



# Compliance Assurance Manual

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Washington State Department of Ecology

Olympia, Washington

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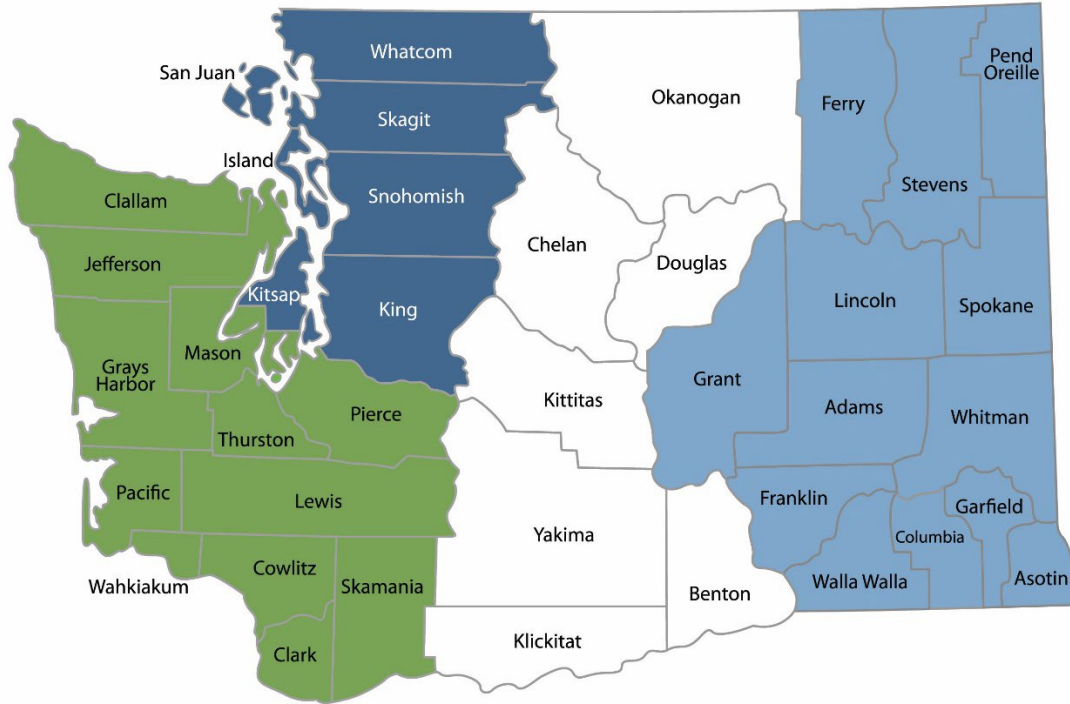
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<sup>1</sup> <http://www.ecology.wa.gov/contact>

# Department of Ecology's Regional Offices

## Map of Counties Served



<b>Southwest Region</b> 360-407-6300	<b>Northwest Region</b> 206-594-0000	<b>Central Region</b> 509-575-2490	<b>Eastern Region</b> 509-329-3400
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Region	Counties served	Mailing Address	Phone
<b>Southwest</b>	Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Mason, Lewis, Pacific, Pierce, Skamania, Thurston, Wahkiakum	PO Box 47775 Olympia, WA 98504	360-407-6300
<b>Northwest</b>	Island, King, Kitsap, San Juan, Skagit, Snohomish, Whatcom	PO Box 330316 Shoreline, WA 98133	206-594-0000
<b>Central</b>	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
<b>Eastern</b>	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	4601 N Monroe Spokane, WA 99205	509-329-3400
<b>Headquarters</b>	Across Washington	PO Box 46700 Olympia, WA 98504	360-407-6000

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DEPARTMENT OF  
**ECOLOGY**  
State of Washington

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## Abstract

Ecology's mission is to protect, preserve, and enhance Washington's environment for current and future generations.

