



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: New Definitions for Key Terms for EPA's Enforcement Program Tools

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I. Purpose

This document defines the following key terms (“finding of violation,” “finding of endangerment”) and action categories, (“informal action,” “formal action,” and “other action”) used in EPA’s enforcement program. The purpose of defining these terms is to promote national consistency and clarity in their use across civil enforcement programs.

EPA’s program-specific enforcement response policies (ERPs) and related documents provide recommendations on a range of possible enforcement responses to various types of pollution problems. Many of the ERPs specify certain actions as “formal” actions and, by default, other actions are considered to be “informal.” These two terms have not been consistently defined and applied across EPA’s enforcement and compliance assurance programs which potentially creates confusion and inconsistent use of these tools. Establishing definitions to apply across EPA’s civil enforcement programs will not only assist in categorizing tools regardless of program, but also facilitate consistency, appropriate use (including escalation) and reporting of the use of these tools.¹

¹ The term “tools” refers to *specific* tools within categories of key terms. For example, formal action tools include Expedited Settlement Agreements (ESAs) and Administrative Orders (AOs).

The definitions in this document are intended to supplement EPA's existing program-specific ERPs and related documents as well as supersede any inconsistent definitions contained therein. EPA enforcement staff should use the definitions in this document, in conjunction with the appropriate ERP, to determine the appropriate action and category in a case. Enforcement staff may also need to modify current practices to ensure that informal, formal, or other actions align with the new definitions and eliminate any inconsistencies.

Please note that this document does not include reporting instructions. EPA enforcement staff and data stewards should continue to follow existing reporting instructions for all compliance and enforcement data. If it is determined that updated reporting instructions are necessary, they will be developed after this document is issued. Additionally, this document supersedes the *Guidance on EPA Definitions for Enforcement Response Tools* (Sept. 30, 2019) from Rosemarie Kelley, OCE Director, David Hindin, OC Director, and Karin Leff, FFEO Director.

II. Terminology

A. Definitions for Key Terms

1. Finding of Violation: A key component of the definition of informal and formal actions. A finding of violation is:

- a) A written or otherwise documented determination²,
- b) Made based on evidence or information available to the regulatory agency,
- c) By regulatory agency personnel authorized to make the finding,
- d) That
 - (i) a law, regulation, order, decree, agreement, or other requirement enforceable by the regulatory agency has been violated, or
 - (ii) there is "reason to believe" that the circumstances described in Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 13(a) exist, or
 - (iii) the circumstances described in Clean Air Act (CAA) Sections 113(a)(5) or 167 exist.

2. Finding of Endangerment: A key component of the definition of formal action. A finding of endangerment is:

- a) A written or otherwise documented determination,
- b) Made based on evidence or information available to the regulatory agency,
- c) By regulatory agency personnel authorized to make the finding,

² This definition includes a determination of violation (finding of violation) made by a computer programmed to generate such a determination, provided it is: (1) pursuant to instructions by an authorized EPA official who has previously determined that a specified type of act or omission constitutes a violation and (2) in response to the receipt of information from the regulated entity or other source that such an act or omission has occurred. For example, EPA's Integrated Compliance Information System - National Pollutant Discharge Elimination System (ICIS-NPDES) automatically determines and records when a monitoring result self-reported on an individual NPDES permittee's electronic discharge monitoring report (DMR) exceeds an applicable permit limit. Not all exceedances result in an EPA "finding of violation."

d) That there exists a condition, act, omission, or circumstance in response to which the regulatory agency may seek relief from an entity pursuant to the following authorities: Toxic Substances Control Act (TSCA) Section 7(a), 15 USC Section 2606(a); FIFRA Section 13(b)(3), 42 USC Section 136k(b)(3); Clean Water Act (CWA) Section 504, 33 USC Section 1364; CWA Section 311(c), (e)³, 33 USC Section 1321(e); Safe Drinking Water Act (SDWA) Section 1431(a), 42 USC Section 300i(a); Resource Conservation and Recovery Act (RCRA) Section 3008(h), 42 USC Section 6928(h); RCRA Section 3013(a) – (c), 42 USC Section 6934(a) – (c); RCRA Section 7003(a), 42 USC Section 6973(a); CAA Section 303, 42 USC Section 7603; RCRA Section 9003(h), 42 USC Section 6991b(h); and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 106(a), 42 USC Section 9606(a)

