



# **Informal and Formal Actions Summary of Guidance and Portrayal on EPA Websites**

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**Summary of Guidance and Portrayal on EPA Websites**

**Summary:**

- States have asked for a clarification in regard to what constitutes a formal and informal action – this paper discusses the various definitions that exist.
- The enforcement responses available to EPA and states range from something as simple as a phone call to a full-blown judicial action. The table below provides an overview of this continuum.
- Each statute has policy and guidance that discusses the concept of appropriateness and escalation of enforcement response in situations of recalcitrance or failure to correct smaller problems. Each program has different terminology and definitions for enforcement responses. Some points to consider:
  - Informal versus formal enforcement distinctions should not be confused with the concept of “addressing,” which normally refers to what type of action is required to respond to and “cure” serious noncompliance problems. The concept of “addressing” is also connected to the concept of “appropriateness.”
  - Generally across each statute, “appropriateness” is discussed as the right response based on the degree of noncompliance (i.e., informal actions can address small or isolated problems, whereas formal actions address bigger problems). However, there are circumstances where a “formal” action does not address serious violations (e.g., SNC for CWA and RCRA and HPV for CAA). Conversely, there may be limited situations when “informal” actions may address SNC/HPV (though this is not the primary expectation in CWA, CWA, or RCRA).
  - There are also instances where a program defines a “formal” action as an interim step toward a final enforcement order. The Clean Air Act considers a Notice of Violation a “formal” document, yet EPA does not count this activity as a “formal action” when rolling up end of year numbers or showing data in ECHO.
- Because there are not standard policies that define these terms across programs, it is difficult to characterize these terms generically. However, ECHO has tried to standardize the display of this information across programs, and will be making some improvements to improve the consistency of counting only those informal actions that are documented, for example, Notices of Violation and Warning Letters.
- The test for whether a state action meets the definition of “formal” is not based on what the state calls or labels the action, but whether the action meets the programmatic definition of formal.
  - Example, some states have “formal notices of violation” that meet the definition of an EPA formal action, and can be counted as a formal action.
  - Although in the majority of instances, an NOV is not considered a formal action.
  - Attachment 1 includes some legal research with more definitions relating to each program.

## Summary of Enforcement Actions as Characterized as Formal or Informal

Activity	Statute	Informal (ECHO)	Informal (According to Policy Guidance)	Formal (ECHO)	Formal (According to Policy Guidance)*	Addresses SNC/HPV**
Phone Call or Verbal	CAA	N	n/a	N	N	N
	CWA (PCS)	N	Y <sup>1</sup>	N	N	N
	CWA (ICIS-NPDES)	N <sup>2</sup>	Y <sup>1</sup>	N	N	N
	RCRA	N <sup>2</sup>	n/a	N	N	N
Warning Letter or NOV	CAA	Y	N	N	Y <sup>3</sup>	N
	CWA (PCS)	Y/N <sup>4</sup>	Y	Y/N <sup>4</sup>	N	N
	CWA (ICIS-NPDES)	Y	Y	N	N	N
	RCRA	Y	Y	N	N	N
Administrative Penalty Order (APO) of Field Citation	CAA	N	N	Y	Y	Y
	CWA (PCS)	N	Y <sup>5</sup>	Y	N	N
	CWA (ICIS-NPDES)	N	Y <sup>5</sup>	Y	N	N
	RCRA	N	N	Y	Y	Y
Administrative Order (w/ compliance schedule)	CAA	N	N	Y	Y	Y
	CWA (PCS)	N	N	Y	Y	Y
	CWA (ICIS-NPDES)	N	N	Y	Y	Y
	RCRA	N	N	Y	Y	Y
Judicial Action	CAA	N	N	Y	Y	Y
	CWA (PCS)	N	N	Y	Y	Y
	CWA (ICIS-NPDES)	N	N	Y	Y	Y
	RCRA	N	N	Y	Y	Y

<sup>1</sup> Phone calls specifically mentioned as an example of informal action in CWA EMS

<sup>2</sup> Prior to July, 2010, ECHO was incorrectly crediting phone calls and verbal informals as “informal” actions for ICIS and RCRAInfo. ECHO has been reprogrammed to exclude these as informal actions (making ECHO consistent with original decisions made during 2002 launch).

<sup>3</sup> The policy discusses NOV as a “formal” part of the enforcement process; however EPA does not treat these as formal actions with regard to addressing HPV.

<sup>4</sup> In PCS, NOV as “Notice of Violation, Formal” or “Notice of Violation, Informal,” so designation depends on a specific NOV-by-NOV basis.

\*Note: Consent Agreements/Decrees, and Judicial/Administrative Complaints are also listed in ECHO and in the Policy Guidance under formal enforcement actions for CAA, CWA, and RCRA. These sub-categories fall with Administrative Orders and Judicial Action on this table. Referrals to the state AG or DOJ are held as enforcement sensitive, so they do not appear in ECHO; however, these activities are an appropriate way to address SNC/HPV.

\*\*Each policy allows for flexibility and exceptions in regard to addressing SNC/HPV. When the regulatory authority chooses to address SNC/HPV by means other than a formal action, the databases provide a mechanism to accurately portray the SNC/HPV status - as specified in the underlying policies (i.e. manual overrides).

<sup>5</sup> CWA policy does not define “Informal” but APOs are treated as informal in that they do not typically address SNC.

