

# Solid and Hazardous Waste Commission Annual Report 2009-2010



Colorado Department of Public Health and Environment  
Solid and Hazardous Waste Commission  
OED-OLRA-A5  
4300 Cherry Creek Drive South  
Denver, CO 80246

# Solid and Hazardous Waste Commission

## *Annual Report May 2009 – April 2010*

### **Commission and Its Members**

In 1992, the Hazardous Waste Commission was established through 25-15-302, C.R.S. In 2006, as a result of Senate Bill 06-171, the Hazardous Waste Commission was renamed the Solid and Hazardous Waste Commission and assumed rulemaking responsibilities from the State Board of Health over solid waste. The Commission, a Type 1 agency located within the Colorado Department of Public Health and Environment but with authority independent of the executive director, is charged with promulgating and adopting rules pertaining to solid and hazardous waste; setting fees and issuing interpretive rules for hazardous waste; and hearing appeals of administrative law judges' determinations regarding the amounts of administrative penalties for hazardous waste matters. The Solid and Hazardous Waste Commission is comprised of nine gubernatorial appointees: three members from industry; three members from the public at large; and three members from government or academia. The executive director has no statutory role in the Commission.

The federal government authorizes Colorado to implement a state hazardous waste program in lieu of a federal program as long as the state program meets certain criteria. One of the major tasks of the Commission is to ensure that the state hazardous waste rules are consistent with the U.S. Environmental Protection Agency's requirements so that Colorado will not lose its authorization and federal funds. The Commission has the authority to adopt rules that are more stringent than the federal requirements and to list or define as a hazardous waste a waste not regulated by the federal rules, if the Commission makes a written finding after public hearing and substantial evidence in the record that it is necessary to protect public health and environment. Six votes are needed and the Commission also must issue an opinion referring to and evaluating public health and environmental information and studies that form the basis of the rules. The rules regarding mining and mineral processing wastes, including exploration, mining, milling and smelting and refining wastes, must be identical to the federal hazardous waste rules.

In May of 2009, the Commission authorized a standing subcommittee to examine greenhouse gas minimization and waste management strategies. The Subcommittee on Carbon Reduction and Waste Minimization, which is chaired by Commissioner Roger Freeman, held its first meeting in August and met several times throughout the year. The Subcommittee continues to explore a variety of avenues wherein the Commission can promote and advocate waste reduction, reuse and recycling efforts in the state. Minutes from the sub-committee meetings can be found on the Commission's website:

<http://www.cdphe.state.co.us/op/hwc/>.

### ***The Commissioners Selected from Industry***

- **Melanie Granberg:** Ms. Granberg is an environmental attorney with the law firm of Gablehouse Calkins & Granberg, LLC in Denver. She earned her juris doctor degree from the University of Denver and holds a Bachelor of Science degree from the University of Colorado. Ms. Granberg's practice encompasses a wide variety of environmental matters including assisting clients with environmental site investigation and remediation, transactional work, regulatory compliance, environmental audit and

voluntary disclosure, administrative proceedings, insurance coverage disputes and litigation. Her work involves such topics as CERCLA, RCRA, CWA, CAA, asbestos, mold and methamphetamine remediation. Her practice also includes advising local governments and communities in emergency planning related to chemical accident prevention. She has lectured in Lucknow, India and Beijing, China on these topics. Ms. Granberg is the current environmental law article editor for *The Colorado Lawyer*, a board member of the Colorado Association for Meth and Mold Professionals, and the former president of the Colorado Hazardous Waste Management Society. She is a member of the American, Colorado and Denver Bar Associations.

