



Hazardous Waste/Toxics Use Reduction Program Implementation Policy

POLICY TITLE: Significant Non-Compliers of Hazardous Waste Management

POLICY NUMBER: 2001-PO-005 [Supercedes 2000-PO-002]

EFFECTIVE DATE: May 22, 2001

PURPOSE: This policy provides guidance for use by Hazardous Waste (HW) and Enforcement personnel on the designation and reporting of facilities identified as Significant Non-Compliers (SNCs). The purpose of this policy is two-fold: to clarify SNC criteria for use in evaluating and identifying SNCs, and to document the Department's commitment to the reporting of SNCs in RCRAInfo, pursuant to the Hazardous Waste Program's Performance Partnership Agreement with EPA Region X.

APPLICABILITY: This policy provides guidance for Hazardous Waste and Enforcement personnel in determining whether a person meets the definition of a SNC, for use in prioritizing DEQ HW enforcement cases. Note that the determination that a facility is a SNC is not an appealable determination and bears no direct enforcement consequence. This policy is intended solely as guidance for employees of the Department. It does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create a right or benefit, substantive or procedural, enforceable by law or in equity, by any person. DEQ may take action at variance with this policy statement.

DISCUSSION: DEQ personnel shall evaluate, designate, and report Significant Non-Compliers as defined herein.

Significant Non-Compliers (SNCs) are those facilities which:

- Cause actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents to humans or the environment; or
- Violate the law through flagrant or willful action; or
- Are chronic or recalcitrant violators; or
- Have violation(s) which deviate substantially from the terms of a permit, order, agreement or hazardous waste statutory or regulatory requirement.

Any one of these criteria is sufficient to warrant designation as a SNC. Facilities may be evaluated on a multi-media basis for SNC designation; however, a facility may be found to be a SNC based solely on prior RCRA violations and behavior.

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; however, in most cases HW staff will make qualitative assessments of whether exposure has, or is likely to occur, which does not require a risk assessment. Environmental impact alone is sufficient cause for designating a facility as a SNC, particularly when the environmental media affected require special protection (e.g., wetlands or sources of underground drinking water).

When determining whether a facility has been a *chronic* violator the Department may consider violations from prior enforcement actions, as well as violations that were observed but not included as the basis for penalty assessment of a prior enforcement action. The Department may also consider the compliance history at other facilities of the owner/operator, or in other media programs in designating a chronic violator. In general, a violator demonstrates *recalcitrance* through behavior or actions that constitute an unwillingness or stubborn refusal to adhere to the law. For example, a facility may be identified as recalcitrant due to failure to implement required compliance actions within the timeframe specified by the Department; in such a case the facility becomes a SNC once the timeframe specified has been exceeded.

Violations that constitute *substantial deviation* of a permit, order or regulatory requirement, are those violations of requirements that are important to the protection of the environment or human health or the integrity of the regulatory system. For example, violations that allow a facility to remain outside the scope of the regulatory program, or violations of requirements that provide information essential to the integrity of the RCRA program would constitute substantial deviation.

This policy includes an attachment (Attachment 1) that provides examples illustrating how the Department would designate a SNC under these four criteria for a given set of compliance conditions.

It is important to note that while the SNC definition contained herein closely parallels that of EPA's 1996 Civil Enforcement Response Policy and 2000 Addendum¹, the agencies' implementation objectives differ. The EPA uses SNC designation to identify those facilities for which formal enforcement is appropriate²; DEQ, on the other hand, does not limit formal enforcement to those facilities identified as SNCs. DEQ's Enforcement Office uses the SNC designation to prioritize agency enforcement resources to address the most serious violators with formal enforcement actions, consistent with the agency's Enforcement Guidance, and to ensure appropriate and timely enforcement actions are taken.

DEQ may designate SNCs based on violations within any media program, including but not limited to RCRA violations. HW field staff identifying a violation will recommend SNC

¹ US EPA Memorandum from Desi Crouther to RCRA Enforcement Managers, "Transmittal of Addendum to the 1996 Hazardous Waste Enforcement Response," April 18, 2000.

