

CHAPTER 301

HEALTH AND ENVIRONMENT

HOUSE BILL 09-1056

BY REPRESENTATIVE(S) McCann, Fischer, Frangas, Labuda, Levy, Merrifield, Middleton, Primavera, Ryden, Schafer S.;
also SENATOR(S) Kopp, Boyd, Gibbs, Harvey, Heath, Kester, Newell, Penry, Tochtrop, White.

AN ACT

CONCERNING INCREASED PENALTY AUTHORITY FOR THE DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT FOR VIOLATIONS OF SOLID WASTE DISPOSAL LAWS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 30-20-113 (2), (4), and (5) (a), Colorado Revised Statutes, are amended, and the said 30-20-113 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

30-20-113. Inspection - enforcement - nuisances - violations - civil penalty.

(2) (a) Whenever the department finds that any solid wastes disposal site and facility or any person is in violation of subsection (1) of this section, the department may issue an order requiring that ~~such~~ THE site and facility or person comply with any such requirement, rule, ~~regulation~~, or certificate of designation and may request the attorney general to bring suit for injunctive relief or for penalties pursuant to this section. THE DEPARTMENT SHALL NOT BE REQUIRED TO CONDUCT A HEARING IN ACCORDANCE WITH SECTION 24-4-105, C.R.S., BEFORE ISSUING AN ORDER PURSUANT TO THIS SUBSECTION (2).

(b) (I) AN ORDER ISSUED PURSUANT TO THIS SUBSECTION (2) MAY INCLUDE AN ADMINISTRATIVE PENALTY ASSESSMENT AS PROVIDED IN SUBSECTION (4) OR (5) OF THIS SECTION. IN LIEU OF IMPOSING AN ADMINISTRATIVE PENALTY ASSESSMENT FOR A VIOLATION OF SUBSECTION (1) OF THIS SECTION, THE DEPARTMENT MAY SEEK TO HAVE A CIVIL PENALTY IMPOSED, AS PROVIDED IN SUBSECTION (4) OR (5) OF THIS SECTION, FOR SUCH VIOLATION. THE DEPARTMENT SHALL BRING AN ACTION FOR A CIVIL PENALTY IN THE DISTRICT COURT FOR THE JUDICIAL DISTRICT IN WHICH THE VIOLATION OCCURRED.

(II) IF THE DEPARTMENT ISSUES AN ORDER THAT DOES NOT CONTAIN AN

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

ADMINISTRATIVE PENALTY ASSESSMENT, THE DEPARTMENT SHALL NOT BE PRECLUDED FROM SUBSEQUENTLY IMPOSING AN ADMINISTRATIVE PENALTY ASSESSMENT OR SEEKING A CIVIL PENALTY FOR THE VIOLATIONS DETAILED IN THE ORDER.

(c) THE DEPARTMENT SHALL SERVE AN ORDER ISSUED PURSUANT TO THIS SUBSECTION (2) ON THE PERSON WHO IS THE SUBJECT OF THE ORDER BY PERSONAL SERVICE OR BY CERTIFIED MAIL. IN ADDITION TO IMPOSING AN ADMINISTRATIVE PENALTY, THE ORDER MAY PROHIBIT THE PERSON FROM ENGAGING IN SPECIFIED ACTIVITY IN VIOLATION OF SUBSECTION (1) OF THIS SECTION OR MAY REQUIRE THE PERSON TO COMPLY WITH THE REQUIREMENTS OF PART 1 OR 10 OF THIS ARTICLE. THE ORDER SHALL TAKE EFFECT UPON ISSUANCE UNLESS OTHERWISE SPECIFIED IN THE ORDER.