- **Lynn Kornfeld:** Lynn Kornfeld is a partner with the law firm of Faegre & Benson LLP, specializing in environmental, transactional and administrative law. She has represented national and multi-national manufacturing and energy companies in resolutions of a broad range of issues arising under the Resource Conservation and Recovery Act; Clean Water Act; Clean Air Act; Comprehensive Environmental Response, Compensation, and Liability Act; and their state counterparts. She also provides counsel to a wide range of commercial and industrial clients related to the purchase and sale of contaminated property, including the various issues related to the cleanup of brownfield sites under the Colorado Voluntary Cleanup and Redevelopment Act. Prior to joining Faegre & Benson LLP, Ms. Kornfeld worked for the Denver and Washington D.C. offices of Patton Boggs, LLP, where she practiced law in the Administrative and Environmental Policy groups. Before practicing law, Ms. Kornfeld worked as an environmental consultant for a large construction engineering firm where she provided a broad range of litigation support and technical environmental services for clients, focusing on Comprehensive Environmental Response, Compensation, and Liability Act recovery and construction claims analyses. She holds a juris doctor degree from the University of Colorado School of Law and a bachelor's degree in environmental biology and environmental studies from the University of Colorado. She is a native of Boulder, Colorado.
- **Thomas Schweitzer:** Thomas Schweitzer received a Bachelor of Science degree in civil engineering from the South Dakota School of Mines and Technology in 1980. He is a Registered Professional Engineer in Colorado and North Dakota.

He is currently the engineering manager with Waste Management of Colorado, Inc. with over 20 years of experience in permitting, design, construction management and regulatory compliance of the company's solid waste management facilities, and managing post-closure care and compliance activities for a closed hazardous waste disposal site. Mr. Schweitzer's experience also includes providing engineering and compliance support to Waste Management owned/operated solid waste disposal facilities in California, North Dakota and Utah.

Mr. Schweitzer is on the Board of Directors of the Colorado Chapter of the Solid Waste Association of North America.

## *The Commissioners Selected from the Public at-Large*

- **Scott Myers:** Scott Myers is a Registered Professional Geologist (PG) with more than 24 years of experience managing corporate, consulting, construction, industrial, and retail compliance. As an Environmental, Health, and Safety Manager/Director for such notable companies as Johns Manville, Ashland Petroleum/Marathon/Valvoline, BASF, and Raytheon, Mr. Myers is familiar with implementing Sustainability Development strategies at corporate and line levels. He is proficient with respect to environmental requirements in more than 20 states as well as Europe, Canada, Mexico, Chile, Australia, New Zealand, and Antarctica. His work experience has given him an expert level understanding with respect to RCRA, CERCLA, NEPA, SPCC, OPA, Clean Air Act, Clean Water Act, and OSHA. In addition to his years in the petrochemical, manufacturing, and surface mining industries, Mr. Myers has extensive experience working for federal and state regulatory agencies. He worked as a surface mine inspector and as a RCRA/CERCLA inspector/permit writer for the State of Kentucky. Most recently, Mr. Myers acted as the Environmental, Health, and Safety Director for the prime contractor of the U.S. Antarctic Program. Mr. Myer's remediation experience includes oversight of soil and groundwater cleanup at six RCRA permitted facilities, 300+ sites contaminated by petroleum and solvents, and several multi-million dollar fuel spill responses and remediation.
- **Ann C. Umphres:** Ann Umphres is a 1982 cum laude graduate of Missouri State University with a B. S. in Public Administration and Economics. She is a 1985 graduate of George Washington University, National Law Center with a Juris Doctor degree. Ms. Umphres served as an associate with Cockrell, Quinn & Creighton from 1985-87. She also served as Assistant Regional Counsel with the U.S. Environmental Protection Agency, Region VIII, from 1987-1995 where she handled cases involving CERCLA, RCRA, TSCA, FIFRA, UST and other assorted environmental issues and statutes. She was President of the Law Firm of Ann C. Umphres, P.C. specializing in environmental and natural resources law matters from 1995-2010. In March of 2010, Ms. Umphres joined the Solicitor's Office, Department of the Interior, Rocky Mountain Region where she serves as legal counsel on BLM matters involving CERCLA, natural resource damages, NEPA, abandoned mine clean ups and other assorted environmental, natural resources and public land matters.
- **Alek M Orloff:** Alek M. Orloff is Chief Financial Officer of Alpine Waste & Recycling, a privately-held Colorado-based integrated waste and recycling services firm named "Top Company" by *ColoradoBiz* magazine in 2008, the Colorado Association for Recycling's "Most Outstanding Business" in 2009, and a *ColoradoBiz* "Colorado Company to Watch" in 2010. He has held that position since 2000 and directs all aspects of the company's financial management as well as all environmental site development and compliance activities. He has evaluated numerous acquisition and business development opportunities in that time and has carried out all related acquisition and development processes, including the permitting of waste treatment and