One of the main strategies we use to accomplish our mission is to ensure those we regulate comply with the state's environmental laws and rules. Where we find instances of noncompliance, the state Legislature gives us authority to take administrative enforcement actions and assist the Attorney General's (AG) Office or the Environmental Protection Agency (EPA) in conducting criminal investigations, or both. We do not take enforcement lightly. We must treat all people with respect regarding enforcement actions.

We use education, compliance assistance, and administrative enforcement actions to gain compliance with environmental laws. We might refer intentional and serious violations to the AG Office or EPA for criminal prosecution.

Ecology's Enforcement Coordination Team developed the procedures outlined in this manual to help Ecology staff consistently and fairly enforce the state's environmental laws to get compliance.

It is important to note that the procedures described in this manual are guidelines, not rules. It may be appropriate, justified, and acceptable to deviate from these guidelines at times. The person who has signature authority for the action can approve deviations from these guidelines.

To accommodate differences between our various environmental programs and ensure efficient and best use of resources, each program has developed program specific guidance. Each program's guidance addresses enforcement of the specific laws and rules administered by that program. Program specific guidance is supplemental to and under the general umbrella of this agency-wide guidance.

This manual and each program's enforcement guidance are available on Ecology's intranet site, SharePoint, and upon request.



# Chapter 1: Ecology's Enforcement Principles and Procedures

## Overview

What is our role of “enforcement”? Enforcement is a tool for protecting public health and the environment. Ecology strives to address pollution and public health burdens caused by violations of environmental laws throughout Washington and in the state’s most overburdened communities. When a business or individual pollutes Washington’s land, air, or water we enforce federal and state laws and rules to help change behavior and deter future violations. When warranted, Ecology will take civil or criminal enforcement action against violators of environmental laws.

Equitable enforcement of environmental rules requires carefully matching the environmental and public health impacts of the violation to the magnitude of the enforcement action. Often, enforcement helps “level the economic playing field” by removing economic advantages when a company does not comply with environmental laws and rules. However, these same actions may affect local economies to some degree.

Most environmental regulations are self-implementing. This means knowledge of and voluntary compliance with environmental rules by the regulated community is required and expected. This includes all rules as codified in the Washington Administrative Code (WAC) and, in the case of federally delegated programs, in the Code of Federal Regulations (CFR).

Since many rules are complicated, one of our roles is to educate the regulated community and help them understand how to comply. Each of our environmental programs use a range of tools as our roles move from educator to enforcer.

We achieve voluntary compliance through:

- Education and compliance assistance.
- Inspections.
- On-site compliance visits.

When someone we regulate violates a law or rule for the first time, we must either waive enforcement of the violation or give them time to correct it. This only applies to small businesses, and does not apply to federally delegated programs.

When we cannot get voluntary compliance through compliance assistance efforts, we may use a range of increasingly strict enforcement tools. This range runs from notices to administrative enforcement actions and, when appropriate, criminal prosecution. Effective and equitable enforcement requires using the right tool for the violation.

## Your role in enforcement

Our enforcement actions must be:

- Based in fact and law.
- Well documented.
- Appropriate to the violation.
- Issued professionally and fairly.

Professionalism is required in all our interactions with the public and the regulated community. The way we first approach a facility, business, or other private property sets the tone for later interactions, including enforcement. So, we should enter a facility, business, or other private property in a professional and respectful manner.

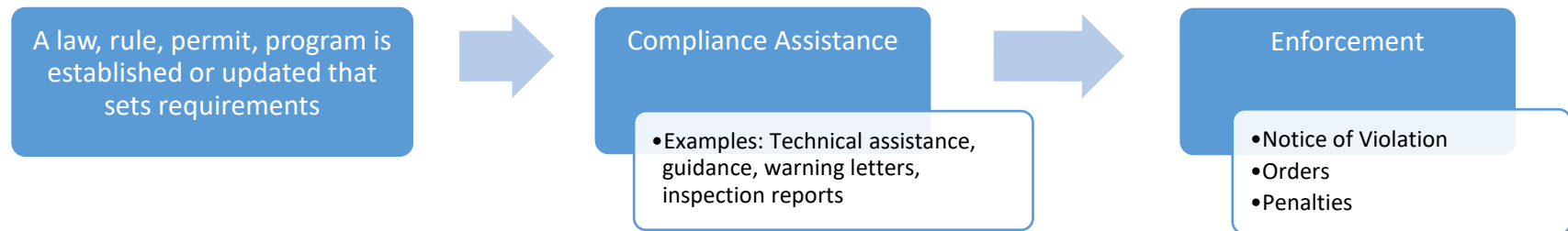
Our policy is to enter facilities, businesses, or other private properties after receiving consent, or obtaining a court order, if we do not receive consent, see [Executive Policy 22-05<sup>2</sup>](#) for more information on accessing private property.