(2.5) (a) A PERSON AGAINST WHOM AN ORDER HAS BEEN ISSUED, REFERRED TO IN THIS SECTION AS THE "REQUESTING PARTY", MAY SUBMIT A WRITTEN REQUEST TO THE OFFICE OF ADMINISTRATIVE COURTS IN THE DEPARTMENT OF PERSONNEL FOR A HEARING ON THE ORDER AND SHALL PROVIDE A COPY OF THE REQUEST TO THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OR THE EXECUTIVE DIRECTOR'S DESIGNEE. THE REQUESTING PARTY SHALL FILE THE REQUEST FOR HEARING BY PERSONAL SERVICE OR BY CERTIFIED MAIL WITHIN THIRTY CALENDAR DAYS AFTER THE EFFECTIVE DATE OF THE ORDER. AN ADMINISTRATIVE LAW JUDGE FROM THE OFFICE OF ADMINISTRATIVE COURTS SHALL CONDUCT THE HEARING IN ACCORDANCE WITH SECTION 24-4-105, C.R.S., EXCEPT AS OTHERWISE SPECIFIED IN THIS SECTION.

(b) IF A REQUEST FOR A HEARING IS FILED, PAYMENT OF ANY MONETARY PENALTY IS STAYED PENDING A FINAL DECISION BY THE ADMINISTRATIVE LAW JUDGE AFTER THE HEARING ON THE MERITS. ABSENT A MOTION TO STAY THE ORDER PURSUANT TO PARAGRAPH (c) OF THIS SUBSECTION (2.5), THE REQUESTING PARTY SHALL COMPLY WITH ANY OTHER REQUIREMENTS OF THE ORDER. IF THE ADMINISTRATIVE LAW JUDGE GRANTS A MOTION TO STAY THE ORDER, THE DEPARTMENT SHALL NOT BE PRECLUDED FROM IMPOSING A PENALTY AGAINST THE REQUESTING PARTY FOR SUBSEQUENT VIOLATIONS OF SUBSECTION (1) OF THIS SECTION.

(c) (I) THE REQUESTING PARTY MAY SUBMIT A MOTION TO THE ADMINISTRATIVE LAW JUDGE TO STAY THE ENFORCEMENT OF THE ORDER PENDING THE OUTCOME OF THE HEARING. THE ADMINISTRATIVE LAW JUDGE MAY GRANT THE MOTION TO STAY ANY PORTION OF THE ORDER IF HE OR SHE DETERMINES THAT THE BALANCE OF EQUITIES FAVORS THE REQUESTING PARTY. IN MAKING HIS OR HER DETERMINATION, THE ADMINISTRATIVE LAW JUDGE SHALL CONSIDER THE FOLLOWING FACTORS:

(A) THE PROBABILITY OF SERIOUS HARM TO THE REQUESTING PARTY IF THE MOTION FOR A STAY IS DENIED;

(B) THE PROBABILITY THAT NO SERIOUS HARM TO THE PUBLIC HEALTH OR THE ENVIRONMENT WILL OCCUR IF THE MOTION FOR A STAY IS GRANTED;

(C) THE MERITS OF THE REQUESTING PARTY'S CASE; AND

(D) THE PUBLIC INTEREST.

(II) IF THE ADMINISTRATIVE LAW JUDGE GRANTS A STAY OF ALL OR A PORTION OF THE ORDER, THE REQUESTING PARTY SHALL NOT BE EXCUSED FROM ITS OBLIGATIONS UNDER APPLICABLE LAWS, RULES, PERMITS, AND VALID, EXISTING ORDERS.

(III) THE ADMINISTRATIVE LAW JUDGE SHALL EXPEDITE HEARINGS AND DETERMINATIONS ON A MOTION TO STAY AN ORDER. THE REQUESTING PARTY BEARS THE BURDEN OF PROOF IN A MOTION TO STAY AN ORDER.

(d) EXCEPT AS PROVIDED IN SUBPARAGRAPH (III) OF PARAGRAPH (c) OF THIS SUBSECTION (2.5), THE DEPARTMENT BEARS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE IN A HEARING PURSUANT TO THIS SUBSECTION (2.5).