disposal sites as well as a successful application for an environmental no-action determination related to the acquisition of a contaminated site. During the 1990s, Alek worked as a management consultant for Deloitte Consulting, LLP in its Reorganization Services Group, advising distressed clients in the retail, manufacturing and financial services industries on financial and operational turnaround measures. Alek received an undergraduate degree (BA) in literature from Colorado College where he also studied petrology and mineralogy. Alek earned a master of business administration degree (MBA) in finance with honors from the UCLA Anderson School where he was awarded the John E. Anderson Fellowship and served as a teaching assistant in management communications. Alek is an accomplished amateur chef and is married with three children.

### *The Commissioners Selected from Academia and Local Government*

- **Christopher J. Neumann**: Christopher J. Neumann is an attorney with the law firm Greenberg Traurig, LLP where he counsels clients in the petroleum, natural gas, mining, airline and retail industries on a wide variety of litigation, environmental, natural resources, administrative and insurance coverage matters. Chris also assists clients in efforts to obtain land use approvals and financial incentives for brownfield sites development projects and in efforts to resolve environmental concerns in complex business transactions. Prior to joining Greenberg Traurig, Chris served as a law clerk for the Environmental Enforcement Section of the U.S. Department of Justice and for Waste Management, Inc. Before attending law school, Chris studied and conducted research in the fields of groundwater hydrology, bioremediation and earthquake seismology at the University of Notre Dame and at Argonne National Laboratory near Chicago, Illinois. Chris received an undergraduate degree in civil engineering from the University of Notre Dame (B.S., engineering and environmental science) and a law degree (J.D.) and certificate in environmental and natural resources law from the Northwestern School of Law of Lewis and Clark College. Since 2005, Chris has served as an adjunct professor in the environmental and natural resources program at the University of Colorado School of Law, where he teaches courses in hazardous waste law and environmental litigation. Chris is an instrument-rated private pilot and is a member of the Aircraft Owners and Pilots Association and the American Society of Civil Engineers.
- **Roger Freeman**: Roger Freeman maintains a diverse practice with Davis Graham & Stubbs in environmental and occupational health law, helping clients address a range of issues, from environmental compliance matters to litigation and arbitration matters. He has organized and overseen numerous clean-up projects, including voluntary clean-up initiatives and other remediation efforts. Mr. Freeman applies his diverse background as an Adjunct Professor at the University of Denver College of Law, and as a member of various environmental boards, to seek multi-faceted solutions to complex environmental problems on behalf of his clients. For example, he was a key player in the Brownfield's clean-up surrounding the construction of the Pepsi Center Arena in Denver. Mr.

Freeman is active in a variety of renewable energy and transportation projects and groups throughout the Rocky Mountain West and California. He has worked with solar and waste-to-energy companies on government relations and legislative initiatives. He has an extensive network of political and agency relationships dating back to the work of his father, S. David Freeman, who has been a preeminent force in the emergence of renewable energy and conservation issues since the 1960s. Mr. Freeman uses his experience and understanding to help expedite project steps and creatively solve legal constraints to the development of renewable and advanced transportation projects. Mr. Freeman has vast expertise in environmental and safety issues surrounding traditional energy development as well. Building on his diverse experience with industry, conservation interests, and government entities, he specializes in building coalitions and overcoming project hurdles.

Mr. Freeman often tackles environmental issues associated with the mining industry, including remediation of mine wastes. He is the long-time Environmental Editor for the *Rocky Mountain Mineral Law Foundation's Mineral Law Newsletter*. His numerous publications in the mining field include "Clean-up on the Federal Lands Meet the Private Sector" published by the Rocky Mountain Mineral Law Foundation in 1998.

Mr. Freeman has vast experience in handling environmental issues related to uranium mill tailings and other radioactive materials. He has worked with numerous mining companies on UMTRCA and NRC compliance matters and licensing proceedings. He has worked with a number of medical and research institutions, including the National Jewish Center in Denver, on the handling and disposal of radioactive isotopes and other source materials generated in this process. He has spearheaded environmental due diligence teams on numerous transactions involving nuclear materials and regularly interacts with technical personnel in his practice.