B. Definitions for Action Categories

There are many tools available to EPA enforcement and compliance assurance programs. Some tools are used to notify regulated entities⁴ regarding potential violations (e.g., Warning Letter, Notice of Non-Compliance). Others are used to advise regulated entities of an impending enforcement action and invite settlement (e.g., Notice of Violation, Show Cause Letter, Pre-Filing Notice Letter, and Notice of Intent to File an Administrative Complaint). Others are the actual enforcement action (e.g., Administrative Penalty Order, Administrative Compliance Order).

As noted above, categorizing tools will facilitate consistency and the appropriate use and reporting of tools, by enabling the accurate placement of each tool into one of three categories (see Table 1): 1) informal action; 2) formal action; and 3) other action.

1. Informal Action: Typically used to address less serious violations⁵, an informal action must meet all the following criteria:

- a) Is issued by the regulatory agency in writing (paper or electronic)⁶ to the regulated entity,
- b) Is issued as a result of a “potential finding of violation” or a finding of violation⁷

³ This section of the CWA uses the term “threat” in lieu of “endangerment.”

⁴ For purposes of this document, “regulated entity” includes any entity that may be subject to an action by EPA.

⁵ The spectrum of less serious to more serious or significant violations may vary across programs and is generally defined in the specific ERPs, where they exist.

⁶ This may include situations where the potential finding of violation is first communicated orally to the regulated entity and then subsequently documented in a follow-up written communication (e.g., warning letter). This document does not include any recommendations about when a regulatory agency should verbally notify a regulated entity of a potential finding of violation or a finding of violation, however, it does exclude from EPA’s definition of “informal action” notification of any type of violation that is only communicated orally. Clear, written communication is important to facilitate a regulated entity’s return to compliance and to enable the regulatory agency to report the entity’s compliance status and document its compliance history.

⁷ Informal actions that include a finding of violation fulfill a statutory requirement to provide a person and the State with notice of the EPA’s findings of violation prior to issuing an order or commencing a civil action (see, CAA § 113(a), SDWA § 1414(a)(1)(A), or SDWA § 1423(a)(1)). Note, however, that SDWA § 1423(a)(2) does not require

c) Contains a description of the legal and factual basis for the possible action and states with reasonable specificity the nature of the potential finding of violation or finding of violation⁸,

d) Includes:

- (i) A statement that the regulated entity should take whatever action(s) is necessary to correct the potential finding of violation or finding of violation,
- (ii) A recommended reasonable timeframe for completing and/or reporting, as appropriate, either any necessary actions to correct the potential finding of violation or finding of violation expressed in specific terms (e.g., within 45 days of receipt of this action or prior to the next permit reporting deadline), or a demonstration by the recipient that there is no such violation; and
- (iii) A statement describing the steps the regulatory agency “may” take or “is prepared to” take with respect to the potential finding of violation or finding of violation⁹,

(e) Is not independently enforceable,

(f) Is not an action established by law or regulation by which the regulatory agency may itself impose or seek through a court or other tribunal,¹⁰ the imposition of a sanction (e.g., a penalty) or injunctive relief for the identified violation, obtain compliance or abate the endangerment, or resolve liability,¹¹ and

(g) Includes, for self-disclosures where there is a potential finding of violation,¹² acknowledgment that the discloser has certified that the violation has been corrected (e.g., Acknowledgement Letter).

