

OGC #8: Solid Waste Enforcement Policy

New York State Department of Environmental Conservation

DEC Program Policy

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Title: Solid Waste Enforcement Policy

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This Policy is intended to be consistent with the Department's Civil Penalty Policy; Order on Consent Enforcement Policy; Water Pollution Control Enforcement Policy; Bulk Storage & Spill Response Enforcement Policy; Freshwater Wetlands Enforcement Policy; Construction and Demolition Debris Landfill Enforcement Policy; Record of Compliance Enforcement Policy; Summary Abatement Order Enforcement Policy; Natural Resource Damages Enforcement Policy; Small Business Self-Disclosure Policy; and Commissioner Policy 29, Environmental Justice and Permitting.

The policies and procedures set forth in this document are intended solely for the use and guidance of New York State Department of Environmental Conservation ("Department" or "DEC") personnel. They are not intended to create any substantive or procedural rights, enforceable by any party in administrative and judicial litigation with the State of New York. DEC reserves the right to act at variance with these policies and procedures.

Any penalty calculations undertaken hereunder by DEC in anticipation of litigation are exempt from disclosure under the Freedom of Information Law. Pursuant to §4547 of the Civil Practice Law and Rules of the State of New York, all evidence or conduct of negotiations or settlement are inadmissible as evidence as proof of liability for or invalidity of the claim which is disputed as to either validity or amount of damages.

The penalty amounts calculated with the aid of this document in adjudicated cases, on average and consistent with consideration of fairness, must be significantly higher than penalty amounts that DEC accepts in consent orders, which are entered into voluntarily by respondents.

I. Summary

This Policy provides a consistent approach to address violations of New York State's solid waste laws and regulations. The guidance contained in this Policy will promote consistent enforcement by Department of Environmental Conservation Staff against those who violate the State's solid waste statutes and regulations.

II. Purpose and Background

This document establishes DEC's policies and procedures to ensure compliance with the New York State statutes, regulations, and permits that regulate solid waste, solid waste generators, solid waste management facilities, solid waste transporters, and solid waste program areas, including the following:

- Landfills
- Transfer Stations
- Compost Facilities
- Regulated Medical Waste Transporters, Generators, Disposal and Treatment Facilities
- Waste Tire Storage Facilities
- Vehicle Dismantling Facilities
- Recyclables Handling and Recovery Facilities
- Construction and Demolition Debris Landfills and Processing Facilities
- Land Application Facilities
- Solid Waste Incinerators, Refuse-Derived Fuel Processing Facilities or Solid Waste Pyrolysis Units
- Household Hazardous Waste Collection Facilities
- Waste Oil Handling Facilities
- Returnable Beverage Container Requirements for Deposit Initiators, Distributors, Redemption Centers and Dealers
- Mercury Added Consumer Product Manufacturers
- Waste Transporters

Environmental Conservation Law (“ECL”) Article 27 is the State law that governs collection, treatment, and disposal of refuse and other solid waste. ECL §3-0301(2)(m) empowers DEC to promulgate regulations to effectuate the purposes of ECL Article 27. DEC regulations pertaining to solid waste (other than hazardous waste) are located at Parts 360-369 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Parts 360-369).

DEC has a statutory responsibility to ensure compliance with New York's solid waste law. Enforcement is necessary to protect the public health and the environment and fulfill that responsibility. The objectives of DEC's solid waste enforcement program are to: ensure compliance; deter violations; and impose sanctions for non-compliance in a consistent manner.

Any enforcement action should be part of a system that integrates all aspects of the DEC enforcement team, including Regional and Central Office Program Staff, Attorneys, Regional and Division Directors and Regional Enforcement Coordinators, and sets timelines and expectations to facilitate timely resolution of cases.

Detailed Discussion of Policy Objectives

Objective 1: Ensure compliance with all solid waste laws, regulations, and permits.

DEC's primary goal in solid waste management is to maintain or improve environmental quality and protect the public health and welfare. In order to achieve this objective, it is necessary to take action against violators. The purpose of any enforcement action is to obtain compliance with the law and, when necessary, to punish illegal conduct.