The following section summarizes these principles and is also in [Appendix A](#).

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<sup>2</sup>POL 22-05 <http://teams/sites/EXEC/policies/PolicyDocuments/POL22-05.pdf>

## Compliance Assistance and Enforcement at the Department of Ecology



### Philosophy and Approach

We know that regulated entities want to, and most often do comply with environmental requirements, such as laws, rules, permits, etc. We understand that when compliance can't be achieved, this can be for a variety of reasons. To help reach compliance we use reasonable discretion, within our authority, in how we employ escalating levels of enforcement with the following in mind:

- Seriousness of the violation (such as, public health and environment impacts)
- Violations in overburdened communities
- Whether it was a knowing and willful violations of the requirements
- History and responsiveness of the violator
- Resources available for compliance including financial assistance

In general, we start with compliance assistance. However, in some cases where there is an immediate threat or harm to the environment or public health (an oil spill for example), it may be appropriate to move directly to enforcement. Further, we may move to enforcement when the violation involves areas with environmental justice considerations, such as low-income populations, communities of color, and indigenous populations.

## Compliance Assistance

One of our main agency approaches is to provide compliance assistance which includes support, actions, and other communications to help entities reach compliance. Support and action can include:

- Technical assistance: Calls, visits, letters, emails, meetings, guidance documents, checklists, tip sheets, and posters
- Inspection(s) and report describing the results of the inspection
- Corrective action letters (sometimes called Notices of Correction, Non-compliance letters)

## Enforcement

When enforcement takes place, we inform the entity that caused the non-compliance, just as we would when we provide compliance assistance. Enforcements are actions defined in statutes that authorize us to enforce the regulatory requirements that we are implementing. Enforcement actions do not include those actions (for example compliance assistance) authorized under in RCW 43.05 Technical Assistance Programs<sup>3</sup> or other technical assistance directed in the program's authorizing statutes. (For example in RCW 90.03.605).

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<sup>3</sup> Chapter 43.05 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=43.05>

## Role of Environmental Justice & Civil Rights (Title VI) in Enforcement

As part of Ecology's commitment to environmental justice (EJ), and to meet federal non-discrimination obligations under Title VI of Civil Rights Act of 1964 (Title VI), Ecology strives to strengthen communication and transparency with affected communities and the public. We rely on best practices to reach a diverse audience and to address barriers to public involvement such as:

- Limited English proficiency
- Literacy
- Access to technology and internet
- Limited education and understanding of the subject
- Geographic isolation
- Limited trust and consultation fatigue

Communities of color, Tribes, indigenous peoples, and low-income populations are disproportionately exposed to environmental harms and risks in their communities, including proximity to environmental hazards and industrial facilities, and water and air pollution. Environmentally overburdened communities often experience poorer health outcomes and other adverse impacts to their social, economic, and community well-being. Planning for culturally effective and accessible communication better ensures information about environmental and human health impacts reaches affected communities, and supports public engagement that can help inform our work and decision-making.

Meaningful engagement efforts span agency programs and activities, including compliance assistance and enforcement actions. We will continue to improve efforts to share information and gather feedback about compliance assistance and enforcement activities, and find ways to help communities better understand the enforcement process. When appropriate, we will inform communities about enforcement actions and opportunities for the public to engage during the appeal process. Through these efforts, we aim to better inform communities about actions that may affect their well-being, and support efforts to increase the number of settlements that provide benefits to the impacted community (e.g., environmental monitoring, reducing exposure to pollution, and posting data online).