Mr. Freeman also represents clients on occupational safety and health matters, including interactions with the U.S. Occupational Safety and Health Administration ("OSHA"). He has assisted numerous companies and other entities in responding to OSHA investigations, interpreting OSHA regulations, and handling OSHA citations and penalty proceedings.

Mr. Freeman takes pride in giving pragmatic, sound counseling in all areas of law, often providing basic business counseling to his clients. He is an expert in seeking recovery for environmental costs under insurance policies. Whether through counseling, negotiation, litigation or alternative dispute resolution processes, Mr. Freeman emphasizes cost-effective solutions to environmental and occupational health issues for each of his clients.

- **William Patterson:** Bill was born and raised in Ohio and has lived in Colorado since 1976. Bill has extensive business, engineering and public service experience. He is Director of Engineering at TEI Rock Drills in Montrose. Mr. Patterson was elected for a

two-year term to the Montrose City Council which started April 15, 2010. Mr. Patterson served as Montrose County Commissioner from 2005-2009 and on the Montrose City Council from 1996-2002 and was elected Mayor in 1999 and 2000. Mr. Patterson holds a graduate degree in Mechanical Engineering, and graduated Summa Cum Laude with a Bachelor of Mechanical Engineering from Ohio State University. He has authored 16 publications and over 30 technical reports. Bill is a pilot and other interests include family and motorcycles. Bill and his wife, Judy, who met at the pony barn at the County Fair, have been married for 50 years and have 6 children. They owned a hay farm in Ohio and sold Case/ I.H. farm and construction equipment.

## **Rulemaking Hearings and Public Outreach**

### **May 19, 2009**

On May 19, 2009, the Commission held its business and annual meeting. Section 6.04(a) was revised to reflect the annual fees being assessed for fiscal year 2009-2010. The fees, which fund the operation of the Commission, were not adjusted.

At this meeting, the Commission held a hearing on amendments to the hazardous waste fees. These fees partially fund the hazardous waste program. After three years under the present hazardous waste fee structure, the Department determined that an increase in fees was necessary beginning in state fiscal year 2010. The Department is authorized by the U.S. EPA to operate the hazardous waste regulatory program in Colorado in lieu of the federal government. One of the key criteria evaluated by the U.S. EPA in authorizing the state program is resources, both in terms of funding and in terms of qualified personnel. Without an increase in fee revenues, the Department determined that it would not be able to operate an adequate program 2010 and would be in danger of losing program authorization.

General state directives for implementation of the hazardous waste regulatory program are found in § 25-15-301.5, C.R.S. These directives include implementing a hazardous waste program that a) maintains program authorization by the U.S. EPA; b) promotes a community ethic to reduce or eliminate waste problems; c) is credible and accountable to industry and the public; d) is innovative and cost-effective; and e) protects the environmental quality of life for impacted residents of the state. Section 25-15-302(2), C.R.S., provides guidance for future fee adjustments by the Solid and Hazardous Waste Commission. This guidance includes setting the fees such that the revenue generated by each fee approximates the actual reasonable program costs attributable to the facilities paying the fee.

The purpose of these amendments was to implement a balanced increase in hazardous waste program fees that the Department expects will provide adequate funding for the hazardous waste program for a period of approximately two years. The adjusted fees are expected to increase the revenue from fees to the hazardous waste program by approximately 15% in state fiscal years 2010 and 2011. When the funding provided by U.S. EPA is considered, the fee changes were expected to increase funds available to operate the hazardous waste program by approximately 11%. This 15% fee increase was discussed and agreed to by a group of key stakeholders convened by the Department. The stakeholder group included the two largest treatment,

storage, and disposal facilities in Colorado, one of the largest hourly fee payers, and several important large quantity generators and small quantity generators of hazardous waste. This group met three times in January and February, 2009, and discussed many aspects of the Department's hazardous waste program and its budget and finances. In the three previous adjustments to this fee structure the Department proposed adjustments that would cover anticipated funding needs for the following three years rather than two. In discussion with the stakeholder group it was agreed that, given the current economic recession, proposing adjustments to cover a two year period rather than three was appropriate.