DEC will use the entire spectrum of its statutory and regulatory powers to enforce compliance with solid waste laws and regulations. When using its enforcement powers, DEC's imposition of penalties, along with permit suspensions, permit revocations, construction bans, etc., should be calculated to promptly obtain compliance and to make compliance more attractive and less expensive than non-compliance.

The ECL provides a variety of sanctions against violators, including the assessment of criminal, civil, and administrative penalties. In many instances, it is not necessary to demonstrate environmental harm to take enforcement action. Unless otherwise provided by law, the State does not need to prove that the violation was committed intentionally, knowingly, recklessly, or with criminal negligence, which are the culpable mental states defined in Penal Law Section 15.05, in civil and administrative enforcement matters.

DEC should seek to allocate its enforcement resources to obtain the greatest environmental benefit possible, consistent with DEC's Civil Penalty Policy (DEE-1) and Order on Consent Enforcement Policy (DEE-2), which provide guidance for assessing and collecting penalties, and are generally applicable to enforcement of all program areas. The minimum enforcement responses determined in accordance with the penalty range guide appended hereto should conform to those policies.

The ECL provides civil and criminal penalties for every violation, either by specific statutory reference or pursuant to the General Civil and Criminal Penalties set forth in ECL Article 71, Title 40. An extremely broad range of penalties and relief may be sought under the ECL. DEC personnel should consider all possible violations to ensure that adequate penalties and corrective action are obtained.

Administrative enforcement through Consent Orders and orders issued after hearing remain the primary means for taking enforcement action. Nevertheless, the criminal and civil judicial processes must not be overlooked in choosing compliance/enforcement strategies. Environmental Conservation Officers of the Division of Law Enforcement (DLE) are available to actively participate in solid waste enforcement in cooperation with Solid Waste Bureau technical staff.

Where the elements of a criminal offense can be established, DLE should pursue criminal enforcement, either by issuance of Environmental Conservation Appearance Tickets or other suitable

accusatory instruments, or by arrest of the violator. When criminal activity is suspected, the matter may be referred to the DLE, Bureau of Environmental Criminal Investigations, for further development, in conjunction with the Office of General Counsel.

Objective 2: Deter violations by regulated entities through a credible and fair enforcement presence.

To establish an enforcement presence, DEC should focus on securing compliance from violators so that the public receives the greatest possible benefit from DEC's enforcement action. DEC's enforcement presence will make the regulated community increasingly aware that DEC will actively pursue enforcement in a fair and consistent manner. DEC enforcement activities should remove economic benefit, punish illegal conduct, and require timely remedial action. While significant violations generally take priority, all classes of non-compliance should receive enforcement attention. However, DEC must utilize its enforcement resources in a manner calculated to obtain the greatest environmental benefit with its limited resources. To complement its enforcement activities, DEC must conduct outreach to the regulated community for the purposes of educating and informing the regulated community of the statutory and regulatory requirements.

As the public becomes aware of DEC's enforcement actions against offenders, DEC must continue to develop and maintain a reputation for fair and consistent enforcement. Public awareness of solid waste control problems and the array of strategies which can be applied to any given problem will benefit the solid waste enforcement program.

Objective 3: Impose sanctions consistently throughout the State.

DEC's Regional Offices are responsible for implementing solid waste enforcement programs that are subsets of the larger coherent State program.

Timely and appropriate enforcement responses have been and will continue to be developed by DEC to ensure that New York's solid waste enforcement program is applied consistently throughout the State. Accordingly, this Policy establishes a penalty response for various categories of solid waste violations. Furthermore, the establishment of consistent penalty responses will allow DEC personnel to deal swiftly and effectively with most types of solid waste violations.

III. Penalty Considerations and Framework

A. Appropriate Penalties

Consistent with the Civil Penalty Policy, a penalty generally is warranted when a violation occurs. Department Staff should use this Policy for guidance to address the violations and create an effective level of deterrence against future non-compliance. The DEC Attorney and Department Staff may exercise independent judgment to deviate from the penalty ranges, consistent with this Policy and the Civil Penalty Policy. Individual circumstances may warrant assessment of higher or lower penalties

and this Policy does not preclude Department Staff from exercising their discretion to seek such penalties as appropriate, provided the penalty guidelines of this and other enforcement policies are followed.