# Chapter 2: Enforcement Options

## Overview

There are two paths for enforcing environmental laws and rules, civil and criminal.

## Civil enforcement

We can pursue civil enforcement through the courts or administratively through action by Ecology. We do most of our enforcement through administrative civil actions.

Civil enforcement is an administrative action that uses state civil authority to direct a facility, site, or property owner or operator to comply with state law or rule. Civil enforcement is based on:

1. A violation of, or a potential to violate, state law or rule.
2. Our authority to enforce that law or rule.

We must always issue enforcement actions in writing. In cases where we give verbal direction in the field, to stop or change an activity, we must always follow up in writing to document the issues and directions given.

Some laws that give us the authority to issue enforcement actions make that authority discretionary (e.g. 70A.300.120),<sup>4</sup> and others require action (e.g. RCW 90.48.144).<sup>5</sup> Some laws require us to notify the violator that violations exist, or the substantial potential to violate exists, before we issue an Order requiring compliance (e.g. RCW 90.48.120).<sup>6</sup> All three laws require us to first make a determination that a violation occurred, or may occur. We must support our determination with appropriate documentation (see Ecology's Investigator Guidance Manual).<sup>7</sup>

For more information, see the chapter on [Civil Enforcement](#).

## Civil Penalties

Civil penalties may be issued after other enforcement tools we have tried are not successful in returning a violator to compliance.

Civil penalties are specifically authorized by law. The laws set maximum penalty amounts, usually on a per day and/or per violation basis. Some laws also set minimum amounts. "Penalties" are civil monetary assessments while "fines" are criminal monetary assessments.

The purpose of a penalty is to:

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<sup>4</sup> Chapter 70.A.300.120 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=70A.300.120>

<sup>5</sup> Chapter 90.48.144 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=90.48.144>

<sup>6</sup> Chapter 90.48.120 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=90.48.120>

<sup>7</sup> Ecology's Investigator Guidance Manual

[http://partnerweb/sites/EXEC/ComplianceEnforcement/Documents/investigators\\_manual.pdf](http://partnerweb/sites/EXEC/ComplianceEnforcement/Documents/investigators_manual.pdf)

- Change the behavior of the specific violator.
- Provide an economic incentive to comply.
- Act as a deterrent for similar non-compliant behavior by the regulated community in general.

Most of our penalties are governed by RCW 43.21B.300.<sup>8</sup> Penalties may take the form of:

- Notices of Penalty.
- Field citations.
- Other legally authorized administrative means of imposing monetary penalties against a facility or individual.

RCW 34.05.110<sup>9</sup> applies to a penalty issued to a small business for a first-time paperwork violation or violation of other rule or law. Before issuing a penalty, you should determine whether the recipient is a small business as defined in RCW 34.05.110.

Penalty recipients must appeal a penalty within the timeframes provided by law, or lose their appeal rights. If they fail to pay within the time allowed, the penalty becomes due and payable.

We track penalties in the Docket Management System (DMS), but each program should also track the penalties it issues.

For more information, see the chapter on [Civil Penalties](#).

## Criminal enforcement

We can pursue criminal enforcement if evidence of criminal activity is noted. When that happens, it may be appropriate to refer the action for investigation by:

- The State Attorney General's Office.
- The Environmental Protection Agency.
- Another agency with authority to prosecute.

Unlike civil violations, when Ecology investigates and prosecutes environmental crimes, we must have documentation that shows a violation of the law, and the violator's state of mind. Usually, the required mental state, under state law, is that the person committed the violation knowingly, willfully, or intentionally. Criminal prosecution also has a higher burden of proof to establish that the violator committed a crime.