² US EPA Hazardous Waste Civil Enforcement Response Policy, March 15, 1996, p. 5.

designation pursuant to the above definition, with manager concurrence, when referring alleged hazardous waste management violations to either DEQ's Enforcement Office or EPA Region X for formal enforcement.

Facilities will be deemed to have Returned to Compliance, and to no longer be a SNC, when they are in full physical compliance with regulatory and/or statutory requirements or when they are in full compliance with a compliance schedule established in a formal enforcement action (in either an order or an agreement). When it is determined that a facility is no longer a SNC, regardless of any outstanding enforcement actions, field staff, with manager concurrence, will update RCRAInfo to reflect the change in SNC status.

POINT OF CONTACT: Questions pertaining to policy interpretation should be directed to Karen Whisler at (503) 229-5082 (e-mail address: whisler.karen@deq.state.or.us).

ATTACHMENT 1

The following examples are provided to clarify how the Department expects the above criteria to be interpreted to ensure statewide consistency. It is expected that DEQ inspectors will use their own professional judgement when identifying significant non-compliers. As the examples are necessarily brief, please keep in mind that additional information regarding the circumstances of the cases presented may warrant a different interpretation than that reached below.

Example 1: Actual or Substantial Likelihood of Exposure

Circumstances: During a focused compliance assurance effort in a mixed industrial area dominated by small businesses, you find the following violations:

- Company A has dumped solvent waste out into the woods behind the shop where there is a dead spot in the ground vegetation.
- B Company has four open drums of used oil in an area where forklift use and employee traffic is heavy, indicating the drums could easily be knocked over or punctured.
- Company C, a mercury recycling facility, has removed emission controls from its processing equipment and you observe broken fluorescent tubes and dust on the floor and employees working in t-shirts and shorts.
- D Company, an abandoned industrial facility, has several open, unmarked containers of hazardous waste. The facility is located adjacent to a school; the school has complained that it is difficult to keep the kids from crossing into the property and during the site inspection you observe four children playing in close proximity to the containers.

Evaluation: Exposure to humans or the environment means that the hazardous waste will come in contact and cause a physical injury to a human or be introduced into the environment and cause damage to habitat, wildlife, flora, aquatic or marine life, livestock or crops. In case of an actual exposure, designation as a SNC is always appropriate. For this reason, Company C would be SNCs for actually exposing workers to hazardous waste fumes. Note that employee exposures are sufficient to determine this criterion, a point reiterated in EPA's 2000 Addendum to the federal Enforcement Response Policy, in that much of the RCRA regulations are in fact designed to protect the health of workers from hazardous wastes. (If you had additional information establishing that the facility intentionally removed pollution control equipment with disregard for regulatory requirements or employee health you might also determine that the company met the willful and flagrant criteria for SNC designation.)

A Company would likely also be designated a SNC for damaging the forest habitat and flora, however additional information than provided in this example regarding the quantity, toxicity, and frequency of disposal, and the extent of contamination would be important to establishing both the violation that occurred and the SNC designation.

A facility does not have to cause actual exposure to be a SNC if there is a "substantial likelihood" of exposure. In making this decision, consider both the probability that any exposure will occur, and the degree of potential harm that could result. In general, a violator will be designated as a SNC if he or she acted with gross negligence. These considerations could factor into a determination that D Company is a SNC for the gross negligence related to storage and security that could result in hazardous waste exposures to school. Similarly this consideration could lead to SNC designation for Company A. B Company is storing used oil in a way that

likely will lead to exposure. However, B Company is not a SNC because the damage that could result is small, and this casual storage of used oil is not so far beyond the social norm to be grossly negligent.

