

# Enforcement Guide



Stationary Sources Program  
Colorado Air Pollution Control Division



DISCLAIMER:

This Enforcement Guide summarizes certain enforcement-related rules, rights, procedures, policies, and requirements. The summaries are not exhaustive, should not replace independent research of appropriate issues, and do not represent legal advice. Also, the summaries cannot be used to establish new standards or limits, are not binding on any party, and cannot be relied upon to create any rights enforceable by any party. The Colorado Department of Public Health and Environment Air Pollution Control Division (“Division”) reserves the right to change this Enforcement Guide, or its attachments, at any time without public notice.

It is also important to note that, as of the publication date of this guide, the Division and the United States Environmental Protection Agency (“EPA”) were involved in discussions regarding certain EPA enforcement policies. Depending in part upon the directives received from the EPA, certain sections of this Enforcement Guide may be subject to change.

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## I. INTRODUCTION

The Colorado Department of Public Health and Environment (CDPHE) Air Pollution Control Division (Division) is responsible for enforcing the State's air pollution laws and regulations. In carrying out this responsibility, the Division provides compliance assistance and performs investigatory activities, including site inspections. The Division may, depending upon the results of its investigations, initiate an enforcement action. The Division's enforcement actions achieve multiple objectives. Among those objectives are the documentation of instances of non-compliance, ensuring that sources return to compliance, and the assessment of any penalties, as appropriate. Most importantly, the Division's enforcement actions are pursued to achieve the overarching objective of protecting the health and environment of Colorado's citizens.

Regulated entities may generally elect to resolve Division enforcement actions informally or formally. If a matter is resolved informally, as is generally the case, the Division must consider the appropriate settlement terms. The informal settlement terms depend upon the unique circumstances of a particular case and are ultimately reflected through a resolution document. If the matter is resolved formally, then the Division must follow requirements specified by state statute. This guide addresses important aspects of both the informal and formal processes through which the Division's enforcement actions are resolved.

## II. DEFINITIONS

For purposes of this Enforcement Guide, the following terms have the meaning described below:

- a. **Act:** The term Act refers to the Colorado Air Pollution Prevention and Control Act, set forth at §§ 25-7-101 et. seq., C.R.S.
- b. **AQCC:** The term AQCC refers to the Colorado Air Quality Control Commission, created by §25-7-104, C.R.S.
- c. **APEN:** The term APEN means an Air Pollution Emissions Notice, as set forth in AQCC Regulation Number 3, Part A §II.
- d. **CAA:** The term CAA means the Clean Air Act, as set forth in 42 U.S.C.A §§7401 *et seq.*
- e. **CDPHE:** The term CDPHE means the Colorado Department of Public Health and Environment.
- f. **Civil Penalty or Administrative Penalty:** The terms civil administrative penalty and administrative penalty refer to a penalty of the type contemplated by § 25-7-122(1)(b), C.R.S., which is separate from, and in addition to, any Economic Benefit Penalty.

- g. Compliance Advisory or CA: The terms Compliance Advisory or CA refer to a document through which the Division notifies a Source of alleged violations, per § 25-7-115, C.R.S., generally as a part of the Division's informal resolution process.
- h. Compliance Order: The term Compliance Order refers to an order of the Division, issued pursuant to § 25-7-115(3), C.R.S., within the formal resolution process.
- i. Compliance Order on Consent or COC: The terms Compliance Order on Consent or COC mean a Consent Order, mutually agreed upon by the Division and a Source, as a resolution to an action initiated within either the informal or formal resolution processes.
- j. Department of Justice or DOJ: The terms Department of Justice or DOJ refer to the Federal agency that prosecutes certain enforcement actions.
- k. Division: Refers to the Air Pollution Control Division, unless otherwise stated.
- l. Economic Benefit Penalty: An Economic Benefit Penalty or Noncompliance Penalty is a penalty of the type addressed in § 25-7-115(3)(b), C.R.S. An economic benefit penalty takes into direct consideration a Source's economic benefit(s) associated with noncompliance.
- m. Environmental Protection Agency or EPA: The terms Environmental Protection Agency or EPA mean the Federal agency created following the enactment of the National Environmental Policy Act of 1969, and that is responsible for administering certain aspects of the Clean Air Act.
- n. Early Settlement Agreement or ESA: The terms Early Settlement Agreement or ESA mean the settlement document utilized by the Division and Source to resolve certain informally or formally initiated enforcement actions.
- o. Injunctive Relief: The term Injunctive Relief refers to judicial relief requiring a person or entity to perform, or refrain from, a specific activity.
- p. Noncompliance Penalty: Noncompliance Penalty, also referred to as an Economic Benefit Penalty, means a penalty that takes into direct consideration the Source's economic benefit(s) associated with noncompliance.
- q. Notice of Violation or NOV: The terms Notice of Violation or NOV refer to a document through which the Division notifies a Source of alleged violations, per § 25-7-115, C.R.S., generally as part of the Division's formal resolution process.