In addition to specific environmental crimes, criminal prosecution may also involve related crimes. For example, any fraudulent reporting, false testimony, or fraudulent recordkeeping may also be

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<sup>8</sup> Chapter 43.21B.300 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=43.21B.300>

<sup>9</sup> Chapter 34.05.110 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=34.05.110>

considered a criminal action. Most Ecology programs have provisions authorizing criminal sanctions for certain violations. Criminal violations are not tracked in Ecology's Docket Management System.

For more information, see the chapter on [Criminal Enforcement](#).

Civil and criminal actions may happen simultaneously. When carefully coordinated, these are called parallel proceedings.



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# Chapter 3: Issuing an Enforcement Action

## Overview

Below are the basic steps Ecology takes when we issue an enforcement action:

1. Write the Recommendation for Enforcement (RFE).
2. Check to see if enforcement exceptions apply per RCW 34.05.110<sup>10</sup> and RCW 43.05.<sup>11</sup>
3. Determine if federal or local laws affect Ecology's enforcement.
4. Get approval from the manager with signature authority for enforcement actions.
5. Alert Regional Communication Manager.
6. Prepare the recommended enforcement action.
7. Review and approval by Regional and Executive Management (for penalties that are in excess of \$5,000, significant, or controversial.). See the chapter on [Enforcement Communications Plans](#).
8. Alert the violator an enforcement action is coming.
9. Serve the violator the legal document(s), and send copies per boilerplate instructions.

## Write the Recommendation for Enforcement

The Recommendation for Enforcement (RFE):

- Documents the evidence that supports issuing a Notice, Penalty or Order.
- Ensures the reasons for issuing an enforcement action meet legal criteria.
- Helps explain the action to program management, the violator, an adjudicative body, the media, interested parties, and the public.

The RFE is a public document (including drafts and supporting documentation). It is subject to public disclosure, and may become evidence in an appeal challenging our enforcement decision. It is important for the document to contain a sound rationale and supporting documentation for the recommended enforcement action and be free of subjective opinions. See the chapter on [Records and Public Disclosure at a Glance](#).

See your program's boilerplate to see what should be included in the RFE.

The following information should be included in the RFE:

- An executive summary for long or complicated recommendations.

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<sup>10</sup> Ibid.

<sup>11</sup> Chapter 43.05 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=43.05>

- Background information regarding the location of the violation, e.g., name, address, type of business, contact name, etc.
- Ecology representative contact information.
- Efforts made by Ecology to obtain voluntary compliance, e.g., technical assistance visits, educational material, warning letters or documented verbal warning, communications such as emails, notices and an opportunity to correct the violation(s) as required in Chapter 43.05 RCW, inspection reports or permits. Any other compliance assistance efforts.
- The nature of the violation (who, what, where, why, when, and how), including potential impacts and threats to human health or the environment, such as contamination of water, ambient air standards, worker exposure, or other harm or risk of harm to human health or the environment.
- Violations in overburdened communities as determined by Ecology staff using existing tools and other data.
- If applicable and where possible, an estimate of the economic benefit to the violator from noncompliance.
- Citations of the laws and rules violated.
- How and when the violation was discovered.
- Photographs, sampling results, and other documentation related to the violations.
- Compliance history of the violator, with an emphasis on similar types of violations that were the subject of prior compliance assistance or enforcement actions.
- The actions required to return to compliance.

Check to see if enforcement exemptions apply (RCW 34.05.110 and RCW 43.05). See the chapter for [Paperwork Violations, Technical Assistance Exemptions, and Notice of Correction](#).

## Determine if federal, state and other relevant laws affect our enforcement

Sometimes a case will present violations of federal, state, and even local laws or rules. Federal action may limit, or preempt, your ability to enforce state environmental laws and rules. State action may limit or preempt local enforcement. Under the Clean Water Act<sup>12</sup>, state action precludes federal civil enforcement. When presented with such a case, you should consult with your program's Assistant Attorney General.

