

Using Immunity from Enforcement in the Hazardous Waste Technical Assistance Program



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Date: April 14, 2015

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Date: 4-14-15

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1 Introduction

1.1 Background

As a regulatory agency, DEQ primarily sets standards for behavior through rule adoption, educates the regulated public about standards, assesses compliance, and issues informal and formal enforcement actions to encourage compliance and discourage violations.

DEQ supplements regulatory oversight with technical assistance and other educational efforts during which non-enforcement compliance assistance is provided. During these efforts, DEQ offers participants limited immunity from enforcement, and sets aside the usual *Enforcement Guidance* response.

The Oregon Revised Statutes [ORS 466.068\(2\)](#) and [ORS 465.012\(4\)](#) authorize and direct the hazardous waste program to assist facilities without compliance enforcement, unless there is reasonable cause for immediate danger to public or environment. ORS 466.068(2) states:

“Technical assistance services provided under this section shall not result in inspections or other enforcement actions unless there is reasonable cause to believe there exists a clear and immediate danger to the public health and safety or to the environment.”

Background material provided by ORS 465, 466, Chapter 2 “Field Manual for Hazardous Waste Inspections,” HW Managers and OCE.

1.2 Purpose & Applicability

This internal management directive (IMD) is to establish an approved Immunity Program pursuant to the IMD on Procedures for Adopting a Program that Uses Immunity from Enforcement. This directive applies to all site visits other than compliance inspections, and does not apply where staff may hear about possible violations not verified or provable, for example disclosures made during classroom trainings or while talking to phone callers about compliance. Nothing in this directive discourages staff from offering assistance on matters such as pollution prevention, toxics use reduction, or process efficiency.

The following are instances when immunity from enforcement can be offered, but is not limited to:

- ***Short-term immunity during initial implementation of new rules or new regulatory programs.*** Outreach might include written materials, specialized trainings, and requests for site walkthroughs to help identify areas subject to the new rules or regulations.
- ***Short-term immunity for newly regulated entities and/or businesses with new staff.*** Those new to the regulations can lack knowledge or experience in meeting compliance. This is an opportunity for DEQ to introduce our staff and the available resources we offer for hazardous waste technical assistance.
- ***Targeted initiatives to address a specific problem*** allows DEQ to reach businesses that may not be addressed otherwise from typical outreach methods. Program initiatives can include: targeted toxics or chemicals, specific manufacturing processes, industry sectors, geographical areas, watersheds, and trade groups to name a few.
- ***Educational outreach*** to help a person or business comply voluntarily with the regulations effectively, as well as reduce the toxicity and volume of hazardous wastes generated. Outreach might include written materials, focused trainings, and requests for site walkthroughs.
- ***Requests for technical assistance.*** Voluntary requests for assistance from businesses and others that allow DEQ to identify and correct compliance problems that may have not otherwise been identified. This can include requests for a tailored training on-site or off-site.
- ***DEQ sponsored contact.*** The agency may pursue other points of contact through technical assistance that might include gathered information from other sources: EPA, CEG collection facilities, Oregon State Fire Marshal database, or other means to ensure regulatory compliance.

1.2.1 Definitions

In addition to the definitions in the directive entitled “Procedures for Adopting a Program that Uses Immunity from Enforcement,” as used in this directive, the following definitions apply:

Agency Compliance and Enforcement System (ACES): The Agency’s centralized data system for documenting all site visits, compliance and enforcement information.

Clear and immediate danger: This is the standard for a deficiency being sufficiently severe as to disqualify the person or business from immunity. *The term “clear” means plain, evident, free from doubt, and the term “immediate danger” means a situation where there is substantial likelihood that serious harm may be experienced within the time frame necessary for the Department to pursue an enforcement action (e.g., observation of a leaking drum) as defined in OAR 340-135-0105(3)(a).*

Deficiency: Means a compliance issue identified during a hazardous waste technical assistance visit. All technical assistance documentation (such as field notes, photos, letters, emails, checklists, data entry) should utilize the term “deficiency” instead of the term “violation.”

Technical Assistance Umbrella: The period between the time an eligible person or business agrees with DEQ to a technical assistance site visit and the time a business could be scheduled for a hazardous waste compliance inspection (*see section 1.3.3*).

1.3 Operational Details of How the Program Will Implement the Immunity

The following implementation applies to both hazardous waste technical assistance staff and hazardous waste inspectors doing hazardous waste technical assistance.

Note: Staff with a hazardous waste inspector position description are also referred to Chapter 2 of the Field Manual for Hazardous Waste Inspections (Field Manual) to ensure technical assistance site visits are predetermined prior to visit.

1.3.1 How will participants be selected for the immunity?

Staff may offer technical assistance to any eligible business who requests it or those eligible as outlined in section 1.2 of this directive unless excluded in section 1.3.4.

1.3.2 How will staff document eligibility and communicate the offer of immunity?

Staff will explain the immunity to eligible businesses, and document with entering it into ACES as a scheduled site visit (*see 1.3.3 Begins*) along with the Begin and End date of immunity in the “comments” field.

Eligible members of the regulated community are notified in various ways, through DEQ trainings, flyers, mailers, phone calls, in person, or through other forms of communication (*see Field Manual’s Introduction Letter*).