- r. SEP: The term SEP means a supplemental environmental project, as defined and described in the CDPHE SEP Policy. SEPs may mitigate an agreed component of a penalty, as part of the resolution of an enforcement action.
- s. SIP: The term SIP means the State Implementation Plan, as defined in 42 U.S.C.A §7409. SIPs are the instruments through which States demonstrate compliance with the Clean Air Act and related EPA rules.
- t. Source: The term Source means a regulated entity subject to a Division and/or EPA enforcement action.
- u. State: The term State, unless indicated otherwise, refers to the State of Colorado.
- v. Verbal Warning: The term Verbal Warning, means the oral communication of a noncompliance event, generally from a Division inspector to a Source representative, to resolve a compliance issue without the initiation of either an informal or formal enforcement action.
- w. Warning Letter: The term Warning Letter means the written communication of a noncompliance event, generally from a Division inspector to a Source representative, to resolve a compliance issue without the initiation of either an informal or formal enforcement action.

### III. ENFORCEMENT AUTHORITY

#### a. State Enforcement-Related Authority

The Division pursues its investigations and enforcement actions under authority, including the following:

##### **1. Information Gathering**

Section 25-7-111, C.R.S. (Administration of air quality control programs) empowers the Division to “conduct or cause to be conducted studies and research,” to “collect data,” to “enter and inspect any property,” and to otherwise secure information, consistent with the rule’s requirements and restrictions.

##### **2. Emergency Situations**

Sections 25-7-112, C.R.S. and 25-7-113, C.R.S. address the Division’s authority in emergency situations. Section 25-7-112, C.R.S. concerns endangerments to public health, while § 25-7-113, C.R.S. concerns endangerments to public welfare. These statutes require the Division, in prescribed situations, to issue a cease-and-desist order to a person, requiring the immediate discontinuance of the activity or discharge at issue.

### **3. Enforcement Actions**

Section 25-7-115, C.R.S. (Enforcement) describes the Division's basis for, and procedures relating to the enforcement of Colorado's air pollution laws and regulations. This statute provides that the Division shall perform investigations of potential air pollution violations. Depending upon the results of its investigations and other circumstances of a particular case, the Division is further required to provide notification of an alleged violation and confer with the source regarding the alleged violation. Finally, if the Division determines that a violation has occurred, the statute requires the Division to issue a compliance order and assess a penalty, if appropriate. Penalty assessments and specific enforcement procedures are discussed separately below.

### **4. Penalties**

As noted above, the Division assesses penalties in appropriate enforcement actions. The penalty assessed in a particular case may be one or more of several types, and of varying amounts. The type and amount of penalty assessed depends upon the nature of the violation and the compliance objective underlying the penalty assessment. Important sources of the Division's penalty issuance authority are summarized below.

#### *i. Civil Penalties*

Section 25-7-122, C.R.S. addresses most penalties assessed by the Division. The statute provides that any person who violates any of multiple categories of requirements "shall be subject to a civil penalty of not more than fifteen thousand dollars per day for each of such violation."

The Act also provides, however, that certain types of violations are subject to lesser penalties or additional pre-assessment requirements. For example, penalties assessed for a violation of § 25-7-114.1, C.R.S. (APEN violations) may not exceed five hundred dollars. Open burning penalties issued under § 25-7-123, C.R.S. may not exceed one hundred dollars per day for non-commercial violations and ten thousand dollars per day for commercial violations. Also, the Division may not assess a penalty for a violation of the AQCC Regulation Number 3 opacity standard, but may address related violations of a fugitive dust control plan.