Examples of some federal laws and local codes are provided below. This list is not meant to be comprehensive:

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<sup>12</sup> Clean Water Act <https://www.epa.gov/laws-regulations/summary-clean-water-act>

- Federal laws relating to interstate commerce may limit our ability to take actions that restrict transport of goods and services across state lines.
- Federal laws, such as the Atomic Energy Act,<sup>13</sup> may limit our actions regarding mixed waste management (mixed waste being a solid waste that is both hazardous waste and radioactive).
- Local fire codes may conflict with some hazardous waste storage requirements.

The Endangered Species Act (ESA) is an example of a federal law that may affect our actions and should be considered when addressing violations of state or federal laws or rules.

The U.S. Fish and Wildlife Service (USFWS), within the U. S. Department of the Interior, and the National Marine Fisheries Service (NMFS), within the U. S. Department of Commerce, share responsibility for administering the ESA.

The ESA also allows citizen suits to enforce its requirements, similar to the citizen suit provisions in the Clean Water Act. We do not have the authority to enforce the provisions of the ESA. Remember that any enforcement action we take must be clearly within its authority under state and federal law.

## Get approval from the manager with signature authority for enforcement actions

A manager in your program, delegated with signature authority for the recommended action must approve the RFE, and the recommended enforcement action. This authority is delegated by the Director, and documented in the Signature and Authority Matrix (Attachment A to Ecology Policy 17-01).<sup>14</sup> Each program’s section of the Matrix identifies who in the program may approve and sign key documents including enforcement actions.

Before you prepare the recommended enforcement action, you must brief the manager who will sign the action. It is important to remember the RFE is only a recommendation. The approving manager will determine the course of action. They may seek input from others before giving approval to proceed and may recommend a different course of action. In some cases, if the actions you are recommending are very complex or controversial, it may be a good idea to ask an Assistant Attorney General for help in preparing the recommended enforcement action.

Once the manager approves a course of action, you need to prepare the enforcement action. Some programs have a “Peer Review” process for their enforcement actions. The goal is to get constructive feedback on the basis of the action and the prepared paperwork. Additional briefings for Program, Regional, and Executive Management may be required.

## Alert the Communication Manager

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<sup>13</sup> Atomic Energy Act [https://www.epa.gov/laws-regulations/summary-atomic-energy-act#:~:text=The%20Atomic%20Energy%20Act%20\(AEA,of%20the%20AEA%20has%20been](https://www.epa.gov/laws-regulations/summary-atomic-energy-act#:~:text=The%20Atomic%20Energy%20Act%20(AEA,of%20the%20AEA%20has%20been)

<sup>14</sup> POL 17-01 <http://teams/sites/EXEC/policies/PolicyDocuments/POL17-01.pdf>

It is Ecology's policy to publicize significant and/or controversial enforcement actions (see Executive Policy 20-03).<sup>15</sup> Some actions may require a press release and an opportunity for the recipient to make factual corrections and provide a quote. Controversial actions may require a more in-depth communication plan and coordination with Ecology's Regional and Executive Management or even the Governor's Office. Therefore, it is important to coordinate early and often with your Communication Manager.

## Prepare the recommended enforcement action

### Boilerplates

You must use your program's enforcement boilerplates to prepare the recommended enforcement action – Find the most current boilerplate on the ECT SharePoint site.<sup>16</sup>

### Docket number

We use docket numbers to track enforcement actions in Ecology's Docket Management System (DMS). If you are issuing an enforcement action such as a Notice, Order, or Penalty you must get a docket number from your Docket Coordinator. We don't assign docket numbers to warning letters and letters of non-compliance. However, some programs do require docket numbers for other certain actions.

A list of action types that require a docket number and a list of Docket Coordinators is on the DMS SharePoint page.<sup>17</sup>

### Detail the violations

It is important to include enough detail in the enforcement action to describe the nature of the violation(s). Penalties are required to state the violations with "reasonable particularity" (see RCW 43.21B.300).<sup>18</sup>

Penalties and other enforcement actions should provide the recipient and other interested parties (e.g. adjudicative body, attorneys, legislators, the media, and the public) enough information to:

1. Identify the violator.
2. Locate where the violation occurred.
3. Identify the applicable laws and rules.
4. Present evidence showing how those laws and rules were violated.
5. Identify Ecology's authority to issue the action.