Attachment 1 – Discussion and Definitions from Program Guidance

*The attached information was compiled by OC legal intern, based upon research into the enforcement policies of the CAA, CWA, and RCRA programs.*

**Clean Air Act:**

Under the CAA program, no explicit definition is given for a “formal” enforcement action, but qualifications of a “formal” action center around judicial or litigious actions taken, addressed violations, and anything that “starts the penalty clock.” Examples include: the issuance of a Notice of Violation (NOV) or FOV<sup>6</sup>; Administrative Order<sup>7</sup>; Administrative Penalty Order (APO)<sup>8</sup>; Civil Judicial Referral<sup>9</sup>; Complaint<sup>10</sup>; confirming a violation<sup>11</sup>; Consent Agreement or Decree<sup>12</sup>; and Consent Agreement/Consent Order (CACO).<sup>13</sup>

No specific definition of an “informal” enforcement action is given, but criteria of such actions center on the identification of violators, consultation, and correspondence between sources, the States, and EPA before a formal enforcement action is commenced (*i.e.*, before an NOV is issued).

**Resource Conservation and Recovery Act:**

Under the RCRA program, a “formal” enforcement action is defined as a written document that mandates compliance and/or initiates a civil or administrative process or action [for the EPA, a referral to DOJ; for a state, a referral to the State Attorney General], with or without appeal rights before a trier of fact, that results in (1) an enforceable agreement or order and (2) an appropriate sanction. More specifically, notices to alleged violators prior to filing a civil or administrative complaint, order, or agreement do not constitute formal enforcement action; rather, it is the ensuing civil or administrative complaint, order or agreement which constitutes the formal enforcement action.

Additionally, a SNC should be addressed through formal enforcement. This formal enforcement response should: (1) mandate compliance and initiate an administrative or civil

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<sup>6</sup> Shifts the burden of proof of continuous compliance to the source and “starts the penalty clock.”

<sup>7</sup> A CAA section 13(a) or section 167 order that requires the source to comply with the CAA or a permit promulgated thereunder but does not stipulate penalties; a State administrative action (not civil or criminal) against a source pursuant to the State authority.

<sup>8</sup> A CAA section 113(d) order issued by EPA that has stipulated penalties.

<sup>9</sup> A Federal or State case that has been referred to the Department of Justice or the State Attorney General for resolution in a civil judicial forum.

<sup>10</sup> A written communication, alleging one or more violations of specific provision of the Act, regulations, or a permit promulgated thereunder, issued by the complainant to a person.

<sup>11</sup> Includes on-site inspection, review of an appropriate self-monitoring report, stack test, reference method compliance test, or a response to a CAA section 114 letter.

<sup>12</sup> Any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

<sup>13</sup> A signed document settling a CAA Section 113(d) administrative penalty order.

action that (2) results in an enforceable agreement or order and (3) imposes sanctions (actions that recover the economic benefit of non-compliance plus some appreciable amount reflecting the gravity of the violation; additional sanctions may also be available, such as permit modifications, permit revocation, facility shut down, and suspension and debarment proceedings). The formal enforcement response should seek injunctive relief that ensures that the violator resolves its violations and expeditiously returns to compliance. If the order has no stipulated penalty provision, then the implementing agency should take another formal enforcement action (e.g., such as a referral to DOJ or the State Attorney General's office).

An "informal" enforcement action under RCRA is broadly defined as "those actions that are not formal enforcement actions that notify the violator of its violations." These typically represent written notices to alleged violators prior to filing a civil or administrative complaint, order or agreement. However, an enforcement action's designation as either "formal" or "informal" depends on the type of facility by which the action is being made. For example, SNC violations are expected to receive "formal" enforcement; however, if a facility is found to be in lesser violation, SV (secondary violations), an informal enforcement response is the minimally appropriate enforcement response. The implementing agency can choose to take a formal enforcement response against SV as it deems appropriate, and should escalate SVs to SNCs if the violation is not quickly corrected.

The RCRA program also designates differences in Response Time Guidelines based on whether a formal or informal enforcement action is made. For formal enforcement actions, target response times are differentiated by (1) unilateral or initial orders<sup>14</sup> (should be issued by Day 240); (2) referrals to DOJ or State Attorney General's Office<sup>15</sup> (should be made to the appropriate agency by Day 360); and (3) final or consent orders<sup>16</sup> (should be signed by Day 360). For informal enforcement actions, alleged violators should return to compliance in the shortest possible time frame, with a maximum limit of 240 days after the day the violation(s) is discovered (i.e., Day Zero). If the facility fails to come into compliance within the timely manner of 240 days or fails to notify the implementing agency of the inability to return to compliance, then the implementing agency may re-classify the violator as a SNC and may result in an escalation to formal enforcement.

### **Clean Water Act:**

Applicable CWA guidance defines a formal enforcement action as "an action that requires actions to achieve compliance, specifies a timetable, contains consequences for noncompliance that are independently enforceable without having to prove the original violation, and subjects the person to adverse legal consequences for noncompliance." Examples of a formal enforcement response include an Administrative Compliance Order or state equivalent action, or a judicial referral to the State Attorney General or to the Department of Justice.

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<sup>14</sup> Orders issued by the implementing agency and assert the agency's position that violations have occurred.

<sup>15</sup> These occur when a Federal or State case is officially transmitted to those offices for action.

<sup>16</sup> These orders represent the agreement of the parties involved or the decision of a tier of fact, and are documents for which no appeal remains.

An “informal” enforcement action is not explicitly defined in CWA guidance, but types of enforcement responses are described: an inspection; phone call; violation letter (which can be limited to a notification of the violation or requiring certain steps to be taken within a specific time frame); or a Federal Notice of Violation (NOV). Note that, an administrative penalty order, because it does not require actions to achieve compliance, is excluded from the definition of formal action.