Section 25-7-122, C.R.S. also provides that the Division shall consider various factors in arriving at the appropriate penalty, and in determining whether a deferral or suspension of some or all of the penalty is appropriate. Those aggravating factors in the statute include:

- The violator's compliance history
- Good faith efforts on behalf of the violator to comply
- Payment by the violator of penalties assessed for the same violation



- Duration of the violation
- Economic benefit of noncompliance to the violator
- Impact on, or threat to, the public health or welfare or the environment as a result of the violation
- Malfeasance
- Whether legal and factual theories were advanced for purposes of delay

§ 25-7-122(2)(a), C.R.S.

Additionally, § 25-7-122, C.R.S. provides that the Division shall consider the following circumstances in determining if a reduction or elimination of civil penalties is appropriate:

- The voluntary and complete disclosure by the violator of such violation in a timely fashion after discovery of the noncompliance
- Full and prompt cooperation by the violator following disclosure of the violation including, when appropriate, entering into a legally enforceable commitment to undertake compliance and remedial efforts
- The existence and scope of a regularized and comprehensive environmental compliance program or an environmental audit program
- Substantial economic impact of a penalty on the violator
- Nonfeasance
- Other mitigating factors

§ 25-7-122(2)(b), C.R.S.

*ii. Civil Noncompliance/Economic Benefit Penalties*

Additionally, § 25-7-115, C.R.S. describes the situations in which the Division shall issue a Noncompliance Penalty, also referred to as an Economic Benefit Penalty. Subsection (5) of the statute requires violators of § 120(a)(2)(A) of the Clean Air Act to calculate the noncompliance penalty within forty-five days of the issuance of a Compliance Order. Section 120(a)(2)(A) of the Clean Air Act concerns the failure to adhere to certain Federal limitations, standards, schedules or other requirements. Section 25-7-115, C.R.S. also describes the manner by which the violator is required to determine the economic benefit associated with the act of noncompliance.

### *iii. Criminal Penalties*

Section 25-7-122.1, C.R.S. provides that the Division, upon discovery of a knowing violation, may request either the attorney general or the district attorney to pursue criminal penalties against the violator. Section 18-1-501, C.R.S. defines the term “knowingly” for purposes of this statute. The activities covered by this statute include knowing violations of an emission control regulation of the commission, a SIP or permit, certain false statements, representations or certifications, and specified acts constituting knowing endangerment of another person.

### **b. Federal and State Enforcement Authority**

Federal and State CAA enforcement authority overlaps in some areas and is separate and distinct in others. The Federal Government, through the EPA or DOJ, may enforce federal rules and regulations. The Federal Government may also enforce state regulations that have been included in the SIP. Conversely, the State may enforce state air pollution statutes and regulations. The State may also enforce federal regulations that have been delegated to the State and are included in the State’s SIP.

Enforcement actions initiated by the Federal Government are subject to different procedures, penalties, and other rules than are described with respect to the State in this Enforcement Guide. For example, the federal government may pursue civil penalties of up to \$37,500 per day for each violation, separate from its right to pursue Injunctive Relief.

The EPA has delegated to the State of Colorado the authority to enforce a wide range of Federal statutes and regulations; however, the EPA retains certain oversight authority over the State. For example, the EPA monitors the enforcement actions pursued by the State with respect to the alleged violations at issue, the timeliness of the resolution, and the penalties assessed. The EPA also retains over-filing authority over the state. That is, in certain cases, the EPA may elect to take over a particular enforcement action and pursue resolution through the Federal system.