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<sup>15</sup> POL 20-03 <http://teams/sites/EXEC/policies/PolicyDocuments/POL20-03.pdf>

<sup>16</sup> Enforcement boilerplates <http://partnerweb/sites/EXEC/ComplianceEnforcement/Pages/Boilerplates.aspx>

<sup>17</sup> Docket management System <http://partnerweb/sites/EXEC/ComplianceEnforcement/Pages/DMS.aspx>

<sup>18</sup> Chapter 43.21B.300 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=43.21B.300>

## Review and approval by Regional and Executive Management

Enforcement should be a regular topic at your Program Management meetings. Program Management teams must be aware of all enforcement and compliance efforts within the program.

Regional Managers must be informed of all penalties and potentially controversial enforcement actions that may affect their region. For penalties of \$5,000 or more, Regional Managers must review and approve the penalty, and may request the Executive Leadership Team be briefed and provide input.

Program, Regional and Executive management teams must be informed and, if asked, briefed on all penalties of \$10,000 or more, and potentially controversial enforcement actions. Regional and Executive leadership teams must approve the basis, calculation, timing, and communications of a penalty of \$10,000 or more.

For more guidance, see [Appendix B – Best Practices for Enforcement Communication](#).

## Alert the violator an enforcement action is coming

No enforcement action should come as a surprise to Ecology staff or to the recipient of the enforcement action. You should inform the regulated party that an action is coming by:

- Calling them the day you issue the enforcement action.
- Emailing them a copy.
- Explaining the reasons for the enforcement action.

## Serve the violator the legal document(s) and send copies per boilerplate instructions

Enforcement actions must be properly served on the recipient to be legally enforceable. When a law or rule specifically authorizes an enforcement action (Notices, Orders, or Penalties) the law will also state how that enforcement action must be served.

Most often, service is accomplished by Certified Mail or personal delivery. RCW 1.12.060<sup>19</sup> also allows use of Certified Mail when Registered Mail is required by the authorizing law. The same law allows an electronic record of receipt, from the United States Post Office, as proof of delivery.

Enforcement Boilerplates have instructions on how to serve the enforcement action. In some cases, it may be necessary to have the papers served by a Sheriff or process server. In any case, you must get a receipt documenting delivery of the action. This provides you evidence the action was received on a specific date.

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<sup>19</sup> Chapter 1.12.060 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=1.12.060>

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# Chapter 4: Paperwork Violations, Technical Assistance Exemptions, and Notice of Correction

## Overview

When you consider issuing an Administrative Order, Penalty, and possibly other actions, be aware the following exemptions may apply and you must consider them first. Check your program's Compliance Assurance Manual chapter to be sure.

## Does the first time paperwork violation law apply?

In 2010, the legislature amended RCW 34.05.110,<sup>20</sup> the 2009 provision in the Administrative Procedure Act that requires agencies to waive "first time paperwork violations" by small businesses unless an exception applies. The amended law now requires that agencies give small businesses a copy of the law or rule they are violating and an opportunity to correct violations before the agency may impose penalties, or other administrative sanctions, unless an exception applies. The 2010 amendment became effective on June 10, 2010, and is not limited to paperwork violations.

The 2011 Legislature again amended RCW 34.05.110 to require agencies to provide the small business seven days within which to correct a violation before issuing a penalty or other administrative sanction.

Before proceeding with enforcement for a paperwork violation, you should answer the following questions and document your answers in the RFE:

1. If you work in a Program with delegated authority or that receives federal funds, has the Director determined that compliance with RCW 34.05.110 would violate the terms of the delegation?
2. Is the recipient a small business?
3. Is the violation a first-time paperwork violation?
4. Does the recipient qualify for an opportunity to correct before issuing a penalty or administrative sanction?