(e) (I) UPON THE MOTION OF A PARTY TO THE HEARING, AND IN THE DISCRETION OF THE ADMINISTRATIVE LAW JUDGE, AN ADMINISTRATIVE LAW JUDGE MAY REQUEST AN INTERPRETIVE RULE FROM THE SOLID AND HAZARDOUS WASTE COMMISSION PERTAINING TO ANY RULE THAT IS AT ISSUE IN THE HEARING, BUT ONLY IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT OR THE PARTIES HAVE STIPULATED TO THE MATERIAL FACTS FOR THE PURPOSES OF THE INTERPRETIVE RULE. THE ADMINISTRATIVE LAW JUDGE MAY ADJUST THE SCHEDULE OF THE HEARING TO ACCOMMODATE THE RECEIPT OF AN INTERPRETIVE RULE. IN MAKING A DETERMINATION ON A MOTION TO REQUEST AN INTERPRETIVE RULE, THE ADMINISTRATIVE LAW JUDGE SHALL CONSIDER THE FOLLOWING FACTORS:

(A) WHETHER THE PLAIN LANGUAGE OF THE RULE IN QUESTION IS CLEAR AND UNAMBIGUOUS;

(B) WHETHER THE PROPOSED CONSTRUCTION OF THE RULE IN QUESTION WOULD LEAD TO AN ABSURD RESULT; AND

(C) WHETHER THE SOLID AND HAZARDOUS WASTE COMMISSION HAS PREVIOUSLY ISSUED AN INTERPRETIVE RULE CONCERNING THE SUBJECT OF THE REQUEST FOR AN INTERPRETIVE RULE.

(II) NOTWITHSTANDING SECTION 24-4-103 (1), C.R.S., IF THE ADMINISTRATIVE LAW JUDGE REQUESTS, AND THE SOLID AND HAZARDOUS WASTE COMMISSION AGREES TO ISSUE, AN INTERPRETIVE RULE, THE COMMISSION SHALL GIVE NOTICE TO THE PUBLIC OF THE INTERPRETIVE RULE-MAKING PROCEEDING IN ACCORDANCE WITH SECTION 24-4-103, C.R.S. THE COMMISSION SHALL PROVIDE THE NOTICE WITHIN FORTY-FIVE DAYS AFTER RECEIPT OF THE REQUEST. THE COMMISSION SHALL ACCEPT WRITTEN MATERIAL, NOT TO EXCEED FIFTEEN PAGES IN LENGTH, FROM ANY INTERESTED PERSON IF IT IS PROVIDED WITHIN FIFTEEN DAYS AFTER THE DATE THAT NOTIFICATION IS GIVEN. THE COMMISSION SHALL ISSUE THE WRITTEN INTERPRETIVE RULE NO LATER THAN THIRTY DAYS AFTER THE DEADLINE FOR THE SUBMISSION OF WRITTEN MATERIAL. THE LEGAL EFFECT OF ANY SUCH INTERPRETIVE RULE SHALL BE DETERMINED IN ACCORDANCE WITH APPLICABLE LAW AND IS NOT PRESUMED TO BE BINDING ON ANY PARTY TO THE HEARING.

(f) NOTWITHSTANDING SECTION 24-4-105 (15), C.R.S., ANY APPEAL OF A DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE PURSUANT TO THIS SUBSECTION (2.5) SHALL BE FILED IN THE APPROPRIATE DISTRICT COURT IN

ACCORDANCE WITH SECTION 24-4-106, C.R.S.

(2.7) THE DEPARTMENT SHALL BRING AN ACTION FOR A VIOLATION OF SUBSECTION (1) OF THIS SECTION WITHIN TWO YEARS AFTER THE DATE THE DEPARTMENT DISCOVERS AN ALLEGED VIOLATION OR WITHIN FIVE YEARS AFTER THE DATE THE ALLEGED VIOLATION OCCURRED, WHICHEVER DATE OCCURS EARLIER; EXCEPT THAT THE LIMITATION PERIOD IS TOLLED DURING ANY PERIOD THAT A PERSON INTENTIONALLY CONCEALS THE ALLEGED VIOLATION. FOR THE PURPOSES OF THIS SECTION, "INTENTIONALLY" SHALL HAVE THE MEANING PROVIDED FOR SUCH TERM IN SECTION 18-1-501 (5), C.R.S.