Department Staff should continue to consider any aggravating factors in determining the appropriate sanction for the particular offense. Examples of when the imposition of a civil penalty in excess of the Policy guidelines below is appropriate include instances where the violation(s) continued over an extended period, or where multiple violations are found by the Department. Department Staff should continue to consider any applicable penalty assessment criteria contained in the ECL.

If certain mitigating factors are present, a lower penalty may be warranted. In determining whether a deviation from the stated penalty range or suspension of a portion of the penalties is appropriate, Department Staff should consider the following:

- timeliness in correcting a violation;
- history of past violations;
- cooperative efforts toward compliance;
- severity of violation and relative risk to human health and the environment; and
- other mitigating/aggravating factors.

Written documentation should be made in support of any suspended penalty determination and kept in the case file. The respondent will not be required to pay the amount suspended if the respondent complies with all provisions of the Consent Order.

B. Penalty Considerations

The following should be considered when determining an appropriate penalty:

1. Civil penalty guidelines for violations are presented in the penalty range guide attached as Appendix I. Environmental Conservation Law Article 27 and the 6 NYCRR Part 360 regulations encompass many programs with specific enforcement needs. Appendix I may be applied to any program using the statutory maximum penalties found in Article 71 of the Environmental Conservation Law. Appendix I is limited to the gravity component of the penalty. The economic benefit must be recovered in addition to the indicated amounts. Penalties below \$10,000 may be addressed by staff, after consultation with and review by the DEC Attorney, through a short form consent order.
2. If the facility owner or operator has violated more than one regulatory requirement, a separate civil penalty should be assessed for each violation.
3. Environmental Benefit Projects may not be used to suspend or reduce the penalty paid by a respondent under a Short-Form Consent Order.

C. Applying the Policy

In applying this Policy, Staff should:

1. Determine the severity of the violation(s) and the appropriate enforcement response to address the violation(s) as discussed in Section V;
2. Determine the economic benefit component of the penalty resulting from the failure to comply with the law;
3. Determine the gravity component of the penalty utilizing the Penalty Range Guide attached as Appendix I;
4. If there are mitigating or aggravating factors present, adjust the penalty accordingly using either axis of the Penalty Range Guide; and
5. Assure a return to compliance and prevent repeat violations by using the appropriate enforcement tool.

IV. Responsibility

Typically, each DEC Regional Solid Waste Engineer is responsible for ensuring that a case has merit and that use of the enforcement response tools by his or her staff is appropriate. DEC's legal staff will provide support as needed.

V. Procedure

A. Enforcement Priorities

When a solid waste violation is identified, the violation must be resolved promptly and appropriately. The greater the risk that the violation poses to the public health and the environment, the higher the priority is for response. The time frames contained herein, unless otherwise stated, are recommended as guidance for Solid Waste staff and DEC Attorneys.

The following tiered system establishes three classes of violations, in addition to summary abatement and criminal enforcement, based upon the seriousness of the violations and DEC priorities for investigation and enforcement.

Summary Abatement

Where the activity or condition presents an imminent health danger or is likely to result in irreversible or irreparable damage to natural resources, summary abatement orders should be sought under ECL §71-0301. As stated in DEE-17 Summary Abatement Order Enforcement Policy, "[e]nforcement devices such as Notices of Violation, Orders on Consent and Commissioner's Orders after hearing remain the mainstays of the Department's enforcement program. However, the issuance of Summary Abatement Orders (SAOs) pursuant to ECL §71-

0301 should be considered when it is necessary to ensure immediate response to significant threats to the health or welfare of the people of the State or threats of irreversible or irreparable damage to natural resources.” The Summary Abatement Order Enforcement Policy should be consulted for thresholds and procedures before pursuing that avenue of enforcement.

Referral for Criminal Enforcement

Where the Department is authorized pursuant to statute to secure both civil and criminal sanctions and staff feels criminal sanctions are warranted, staff should consult with the Regional Attorney before referring the matter for criminal enforcement. Office of General Counsel Internal Policy: Handling Matters Involving Both Criminal and Civil Enforcement must be consulted and followed.