The following is a breakdown of the 15% increase over two years<sup>1</sup>:

Department costs	▲ 6%
EPA hazardous waste grant	—
Inflationary increases to cover flat funding by EPA	▲ 3%
Upgrade of databases and data management system <sup>2</sup>	▲ 4%
Decrease in number of fee-payers	▲ 2%

It is also important to note that the proposed fee increase was not a flat 15% fee increase across the board. Some fee components were increased more than 15%, some less. The reason for the different fee increase amounts is that the Division tried to adjust each fee component to more closely align with its investment of time and effort in activities related to that component as required by § 25-15-302(2), C.R.S.

For the annual meeting, Ms. Umphres introduced Alice Madden who serves as Governor Ritter's Climate Change Coordinator. In that role, she is coordinating efforts, both public and private, to meet the green house gas reduction goals set forth in Colorado's Climate Action Plan. Ms. Madden spoke about Colorado's renewable energy initiatives and climate change actions. After Ms. Madden's presentation, Mr. Freeman stated that he takes the Commission's role seriously in helping to identify some projects to help with greenhouse gas reduction. From this discussion, a standing sub-committee was formed to work on minimizing greenhouse emissions and waste management strategies. Ms. Umphres, Ms. Granberg and Ms. Kornfeld expressed interest along with Mr. Freeman in participating on the sub-committee. The Subcommittee on Carbon Reduction and Waste Minimization met numerous times throughout the year. Minutes from the sub-committee meetings can be found on the Commission's website: <http://www.cdphe.state.co.us/op/hwc/>.

### August 18, 2009

At the August 18, 2009 meeting, the Commission adopted amendments to the hazardous waste and solid waste regulations which change the terminology used from "informal conference" to "compliance conference". The reason for these changes is that the term "informal conference" refers to a meeting that is in the informal part of the Division's enforcement process, but is not "informal" in terms of how the meeting is

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<sup>1</sup> This 15% fee increase represents about a 7.5%/yr fee increase over its projected two-year life expectancy. This is significantly less than the last two hazardous waste fee increases which have averaged about an additional 10%/yr over the last six years.

<sup>2</sup> One-time cost of \$200,000



conducted. This terminology had resulted in some confusion to the regulated community and these amendments are intended to eliminate that confusion.

When the Division issues a Compliance Advisory to a facility for violations discovered during an inspection, the facility may request an informal conference. If the Division intends to assess a penalty for the violations, the Division strongly encourages the facility to come in for an informal conference, although doing so is entirely optional. The informal conference is an opportunity for facility representatives to present information to the Division regarding the violations discovered during the inspection of its facility.

The informal conference is also an opportunity for the Division to inform facility representatives of any revisions to the Compliance Advisory that it may be considering. This might include, for example, adding violations to those already included in the Compliance Advisory, sampling results if any, or subsequent determinations that items noted in the Compliance Advisory are not violations. If a compliance schedule is not noted in the Compliance Advisory, the Division may also work with the facility during the informal conference to finalize a schedule to correct any noted violations not already corrected.

Just as the Compliance Advisory and inspection report are part of the Division's administrative record of enforcement activities against a facility, the information supplied during the informal conference is also considered a part of the administrative record. In order to preserve information exchanged during the informal conference for the record, these meetings are recorded. The Division is also typically represented at the informal conference by the Colorado Attorney General's office. While the Division encourages facilities to bring legal representation to the informal conferences, most times the facilities do not. These factors add an additional level of formality to the informal conference.

At this August meeting, the Commission adopted amendments to §260.10 to § 261.33 of the hazardous waste regulations. The change to §261.33 clarifies the applicability of the P and U waste code listings to unused commercial chemical products, and helps remove the confusion regarding Colorado's more stringent regulation of formulations containing more than one active ingredient. A comment listed in the federal regulations at 40 CFR Section 261.33(d) indicates that the listing applies to commercial and technical grades of the product, and to formulations in which the chemical is the "sole active ingredient". "Sole active ingredient" means the active ingredient is the only chemically active component for the function of the product. If the discarded product is a formulation with more than one active ingredient, it would not be within the scope of the federal listing.