(4) Any person who violates paragraphs (b) and (c) of subsection (1) of this section shall be subject to a clean-up and cease-and-desist order issued by the department or by the board of county commissioners if the violation occurred in the unincorporated area of the county or by the governing body of a municipality if the violation occurred within the municipality. Any person who fails to comply with such orders shall be subject to a AN ADMINISTRATIVE OR civil penalty of not more than ~~two~~ TEN thousand dollars for each day of such violation. ~~Such~~ THE violation and civil penalty shall be determined and enforced by a court of competent jurisdiction upon action instituted by the board or governing body that issued the orders. THE VIOLATION AND ADMINISTRATIVE PENALTY SHALL BE DETERMINED AND ENFORCED IN ACCORDANCE WITH SUBSECTIONS (2), (2.5), AND (5.5) OF THIS SECTION. Any penalty collected shall be distributed to the county or municipality that instituted the action.

(5) (a) Any person who is found pursuant to subsection (2) of this section to be in violation of subsection (1) of this section or who fails to comply with an order issued by the department shall be subject to a AN ADMINISTRATIVE OR civil penalty of not more than ~~two~~ TEN thousand dollars for each day of such violation.

(5.5) (a) IN DETERMINING THE AMOUNT OF AN ADMINISTRATIVE OR CIVIL PENALTY IMPOSED PURSUANT TO SUBSECTION (4) OR (5) OF THIS SECTION FOR A VIOLATION OF SUBSECTION (1) OF THIS SECTION, THE DEPARTMENT, THE ADMINISTRATIVE LAW JUDGE, OR THE COURT SHALL CONSIDER THE FOLLOWING FACTORS:

- (I) THE SERIOUSNESS OF THE VIOLATION;
- (II) WHETHER THE VIOLATION WAS INTENTIONAL, RECKLESS, OR NEGLIGENT;
- (III) THE IMPACT UPON OR THE THREAT TO PUBLIC HEALTH OR THE ENVIRONMENT AS A RESULT OF THE VIOLATION;
- (IV) THE DEGREE, IF ANY, OF RECALCITRANCE OR RECIDIVISM UPON THE PART OF THE VIOLATOR;
- (V) THE ECONOMIC BENEFIT REALIZED BY THE VIOLATOR AS A RESULT OF THE VIOLATION;
- (VI) THE VOLUNTARY AND COMPLETE DISCLOSURE BY THE VIOLATOR OF THE VIOLATION IN A TIMELY MANNER AFTER DISCOVERY OF, AND PRIOR TO THE DEPARTMENT'S KNOWLEDGE OF, THE VIOLATION, AS LONG AS ALL REPORTS

REQUIRED TO BE SUBMITTED UNDER STATE ENVIRONMENTAL LAWS HAVE BEEN SUBMITTED AS AND WHEN REQUIRED;

(VII) THE FULL AND PROMPT COOPERATION BY THE VIOLATOR FOLLOWING DISCLOSURE OF THE VIOLATION, INCLUDING, WHEN APPROPRIATE, ENTERING INTO AND IMPLEMENTING A GOOD FAITH AND LEGALLY ENFORCEABLE AGREEMENT TO UNDERTAKE COMPLIANCE AND REMEDIAL EFFORTS;

(VIII) THE EXISTENCE OF A REGULARIZED AND COMPREHENSIVE ENVIRONMENTAL COMPLIANCE PROGRAM OR AN ENVIRONMENTAL AUDIT PROGRAM THAT WAS ADOPTED IN A TIMELY AND GOOD FAITH MANNER AND THAT INCLUDES SUFFICIENT MEASURES TO IDENTIFY AND PREVENT FUTURE NONCOMPLIANCE; AND

(IX) OTHER AGGRAVATING OR MITIGATING CIRCUMSTANCES OR FACTORS.