Class I Violations

Class I Violations are violations requiring immediate action to prevent public health or environmental impacts. Class I Violations must be resolved as quickly and effectively as possible through referral of these matters to the DEC Attorney. Injunctive relief under ECL §§71-2703(1) and 71-2705(1) should also be considered, when necessary, to prevent Class I Violations from continuing. When a Class I Violation is identified, the following enforcement responses should occur to ensure that the matter is addressed in a timely and appropriate manner:

- IMMEDIATELY: issue a Notice of Violation and notify other programs of actual or potential violations relating to that program area.
- within 30 days: send a referral package to the DEC Attorney, including inspection reports, photographs and other supporting documentation.
- within 120 days: obtain a fully executed Consent Order with appropriate compliance terms, commence an enforcement proceeding to ensure compliance, or refer the matter to EPA, the County District Attorney, the Attorney General or the United States Attorney.

The following are examples of Class I solid waste violations which may result in serious short-term public health or environmental impacts:

- emergency incidents which require hospitalization of residents
- illegal disposal causing contamination of surface or ground water
- release of fluids or leachate
- unpermitted activities with no operational controls
- processing of unauthorized wastes at solid waste management facilities

- improper site closure, improper management of non-hazardous waste, contaminated material
- sustaining vector breeding area

Class II Violations

Class II Violations are those violations requiring prompt attention to return the violator to compliance and must be addressed without undue delay. In order to ensure a timely and appropriate enforcement response, it is necessary for DEC personnel to take the following actions when a Class II Violation is discovered:

within 7 days: notify other programs of actual or potential violations relating to that program area

within 15 days: issue a Notice of Violation

within 30 days: send a referral package to the Attorney, including inspection reports, photographs and other supporting documentation

within 150 days: obtain a fully executed Consent Order with appropriate compliance terms, commence an enforcement proceeding to ensure compliance, or refer the matter to EPA, the County District Attorney, the Attorney General or the United States Attorney.

The following are examples of Class II Violations:

- ongoing odor, dust, and litter
- storage or acceptance of unauthorized wastes
- modification of facility to increase throughput without approval
- violation of special permit conditions

Class III Violations

Class III Violations are those violations that relate to housekeeping or record keeping that pose no direct serious threat to the public health or the environment. Class III Violations should be promptly addressed to the extent that technical and legal resources allow. DEC personnel should take the following enforcement actions when a Class III Violation has been identified:

within 7 days: notify other programs of actual or potential violations relating to that program area

within 15 days: issue a Warning Letter with compliance terms. Warning Letters should only be used where the violation is minor and where issuance of a Warning Letter is consistent with Department practice

or

issue a Notice of Violation

within 60 days: if Respondent has not complied with the terms of the Warning Letter or Notice of Violation, send a referral package to the Regional Attorney including inspection reports, photographs and other supporting documentation

within 180 days: obtain a fully executed Consent Order with appropriate compliance terms or commence an enforcement proceeding to ensure compliance.

The following are examples of Class III Violations:

- failure to submit non-critical reports
- lack of non-critical recordkeeping
- inadequate site personnel, signage, etc.
- submission of incomplete reports

B. Enforcement Tools

The provisions of paragraph V.A. above and this paragraph are not intended to be exhaustive lists of procedures or tools to be utilized in the context of solid waste enforcement. Effective tools that have been and may continue to be used are:

- a. letter providing instruction and guidance;
- b. directives to regulated entities;
- c. letter providing a warning along with instruction and guidance;
- d. Notice of Violation including direction on corrective actions with a time frame to demonstrate that the violations have been corrected;
- e. Notice of Violation including direction on corrective actions with a time frame to demonstrate that the violations have been corrected and a short form consent order to be signed by regulated party and returned to staff; and
- f. Notice of Violation including direction on corrective actions with a time frame to demonstrate that the violations have been corrected and, when appropriate, referring the matter to counsel for enforcement.