2. Formal Action: Typically used to address more serious violations and may be independently enforceable, a formal action must meet all the following criteria:

(a) Is issued by the regulatory agency in writing (paper or electronic) to the regulated entity,

notice to the regulated entity and this provision is invoked more frequently than SDWA § 1423(a)(1). Similarly, CAA § 113(a)(3) does not require notice to the regulated entity.

⁸ This description should cite to the statutory provisions or regulatory requirements that are the basis of the potential finding of violation or finding of violation and identify the source of factual information underlying EPA’s proposed finding, such as an on-site inspection, desk audit, or other source of information.

⁹ The statement should not commit EPA to any specific follow-up action prior to EPA making a formal determination about a facility’s compliance, including assessing potential civil penalties, in case information provided by the regulated entity causes EPA to reconsider its position.

¹⁰ For the purposes of this document, the phrase “court or other tribunal” means a court, Regional Judicial Officer, Administrative Law judge, the Environmental Appeals Board or any similar body authorized by law or regulation to impose sanctions or injunctive relief sought by EPA.

¹¹ An action is “independently enforceable” if a regulated entity’s failure to comply with the action is itself a violation (in addition to any underlying violation cited in the action), and may be the basis for additional, distinct sanctions or injunctive relief.

¹² A “self-disclosure” includes any voluntary disclosure of a potential violation made via the eDisclosure system pursuant to the Audit Policy or the Small Business Compliance Policy or a voluntary disclosure of a potential violation made in writing to EPA pursuant to the New Owner Audit Policy.

- (b) Is issued as a result of a “finding of violation”, a “finding of endangerment”, or a self-disclosure¹³,
- (c) Contains a description of the legal and factual basis for the action and states with reasonable specificity the nature of the finding of violation,
- (d) Is an action established by law or regulation by which the regulatory agency may itself impose or seek through a court or other tribunal, the imposition of a sanction (e.g., a penalty) or injunctive relief for the identified finding of violation, obtain compliance or abate the endangerment, or use to resolve liability (e.g., FIFRA Notices of Warning, Federal Facility Compliance Agreement), and
- (e) For self-disclosures where there is a finding of violation, includes notice that the discloser has certified that the violation has been corrected (e.g., electronic Notice of Determination).

3. Other Action: Does not meet the definition of informal action or formal action and is generally used to respond to potential compliance deficiencies or conditions that may become, or ultimately are determined to be, violations or endangerments warranting informal or formal action to include:

- (a) Any verbal notification from EPA to a regulated entity (e.g., discussions during an inspection, a meeting, or a phone call) about potential compliance deficiencies; or
- (b) Any written notification about potential compliance deficiencies (e.g., email, letter, or inspection report) that does not meet all the criteria for an informal or formal action.

Table 1: Action Criteria and Categories			
CRITERIA	FORMAL	INFORMAL	OTHER
Verbal			X
In writing but <i>does not</i> meet all the criteria for either informal or formal			X
In writing and <i>does</i> meet all the criteria for either informal or formal	X	X	
May be issued in response to a finding of violation	X	X	
May be issued in response to a potential violation		X	
May be issued in response to a self- disclosure	X	X	
May be issued in response to an endangerment	X		
Contains legal or factual basis for the action and describes the finding of violation or potential finding of violation	X	X	
For non-self-disclosure, a statement that recipient should take action to correct the finding of violation or potential finding of violation; a timeframe for completing/ reporting the actions to correct or a demonstration by recipient that no violation exists; the steps the Agency may take		X	
May be independently enforceable	X		

¹³ This only applies to self-disclosures pursuant to the EPA Audit Policy, Small Business Compliance Policy, and the New Owner Audit Policy.

For self-disclosure with a potential finding of violation, includes acknowledgement that discloser certified violation correction		X	
For self-disclosure with a finding of violation, includes notice that discloser certified violation correction	X		

This document is effective immediately and applies to EPA actions only. This document is intended to improve the internal management of EPA and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the Agency, its officers or employees, or any other person. If you have any questions, please contact Lauren V. Kabler at kabler.lauren@epa.gov.