The Department has never believed that EPA's approach made sense – if P and U chemical wastes are each dangerous and toxic, then a mixture of those chemicals as active ingredients in a waste would be equally or even more dangerous and toxic. This is the reason the Department did not add the note to this section that appears in the federal regulations. Unfortunately, many regulated entities in Colorado do not realize that this note is missing from the Colorado regulations. These amendments clarify that Colorado is more stringent than the federal requirement, and specifies that formulations may have more than one active ingredient and still meet the listing description. An active ingredient is defined as a component or mixture that performs the function of the product, even if it is present in very low concentration in the product. This definition for active ingredient was added into section 260.10 of the regulations. These amendments make it clear that discarded commercial chemical products are considered hazardous waste in Colorado if they are listed in

section 261.33(e) and (f) (the “P” and “U” lists) or if they exhibit one or more of the hazardous waste characteristics of Part 261, Subpart C.

Also, the Commission removed the extended accumulation time requirements and reduced inspection frequency requirements currently available to members of both Colorado’s Environmental Leadership Program (ELP) and the U.S. Environmental Protection Agency’s (EPA’s) National Environmental Performance Track program. Adoption of these amendments became necessary following EPA’s decision to terminate the federal Performance Track Program effective May 14, 2009.

On March 16, 2009, EPA Administrator Lisa P. Jackson issued a memorandum halting the federal Performance Track program. The Administrator’s memorandum was followed by a memorandum from Chuck Kent, Director, Office of Policy Economics, and Innovation, dated March 25, 2009, which provided more details about the termination, including that the low priority for routine inspections incentive was no longer in effect.

The Commission took this action to maintain Colorado’s authorization to operate its state program in lieu of the U.S. EPA operating a federal program. To maintain consistency with the federal requirements and to avoid state requirements from inadvertently becoming less stringent than the federal program, the Commission revised the state regulations to delete these extended accumulation time requirements and decreased inspection frequency incentives.

Although EPA has terminated the federal Performance Track Program, Colorado will continue to operate its performance-based state program. ELP is a voluntary statewide environmental recognition and reward program administered by the Department’s Sustainability Program that recognizes and rewards organizations and businesses that demonstrate superior environmental performance. This voluntary incentive and recognition program encourages program members to focus on issues important to their communities and to take a creative approach to solve local problems and achieve environmental goals.

In exchange for the environmental commitment and superior environmental performance, Colorado’s leadership program will continue to provide benefits and incentives such as recognition, public-private partnerships, networking and technical assistance to its environmental leaders. Additional information regarding Colorado’s Environmental Leadership Program is available at <http://www.cdphe.state.co.us/el/elp/index.html>.

In August, the Commission adopted amendments to § 1.2 of the solid waste regulations which modify the definition of “agricultural waste” and added a definition of “all-hazards event”. These definitions correspond to the implementing regulations being developed for promulgation by the Colorado Department of Agriculture, and the implementing guidance being developed by the Department. Specifically these definitions will allow the agricultural waste definition to include livestock lost due to an all hazard event or depopulation orders that are “not returned to the soils as a fertilizer or soil conditioners.” Agricultural waste is exempt from being regulated as a solid waste. This exemption will facilitate a more timely response action by the Colorado Department of Agriculture, in coordination with the Department, which will prevent the spread of disease, or the contamination of soil, surface water and groundwater.

Finally, the Commission considered amendments to section 1.5.2 of the solid waste regulations. This amendment included sections 14 through 17 in the list of regulatory sections that are eligible for a waiver from the Department.

### *February 16, 2010*

In February, the Commission adopted amendments to §§ 261.1 and 261.2 to codify the criteria to be used in determining when recycling of materials is legitimate, and provide state analogs to the applicable federal provisions of 40 CFR § 260.43 that were promulgated by EPA as part of the revisions to the Definition of Solid Waste (DSW) final rule published in the Federal Register on October 30, 2008 (73 FR 64668-64788).