Example 2: Willful or Flagrant Conduct

Circumstances: An earlier inspection at Company Alpha, a CEG, reveals that Alpha generates a small amount of p-listed waste. The facility is informed them that they need to ensure the quantity of p-listed waste does not exceed 2.2 pounds per month in order to retain their CEG status. Your inspection reveals that although the company has continued to claim CEG status, they have been generating larger volumes of p-listed waste recently and have been burning some of the waste to avoid the cost of disposal and retain their generator status.

Evaluation: In deciding whether a violator is willful or flagrant you should look for two things: (1) something done on purpose, and (2) a belief or knowledge that the law requires them to do something else. The circumstances above indicate that Alpha burned the waste on purpose while believing they were required to do something else, and therefore the facility should be designated a SNC.

Note that in deciding whether a violation is willful or flagrant, you are also considering whether a facility acted "deliberately, deceitfully, or dishonestly" which are the factors you use in deciding whether to refer a violation for criminal investigation or prosecution (however, SNC designation for willful or flagrant violations does not necessarily mean the Department will pursue criminal enforcement). If you find a violator to be willful or flagrant, you should consider contacting the Department's Environmental Crimes Coordinator.

Example 3: Recalcitrance

Circumstances: Three years ago you inspected Company Theta, an LQG, and found several container management violations (one drum missing a label, one drum stored in excess of 90 days, and inadequate aisle space. You also find a hazardous waste storage tank that has never been evaluated and certified by an independent registered professional engineer (RPE) as meeting LQG Subpart J Tank requirements. It appears that some modifications to the tank including improved secondary containment are needed before such certification can be obtained. You give the company 90 days to make the modifications, obtain the required certification and to send you the documentation. After 100 days you have not heard from the company. You call them and they tell you that there have been some problems, but they are again making progress and need an additional 30-day extension. You approve the 30-day extension. After 40 days you have not heard or received anything. You call again, and they say that they are nearly done and need only two more weeks because the professional engineer has had health problems and you grant them another two-week extension. After a month, you still haven't heard from them. You visit the site and find that they have done almost nothing to modify the tank and get it certified. They have no reasonable explanation for the delay.

Evaluation: Recalcitrance is defined in Webster's as a stubborn resistance to authority; recalcitrance may be evidenced by a facility's actions, behavior, or intentions and is often closely related to repeated or "chronic" violations described below. In many cases recalcitrance, as exhibited through stubborn resistance to comply with the law, is also demonstrative of "willful" behavior. This example illustrates that a facility may be determined to be a SNC based not on

the violations originally discovered, but on their recalcitrance in complying with required compliance actions within the timeframe specified by the Department.

Example 4: Recalcitrance

Circumstances: Omega Company operates several manufacturing facilities located throughout the state. The company employs a central corporate environmental manager responsible for environmental compliance at their Northwest facility operations. Two of their facilities are small quantity hazardous waste generators and the rest are conditionally exempt generators. Recently, staff in response to a complaint visited one of the “CEG” facilities in the NWR and the inspector discovered several wastestreams that had not been properly characterized. Upon conducting proper waste determinations it is discovered that the facility routinely generates more than 400 pounds of hazardous waste per month that is being improperly disposed of as a solid waste. Further investigation reveals that other Omega Company facilities were previously visited in WR for which identical violations for these wastestreams had been found and identified to the company.

Evaluation: Omega Company is recalcitrant not because of their failure to correct the violations discovered during your inspection of one facility (although depending on the nature of the hazardous wastes involved you could find that they met the substantial deviation criterion), but because the company had been previously notified of these infractions at other locations and had not been responsive in correcting the violations company-wide. In identifying recalcitrance it is important to consider that although an individual facility’s RCRA violations may or may not be determined to be significant alone, patterns of compliance at other company locations or within other media programs may be considered to determine the facility is being recalcitrant.

Example 5: Chronic

Circumstances: Seven years ago you inspected Company Gamma and found numerous violations including:

- Failure to conduct hazardous waste determinations;
- Container violations - missed weekly inspections, missing labels and dates, inadequate aisle space;
- Manifest violations - unsigned manifests and missing manifests;
- Insufficient staff training; and
- Inadequate spill preparedness and prevention, and no contingency plan.