1.3.3 What are the bounds of the immunity?

Begins - Immunity from enforcement begins when an eligible business and DEQ agree to a technical assistance site visit. As soon as possible, schedule the visit in ACES. If date is unknown, enter the first of the month closest to the anticipated visit date until agreed upon with the business. When TA is agreed to, send an email to the DEQ manager and field staff in the business’ region listing the business name, start of technical assistance umbrella and anticipated date of site visit.

Expires - The technical assistance umbrella expires after four (4) months, unless an extension is agreed upon. Once ended, notify the business that the technical assistance process is over (see Field Manual's Closure Letter). Email the same regional manager and field staff to let them know when the technical assistance umbrella has concluded.

Extension - A thirty day extension can be determined on a case-by-case basis with the applicable hazardous waste staff and program manager (such as: four months plus 30 calendar day extension equals five months).

1.3.4 Is there an exception from the immunity?

The following are absolute instances when technical assistance immunity from enforcement is not allowed:

1. *DEQ has reasonable cause to believe there exists a "clear and immediate danger" to the public health and safety.*
2. *DEQ has reasonable cause to believe there exists a "clear and immediate danger" to the environment.*
3. *Facility sites with active enforcement investigations by the hazardous waste program.*
4. *Facility sites currently designated in ACES as a hazardous waste significant non-complier.*

In the event of observing a clear immediate danger to the public health, safety or the environment, immunity from enforcement will terminate immediately and the business will be referred for compliance inspection follow-up.

1.3.5 What if there is a scheduling conflict?

There may be a time when a requesting business is already scheduled in ACES for a hazardous waste compliance inspection. If the business is eligible and has not been excluded by section 1.3.4, then the scheduled inspector, technical assistance provider and regional program manager can negotiate a resolution. Negotiated options would include:

1. *Agree to substitute a technical assistance visit;*
2. *Provide technical assistance but let the business know they will be inspected at a later date; or*
3. *Decline to provide technical assistance and perform the scheduled compliance inspection.*

1.3.6 What will be reviewed in an on-site compliance evaluation?

Staff will explain the visit is not an inspection. Depending on the preferences of the business, the scope of the site visit could include a concentration in one or more specific areas, or be a complete walk-through and evaluation of their hazardous waste management (see Field Manual's Confirmation Letter).

1.3.7 How will deficiencies be documented?

Any noted compliance issues observed during a technical assistance visit (as long as not an immediate threat) will be noted as "deficiencies" in all DEQ records. Deficiencies will not be entered into ACES, will not be referred to enforcement personnel, and will not lead to nor become part of an enforcement matter. It is important to note these are deficiencies and not violations.

1.3.8 How will staff communicate to participants about the deficiencies?

During the exit interview staff can review the deficiencies, confirm the response timeframe, and clarify any outstanding questions. Staff will follow-up within one week of the site visit with a confirmatory letter, if needed (see Field Manual's Follow-Up Action Letter).

1.3.9 Will the Program include a verification step to determine if the participant has corrected the deficiencies?

After sending the follow-up action letter, call the business to ensure receipt and remind them of the due date for improvements. Methods of verifying improvements can include: manifests, photos, analytical reports, or other applicable documentation. Correction of deficiencies under TA is voluntary. There is no requirement for a business to correct the deficiencies.

2 Directive

2.1 Directive on Modification of the *Enforcement Guidance*

Upon approval of this directive, the introduction of the relevant program specific guidance table in *Enforcement Guidance* is amended according to Attachment A.

2.2 Directive to Program Staff

Upon approval of this directive, staff working in the hazardous waste program are authorized to implement the immunity program as described above. Any violations identified during a hazardous waste technical assistance visit are exempt from the *Enforcement Guidance* and should not result in a Warning Letter, Expedited Enforcement Offer, or Pre-Enforcement Notice, unless otherwise provided in the description of the Immunity Program.

3 Interpretation

The terms and provisions of this directive are subject to reasonable interpretations of DEQ.

4 Effective Period

This directive is effective from the date signed above until DEQ terminates the directive.

Attachment A

In the Enforcement Guidance, Table 8 (Hazardous Waste), Table 9 (Polychlorinated Biphenyl), and Table 10 (Used Oil) are amended as follows:

Staff will follow the Enforcement Guidance for all violations of any statute, rule, permit or order, identified through document review, inspection, complaint response or any other form of compliance monitoring action. However, limited immunity from enforcement (WLs, EEOs, PENs) can be offered pursuant to the terms of the IMD on Using Immunity from Enforcement in the Hazardous Waste Technical Assistance Program.*

** Until a decision is made for all programs on whether to offer immunity during complaint response, Hazardous Waste will respond in an enforcement mode to complaints at businesses with active hazardous waste enforcement, or designated as a Significant Non-Complier, or when the complaint appears to allege violations that would lead to a Pre-Enforcement Notification under the Enforcement Guidance and the regional manager concurs. Hazardous Waste may respond to all other Hazardous Waste complaints in the normal Technical Assistance mode (only following up with enforcement if there is reasonable cause to believe there exists a clear and immediate danger to public health and safety or to the environment) or per the regional manager's guidance.*