C. Formal Enforcement Use of Short Form Consent Orders

The use of duly authorized short form consent orders for each case, appropriately reviewed by legal staff may be considered when violations are noted and staff want an enforceable instrument and schedule to ensure compliance. Short form consent orders are preferred over warning letters and Notices of Violations with compliance schedules because warning letters and Notices of Violations with compliance schedules are issued unilaterally by staff and do not legally obligate the regulated party to comply. Thus, when a warning letter or Notice of Violation is ignored, staff resources are spent pursuing the matter further. A short form consent order cannot be used for a civil penalty greater than \$10,000. In any instance where such an order may be considered, a referral package should be sent to the DEC Attorney, including inspection reports, photographs and other supporting documentation, for approval before being issued to the respondent.

D. Consent Orders

The use of consent orders, other than short form consent orders, continues to be governed by the Order on Consent Enforcement Policy and subject to the required review and approval of at least one DEC Attorney and the respective Regional or Division technical staff.

VI. Related References

Civil Penalty Policy

Order on Consent Enforcement Policy

Construction and Demolition Debris Landfill Enforcement Policy

Record of Compliance Enforcement Policy

Summary Abatement Order Enforcement Policy

Small Business Self-Disclosure Policy

Returnable Container Act Enforcement Policy

Commissioner Policy 29, Environmental Justice and Permitting

Timely and Appropriate Enforcement Response

Office of General Counsel Internal Policy: Handling Matters Involving Both Criminal and Civil Enforcement

APPENDIX 1

PENALTY RANGE GUIDE

Minimum Enforcement Responses

I. Introduction

In all cases, the Department's response to known violations of the Environmental Conservation Law (ECL) must take into account applicable requirements of the law, individual circumstances of the case, and statewide policy considerations articulated in this and other relevant enforcement guidance.

The following Penalty Range Guide is intended to assist staff in determining penalties when settling violations. Settlement of violations by consent is useful not only to save administrative expense and to expedite resolution of matters, but also because Consent Orders sometimes better ensure rehabilitation of the respondent and can be used to obtain cooperative compliance. Accordingly, penalties sought at hearing should be substantially higher than the penalty ranges presented in the guide.

II. Penalty Range Guide

The following Penalty Range Guide represents **first offense penalty ranges** aimed at determining the gravity component of the penalty consistent with the DEC Civil Penalty Policy and Order on Consent Policy. **Penalty ranges should be doubled to determine a minimum penalty level on second or subsequent offenses but cannot exceed 100% of the maximum penalty.** The Penalty Range Guidance is applicable to all types of violations, is general in nature, and is not intended to supersede the respective ECL provisions; nor is it intended to be all-inclusive. The statute and regulations delineate the exact types of violations and penalties.

This guide should assist Department Staff in determining the initial penalty for each violation so that Department Staff has a basis to work from in settling the penalty. Where a person gains economic advantage by non-compliance, the penalty should recoup the unlawful economic benefit. Then, the penalty should be adjusted using this guide to reflect the gravity of the offense so that the respondent and others are deterred from violating the law. Penalties that are sought must be consistent with statutory amounts.

APPENDIX I PENALTY RANGE GUIDE

**EXTENT OF DEVIATION FROM REQUIREMENT/
IMPORTANCE TO REGULATORY SCHEME**

		MAJOR <i>Class I</i> <i>Violations</i>	MODERATE <i>Class II</i> <i>Violations</i>	MINOR <i>Class III</i> <i>Violations</i>
POTENTIAL FOR HARM OR ACTUAL DAMAGE	MAJOR <i>Class I</i> <i>Violations</i>	85% to 100%	75% to 90%	65% to 80%
	MODERATE <i>Class II</i> <i>Violations</i>	55% to 70%	45% to 60 %	35% to 50 %
	MINOR <i>Class III</i> <i>Violations</i>	25% to 40%	15% to 30 %	5% to 20 %

This chart is intended as guidance in determining a suitable penalty. The percentages listed are to be applied to the maximum penalty allowed by law. Where there are multiple violations, the chart should be applied to each violation separately to arrive at a total penalty. Where there are multiple days of a violation and a penalty can be assessed for each day of violation, staff may choose to: 1) arrive at the daily penalty using the chart and multiply the weighted daily penalty by the number of days of violation, or 2) multiply the number of days times the maximum penalty and apply the recommended chart percentage to that total. Staff may apply mitigating or aggravating factors to either axis and adjust the penalty accordingly.