Control Act, NMSA 1978, §§ 74-3-1 to 74-3-16 and the New Mexico Environmental Protection, Radiation Protection Rules, 20.3.1-20.3.16 NMAC.