## **IV. ENFORCEMENT PROCEDURES**

### **a. Alternatives Available**

Division enforcement actions may be resolved informally or formally, or in some combination thereof, at the Division’s discretion. The Division’s informal resolution process is generally more expedited than the formal process, and typically results in the assessment of lesser penalties. The formal process, on the other hand, utilizes more of the legal mechanisms afforded by § 25-7-115, C.R.S. including the involvement of the AQCC and a Source’s exercise of certain statutory appeal rights. Although the Division attempts to resolve the majority of enforcement actions informally, the formal process

remains available to all sources. Both processes, and the documents utilized in each, are summarized below.

b. Informal Process: The Division provides an opportunity for the informal resolution of enforcement actions through the following steps and procedures:

**1. Verbal and Written Warnings**

In appropriate situations, and with supervisor approval, Division inspectors or other personnel may issue verbal or written warnings to Sources. The Division may consider, in the exercise of its discretion, the issuance of a warning in situations involving a relatively minor violation that has been resolved and committed by a source without a significant history of similar non-compliance. See [Attachment “A”](#) for a sample of a Warning Letter.

**2. Compliance Advisory Letter**

The Division utilizes a Compliance Advisory letter to communicate alleged violations to a Source. A Compliance Advisory letter will contain background information including the name and location of the Source, the equipment and permit(s) at issue, and the date(s) of any inspection preceding the enforcement action. The letter will also identify any alleged violations discovered by the Division and, perhaps, other issues that necessitate further investigation. Finally, the letter invites the Source to submit counter-positions and/or information to a Division inspector, and to schedule a meeting to discuss the alleged violations. See [Attachment “B”](#) for a sample of a Compliance Advisory Letter.

**3. Compliance Advisory Meeting**

At the Compliance Advisory meeting, Source and Division personnel discuss the alleged violations in dispute, and any other relevant matters. Although this meeting is informal, Source representatives may include consultants and/or legal counsel, at the Source’s election. The Division is typically represented by the inspector(s), an Enforcement Supervisor and either the Division’s Legal Administrator or a representative from the Legal Administrator’s team. In appropriate cases, the Division may also be represented by an attorney from the Colorado State Attorney General’s Office. If a Source has questions regarding the Division’s anticipated representation at a Compliance Advisory meeting, or otherwise in relation to the meeting, those questions may be directed to the Division inspector, Enforcement Supervisor, or Legal Administrator.

**4. Penalty Calculations:**

Following the determination of the specific alleged violations at issue, the Division performs a civil penalty calculation. The Division assesses penalties consistent with the factors and limitations contained in

§ 25-7-122, C.R.S. First, the Division arrives at an appropriate base penalty, considering the size of the Source and its enforcement history. Next, the Division increases the base penalty through an application of the § 25-7-122 aggravating factors, including the duration of the violations. Finally, the Division reduces the total penalty after considering § 25-7-122 mitigating factors, including the Source's voluntary cooperation in the informal resolution process. The remaining penalty must be less than the statutory penalty limitation of \$15,000 per day per violation. Each of these penalty calculation steps are described more specifically in the policy documents contained in [Attachment "C"](#).

Section 25-7-115, C.R.S. and EPA enforcement policies also require the Division to assess noncompliance penalties in certain cases. In arriving at the appropriate noncompliance penalty, the Division first requests that the Source perform the EPA-approved BEN calculation. Please see <http://www.epa.gov/compliance/civil/econmodels/index.html#ben> for information regarding the EPA BEN calculation model. The Division reviews the calculations and either approves the calculations, and incorporates them into the settlement document, or denies the calculations with further guidance.

## **5. Enforcement Action Resolution**

Following communications with the Source, the Division evaluates the facts and determines which, if any, violations to pursue. The Division then prepares a written settlement proposal that outlines the specific violations alleged, any requirements to return to compliance, and any associated penalty. The settlement proposal will generally take one of two forms. If the enforcement action involves relatively few, minor violations, each of which have been resolved, the Division may utilize an Early Settlement Agreement (ESA). See [Attachment "D"](#) for an example of an ESA. In other matters that warrant more detailed documentation, the Division utilizes a Compliance Order on Consent (COC). See [Attachment "E"](#) for an example of a COC. Alternatively, if the Division determines that an enforcement action is appropriately resolved without the issuance of any penalty or future compliance requirements, it may elect to issue a No-Further-Action Letter (NFA). See [Attachment "F"](#) for an example of an NFA Letter.