Under the RCRA Subtitle C definition of solid waste, certain hazardous materials, if recycled, are not solid wastes, and therefore, are not subject to RCRA's "cradle to grave" management system. Because there are significant economic incentives to manage hazardous materials outside the RCRA regulatory system, there is a potential for some handlers to claim that they are recycling, when, in fact, they are conducting waste treatment, storage and /or disposal in the guise of recycling.

These amendments establish hazardous waste recycling legitimacy criteria as specific regulatory provisions for distinguishing legitimate recycling from "sham" recycling practices, and activities undertaken by an entity to avoid the requirements of managing a hazardous material as a hazardous waste. The legitimacy criteria are intended primarily to clarify in regulations the concept of "legitimate recycling". These amendments include specific regulatory provisions for determining when hazardous materials are recycled legitimately.

A legitimacy determination involves evaluating case-specific information to determine whether or not a material being recycled is in effect being used as a commodity, rather than as a waste. The legitimacy criteria of § 261.2(f) are intended to apply to a wide range of recycling scenarios across a wide array of industries. Although the Division expects that most, if not all, legitimate recycling practices will conform to each of the four criteria, the application of the criteria will require some subjective evaluation and balancing. Depending on the case-specific facts and circumstances, certain criteria may weigh more heavily than others in making legitimacy determinations. These determinations will require specific evaluation by the Division on what is considered "significant concentrations" of any hazardous constituents in accordance with § 261.2(f) (2) (iv) (A) & (B).

If the Division determines that a process is not legitimate recycling, the activity would be considered waste treatment or disposal and would thus be subject to regulation under the RCRA Subtitle C, if hazardous. Additionally, if the Division determines that the process is sham recycling, the recycler and the generator(s) of the recycled material may be subject to enforcement action.

The Commission also adopted amendments to § 260.34 to add standards and criteria for making non-waste confirmations as part of the revisions to the DSW final rule. These amendments establish a voluntary non-waste confirmation process into § 260.34 that provides persons with an administrative process for receiving a formal confirmation that their materials are not discarded and, therefore, not solid wastes when legitimately

reclaimed. Hazardous materials presented for a non-waste confirmation must be legitimately recycled and, therefore, must meet the legitimacy factors of § 261.2(f) described above.

Facilities may choose to continue to use the self-implementing portions of any applicable waste exclusions and, for the vast majority of cases, where the regulatory status of the hazardous material is evident, self-implementation will still be the most appropriate approach. In addition, facilities may continue to contact the Division to ask for informal assistance in making these types of non-waste confirmations. However, for cases where there is ambiguity about whether a hazardous material is a solid waste, these changes will provide regulatory certainty for both the facility and the Division.

The process for non-waste confirmations is not intended to affect any existing exclusion under § 261.4. The process is also not intended to affect any variance already granted under § 260.30 or other EPA or Division determination. Generators or reclaimers operating under an existing exclusion, variance or other EPA or Division determination do not need to apply for a formal non-waste confirmation under these changes.

Amendments to Parts 261 and 273 were adopted at the February 16, 2010 meeting. These amendments clarify the scope of the Part 273 regulations and amend the waste management standards for small and large quantity handlers of universal waste.

The Universal Waste Regulations (Part 273) include certain hazardous wastes that are commonly generated by a wide variety of generators, including retail and commercial businesses, government agencies and schools. The regulations include an alternative set of reduced management standards for batteries, pesticides, mercury-containing devices, aerosol cans, lamps, electronic devices and electronic components and were designed to reduce the regulatory burden on non-residential entities that generate these universal wastes. The rules are also intended to encourage recycling, while at the same time reducing the amount of hazardous waste items illegally sent to municipal solid waste landfills, thus reducing a potential threat to public health and the environment. Although these same wastes are not regulated as hazardous wastes if generated by residential consumers, the Division encourages households to recycle these wastes, or dispose of them through a local household hazardous waste collection event or facility.