Gamma corrected some of the violations during the inspection and had corrected most of them before they received the NON. Two months after the inspection Gamma had corrected all the violations, including the training, and returned to full compliance. Four years later, during another inspection you find:

- Container violations - failure to label and close a 5-gallon container;
- One missing manifest;
- Failure to meet LDR requirements for wood treatment solution that was shipped off with improper waste codes.

Gamma corrected these violations as quickly as reasonably possible and no referral was made for enforcement. This year your inspection at Gamma identifies:

- Container violations - failure to close a 55-gallon drum;
- One missing manifest; and
- Failure to comply with used oil regulations.

Evaluation: A chronic violation is one that is part of a pattern of similar violations repeated over a long duration. In deciding whether there is a pattern, look for routine carelessness rather than repeated, but occasional, slip-ups. You are more likely to find a pattern with more significant violations. In each inspection, Gamma “repeatedly” failed to close at least one container, and lost at least one manifest. However, these lesser violations, though repeated, do not show a “pattern” of violation because they are more indicative of occasional slip-ups; DEQ would not consider Gamma a SNC. If Gamma had shown a pattern by routinely leaving containers open or losing several manifests in each inspection, you might have identified Gamma as a SNC.

Example 6: Substantial Deviation

Circumstances: Company Beta has an AQ permit from the Department that allows them to burn a specific amount (500 pounds per month) of petroleum-contaminated rags and absorbents in their hogged fuel boiler provided they are not hazardous waste. In their last AQ permit renewal two years ago, during the cross-program review process, the HW program had advised AQ to include specific language in the permit stating that HW cannot be burned and that a HW determination must be conducted on any rags and absorbents burned in the boiler. This was included in the permit. A HW inspection is conducted and information obtained leads you to believe that the facility is burning well over 500 pounds of oily rags and absorbents per month. There is no documentation as to the amount of rags and absorbents being burned per month and no documentation of any hazardous waste determinations on this waste. You also discover that sawdust, rags, and other absorbents routinely used to clean-up paint and solvent spills, paint solvent still-bottoms and dip tank sludge are being burned in the boiler on a routine basis. It appears that the facility is generating and burning several hundred pounds per month of this mixed waste, again without a waste determination. You require the facility to conduct a waste determination on these wastes, and it is determined that they are hazardous wastes.

Evaluation: A violator has "deviated substantially" when (1) the permit, order, law or rule requirement is of high importance to the protection of human health or the environment, or the integrity of the regulatory system (whether or not there has been actual environmental damage), and (2) the violation is outside reasonable expectations, whether or not it was done on purpose.

In the above example, Beta has deviated substantially for both reasons. When the Department issues a permit it is expected that the facility will comply with the conditions of the permit, and further the restrictions on burning hazardous waste without a TSD permit are highly significant for protection of human health and the environment.

Example 7: There must be a Violation

Circumstances: During a response to a complaint you find over 200 55-gallon drums of lacquer, paint, and stain. The drums are stacked three levels high, and some show signs of rust from exposure to the elements. They are located in a rural meadow, next to a stream. Children's toys on a makeshift playground are observed in close proximity to the leaning tower of stacked

drums. For several months you have been demanding in person and in writing that the owner move and properly store the containers to avoid the possibility of a dangerous spill. The property owner always tells you that the coatings are intended for use on cabins soon to be constructed on the site.

Evaluation: This teetering tower of drums which is about to physically fall on children and pollute a major drinking-water stream surely constitutes substantial likelihood of exposure. Furthermore, the owner's failure to act appears recalcitrant if not willful. However, no matter how dangerous the problem or egregious the situation, a facility/owner cannot be a significant noncomplier unless the facility is in *noncompliance*. Unless you can identify that these products are waste, there is no hazardous waste violation and the facility would not be designated a SNC. While not a SNC under RCRA, this could be a case that you would want to refer to Water Quality for identification of potential violations under the Clean Water Act and possible SNC designation.