(b) THE FACTORS CONTAINED IN SUBPARAGRAPHS (VI), (VII), AND (VIII) OF PARAGRAPH (a) OF THIS SUBSECTION (5.5) SHALL BE MITIGATING FACTORS AND MAY BE APPLIED, TOGETHER WITH OTHER FACTORS, TO REDUCE THE AMOUNT OF THE PENALTY.

SECTION 2. 30-20-114, Colorado Revised Statutes, is amended to read:

30-20-114. Violation - penalty. Any person who violates any provision of this part 1 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than ~~two~~ TEN thousand dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment. Nothing in this part 1 shall preclude or preempt a municipality from enforcement of its local ordinances. Each day of violation shall be deemed a separate offense under this section.

SECTION 3. The introductory portion to 30-20-109 (1.5) (c), Colorado Revised Statutes, is amended, and the said 30-20-109 (1.5) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

30-20-109. Commission to promulgate rules - definitions. (1.5) (c) EXCEPT AS PROVIDED IN PARAGRAPH (e) OF THIS SUBSECTION (1.5), an EP waste disposal facility that accepted EP waste on or before ~~the effective date of this subsection (1.5)~~ JUNE 4, 2008, and that ~~has~~ HAD not begun closure by ~~the effective date of this subsection (1.5)~~ JUNE 4, 2008, shall:

(e) (I) UPON THE RECOMMENDATION OF THE DEPARTMENT, THE SOLID AND HAZARDOUS WASTE COMMISSION MAY WAIVE, FOR INDIVIDUAL IMPOUNDMENTS, THE REQUIREMENT IMPOSED PURSUANT TO PARAGRAPH (c) OF THIS SUBSECTION (1.5) THAT AN EP WASTE DISPOSAL FACILITY THAT ACCEPTED EP WASTE ON OR BEFORE JUNE 4, 2008, BUT HAD NOT BEGUN CLOSURE BY THAT DATE, MUST INSTALL FABRICATED LINERS. THE DEPARTMENT MAY RECOMMEND A WAIVER ONLY IF ALL OF THE FOLLOWING CONDITIONS ARE MET:

(A) THERE HAVE BEEN NO UNPERMITTED DISCHARGES TO GROUND WATER OR SURFACE WATER FROM THE OPERATION OF THE FACILITY;

(B) EACH IMPOUNDMENT FOR WHICH A WAIVER IS REQUESTED IS LOCATED MORE THAN ONE THOUSAND FEET FROM ANY PUBLIC OR PRIVATE WATER WELL OR SURFACE WATER;

(C) THE OWNER OR OPERATOR COMPLIES WITH MANDATORY MONITORING AND REPORTING REQUIREMENTS AS DETERMINED BY THE DEPARTMENT, INCLUDING, BUT NOT LIMITED TO, INDIVIDUAL IMPOUNDMENT LEAK DETECTION MONITORING; AND

(D) THE OWNER OR OPERATOR IS NOT SUBJECT TO ANY OUTSTANDING COMPLIANCE ORDERS OR ENFORCEMENT ACTIONS WITH REGARD TO THE DESIGN, OPERATION, OR CLOSURE OF THE FACILITY.

(II) IF, AT ANY TIME, THE DEPARTMENT DETERMINES THAT ONE OR MORE OF THE CONDITIONS SPECIFIED IN SUBPARAGRAPH (I) OF THIS PARAGRAPH (e) ARE NO LONGER MET, THE DEPARTMENT MAY BRING THE RELEVANT INFORMATION TO THE SOLID AND HAZARDOUS WASTE COMMISSION WITH A RECOMMENDATION TO RESCIND THE WAIVER OF THE REQUIREMENT TO INSTALL FABRICATED LINERS. IF THE SOLID AND HAZARDOUS WASTE COMMISSION DETERMINES THAT ONE OR MORE OF THE CONDITIONS ARE NO LONGER BEING MET, THE SOLID AND HAZARDOUS WASTE COMMISSION MAY RESCIND THE WAIVER AND INSTRUCT THE DEPARTMENT TO ESTABLISH A COMPLIANCE SCHEDULE FOR THE OWNER OR OPERATOR TO INSTALL FABRICATED LINERS.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 21, 2009