Handlers of universal waste who disassemble electronic devices into components, or who generate other solid waste as a result of such activities must determine whether the separated components and/or other solid wastes exhibit a characteristic of hazardous waste. If the separated electronic components or other solid wastes generated exhibit a characteristic of hazardous waste, they must be managed in compliance with all applicable requirements of Parts 260 through 268, and Parts 99 and 100 of the hazardous waste regulations. Alternatively, separated electronic components generated may continue to be managed as universal wastes under Part 273. If the separated electronic components do not exhibit a characteristic of hazardous waste, they are not subject to the hazardous waste requirements, nor are they subject to the requirements of Part 273. This waste is, however, required to be handled in compliance with applicable federal, state, and local solid waste regulations.

Additional guidance on the Part 273 Universal Waste Regulations, and the management of electronic wastes, is available on the Division's website at <http://www.cdphe.state.co.us/hm/hw/hwpubs.htm>.

Finally, amendments to revise the K901 and K902 mustard agent listings in § 261.32(a) {Hazardous Waste from Specific Sources} and Appendix VII of Part 261 {Basis for Listing Hazardous Waste}, and add the K901, K902, P909 and P910 listings to the Treatment Standards for Hazardous Waste table in § 268.40 of the Colorado hazardous waste regulations were considered and adopted. These amendments also correct a typographical error in the header of the table in § 268.40.

Part 261, subpart B of the Colorado hazardous waste rules allow chemicals or other materials that are solid wastes to be added to the hazardous waste listings if the chemicals can be shown to meet any one of the criteria listed in § 261.11. In previous rulemakings (§ 8.30, § 8.46, and § 8.48), the Commission determined the reason for listing chemical munitions was that the chemical agents (HD and HT) were toxic as compared to the regulatory criteria for listing a hazardous waste found at § 261.11(a), and that there was adequate justification to add these mustard agents to the P-listed wastes found in § 261.33.<sup>3</sup> At the time of the original listings, the regulatory evaluation was focused upon the EPA determination that mustard was a reactive waste due to its propensity to rapidly react with water to form hydrogen sulfide as well as hydrochloric acid; that the toxicity of mustard agents met the definition of an acutely toxic hazardous waste found at both § 261.11 (a) and § 261.11 (a)(2); and that the Army alleged that it had conservatively chosen to apply the toxicity characteristic waste codes applicable to metal constituents (e.g., arsenic, barium, cadmium, chromium, lead, silver, selenium, and mercury).

At the time of these previous rulemakings, the Commission was acting upon available information, but better, more definitive, information is now available that indicates that other consequential constituents are present that warrant a revision of the initial listing actions. These amendments are more stringent than the federal regulations which do not include mustard agent listings related to military munitions. The Commission found that there was substantial evidence in the record that these rules are necessary to protect the public health and the environment of the state and these findings are based upon its evaluation of the public health and environmental information and studies contained in the rulemaking record, the Statement of Basis and Purpose, and testimony presented at the hearing.

### *Interpretive Rules and Administrative Penalties*

The Commission has the authority to issue interpretive rules and review administrative law judges' determinations regarding amounts of administrative penalties. At the May 2009 meeting, the Commission set an administrative penalty levied against Elizabeth Mining and Development, Inc., Joseph Casebolt and Steven Casebolt at \$405,000. A copy of the findings of fact and conclusion of law can be obtained from the Commission office. No interpretive rules were issued.

### *Other Activities and Forecast for 2010-2011*

All proposed rules that come before the Commission will continue to be examined for potential multimedia impacts, climate change reduction and pollution prevention opportunities, and regulatory necessity. The Commission encourages all interested parties to participate in its activities and welcomes any suggestions for

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<sup>3</sup> This was accomplished by adding waste codes P909 and P910 for the H and HD forms of mustard agent (CAS #505-60-2) and the HT form of mustard agent (CAS#505-60-2 and CAS # 63918-89-8), respectively.

amendments to the solid waste regulations and the hazardous waste regulations. Individuals or groups can be added to Commission's mailing list by contacting the Commission office.

### *Commission Information*

Commission information can be found at the following Internet address:

<http://www.cdphe.state.co.us/op/hwc/>

If you have suggestions or comments please let us know.

For more information on the Colorado Solid and Hazardous Waste Commission or its Annual Report, please call Karen Osthus of the Colorado Department of Public Health and Environment at (303) 692-3466 or Laurie Perila at (303) 692-3467.