In delivering the settlement proposal to a Source, the Division will specify the duration of the settlement offer. If the Source does not accept the Division's settlement offer within the time period described, by signing the settlement document provided by the Division, the offer is subject to potential adjustment; however, if the Source requires additional time to evaluate the settlement proposal, the Division may extend the duration of the offer for an appropriate period of time. Any such extension must be documented by the Division, in writing.

## **6. Supplemental Environmental Projects**

In all enforcement actions, a Source may propose a Supplemental Environmental Project (SEP) as a means of mitigating some of the penalty assessed against it. SEPs are projects that a Source undertakes following the settlement of an enforcement action, without prior commitment or obligation. The project must, among other requirements, benefit either the public health or the environment beyond what is required by law. SEPs are either First-Party, sometimes referred to as Internal SEPs, or Third-Party SEPs. A First-Party SEP refers to a project completed by a Source within its own facilities. A Third-Party SEP refers to one in which the Source makes a donation to a third party or performs the SEP to the benefit of a third party.

If a Source elects to propose a SEP, it will be asked to complete a Supplemental Environmental Projects (SEPs) Proposal/Agreement form. See [Attachment “G”](#) for a copy of the SEP Proposal/Agreement template. The Division will review SEP applications submitted by a Source and, at its discretion, approve or deny the application. A SEP application is not considered approved unless and until a completed SEP Application/Agreement has been signed by the Source and the Division.

With respect to penalty mitigation, SEPs may not mitigate more than 80% of a penalty. Also, in cases in which the Source derives a benefit from the performance of the SEP, it will be required to expend an amount greater than the amount of the penalty being mitigated. Additionally, if a SEP is not completed satisfactorily, any remaining unmitigated portion of the penalty must be paid to the CDPHE as an administrative penalty.

See [Attachment “H”](#) for a copy of the CDPHE’s SEP Policy, including a more complete description of the SEP restrictions and requirements.

### **c. Formal Process:**

The Division’s formal enforcement action resolution process includes the following steps, as further described in § 25-7-115, C.R.S.:

#### **1. Issuance of Notice of Violation**

The Division utilizes a Notice of Violation (NOV) to communicate alleged violations to a Source. As with the CA Letter, the NOV summarizes background information and lists the specific alleged violations at issue. The NOV will also establish the date and time for the NOV conference, described below. See [Attachment “I”](#) for a sample of an NOV.

## **2. Notice of Violation Conference**

At the NOV conference, the Division gathers and discusses the data, views, and arguments relating to the alleged violations, as presented by the Source. The Division generally records these conferences. The Source may, at its election, also provide certain information to the Division in advance of the NOV conference. At the conclusion of the NOV conference, the Division will advise the Source of its appeal rights under § 25-7-115., C.R.S.

The Division is typically represented at an NOV conference by the inspector(s), an Enforcement Supervisor, the Division's Legal Administrator, and an attorney from the Attorney General's Office. Questions regarding the Division's anticipated representation at an NOV conference, or otherwise in relation to the conference, may be directed to the Division inspector, Enforcement Supervisor, or Legal Administrator.

## **3. Issuance of Compliance Order**

After the NOV conference, the Division will consider the information presented to it. The Division will then address the alleged violations, if appropriate, through the issuance of a Compliance Order. The Compliance Order will describe the violations, as determined by the Division, and provide the corresponding penalty and any compliance requirements. The Compliance Order will also remind the Source of its § 25-7-115, C.R.S. appeal rights. It should be noted that the penalty assessment reflected in the Compliance Order, while consistent with § 25-7-122, C.R.S., will likely exceed any penalty assessment contained in a prior settlement proposal. See [Attachment "J"](#) for an example of a Compliance Order.

## **4. Opportunity for Appeal**

Section 25-7-115(4)(a)(I), C.R.S. provides that, within 20 days after receipt of a Compliance Order, a Source may appeal the Order by filing a written petition with the AQCC. Hearings before the AQCC are governed by the AQCC Procedural Rules located at 5 CCR 1001-1.

## **QUESTIONS?**

**If you have any questions regarding the contents of this guide, or any related issues, please see the list of Division personnel contained in [Attachment "K"](#).**