## Exemptions for programs with delegated authority

Programs with delegated federal enforcement authority or that receive federal funds may be exempt from the limitations of RCW 34.05.110 if the Director of Ecology determines that the requirements of the law "are in conflict with federal law or program requirements, federal requirements that are a prescribed condition to the allocation of federal funds to the state, or the requirements for eligibility of employers in this state for federal unemployment tax credits".

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<sup>20</sup> Ibid.



If your Program has not received a written determination from the Director, consult with your Assistant Attorney General to determine whether this exception might apply to a class of violations or to specific violations.

## Identifying a small business

A small business is “a business with two hundred fifty or fewer employees or a gross revenue of less than seven million dollars annually as reported on its most recent federal income tax return or its most recent return filed with the department of revenue”.

### How to check the company’s number of employees?

A number of resources are available to determine the number of employees at a company:

1. Program data – check your program’s data and/or records on the company, or prior enforcement actions.
2. Search for the company on “Workforce Explorer” available through Washington’s Employment Security Department website.<sup>21</sup>
3. If the company is a publicly traded company, you may search the Securities and Exchange Commission filings through their free search engine, EDGAR.<sup>22</sup>

### How to check the company’s gross income?

If a company has more than 250 employees, you must determine the company’s gross income. Ecology receives semi-annual data from the Department of Revenue (DOR) on companies that pay taxes in Washington. To access this information, you need to work through Financial and Administrative Systems section of Ecology’s Information Technology Services Office. Before requesting income data, you need to know:

1. The company’s UBI number or Tax ID.
2. The company’s name. Searching by company name is not recommended unless you know how it is listed in the DOR database. An improper spelling may result in a list of companies with similar names, the wrong company, or no company.

## Paperwork violation definition and examples

A “paperwork violation” is a violation of:

1. A requirement to provide information to an agency that the agency is mandated to collect.
2. A requirement for a small business to collect, post, or retain information.

Some examples of paperwork violations include:

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<sup>21</sup> Washington’s Employment Security Department <https://esd.wa.gov/labormarketinfo/occupations>

<sup>22</sup> EDGAR <https://www.sec.gov/edgar/searchedgar/companysearch.html>

- Submission of emissions data to an agency required to compile emissions data.
- Posting of a professional license at the licensee’s place of business.
- Submission of monthly or quarterly reports to the regulating agency.
- Retention of certain business records at the place of business for inspection by agency officials.
- Failure to submit a required plan or report to the regulating agency, when required by law or rule.

Some examples of actions that do not constitute paperwork violations, although they may involve paperwork, include:

- Failure to obtain or maintain a permit.
- Failure to create a required plan that applies to the place of business (compare to failure to submit above).

An example of an activity that may or may not be a paperwork violation is the failure to monitor or test as required by law or rule. Consult with your Assistant Attorney General to determine whether the failure to monitor or test under your agency’s statutes or regulations meets the definition of a “paperwork violation.”

### Paperwork violation waiver

If the violation is a first-time violation by a small business, and an exception does not apply (see below), you must waive the penalty or order and require correction of the violation within a reasonable time. If the small business cannot correct the violation, you must still waive the penalty or order.

### Opportunity to correct paperwork violation

RCW 34.05.110 requires all state agencies to provide small businesses at least seven calendar days to correct a violation unless correction is not possible or a third party who made the initial complaint would be harmed if time to correct was allowed. You do not have to allow an opportunity to correct if an exception applies (see below).

### Exceptions to paperwork violation waiver and opportunity to correct

If the violation meets one of the exceptions described below, you do not have to waive the first-time paperwork violation or provide an opportunity to correct the violation. The exceptions are:

1. The agency head determines that the effect of the violation or waiver presents a direct danger to the public health, results in a loss of income or benefits to an employee, poses a potentially significant threat to human health or the environment, or causes serious harm to the public interest.
2. The violation involves a willful or knowing violation.

3. The violation is of a requirement concerning the assessment, collection, or administration of any tax, tax program, debt, revenue, receipt, a regulated entity's financial filings, or insurance rate or form filing.
4. The requirements of this section are in conflict with federal law or program requirements, federal requirements that are a prescribed condition to the allocation of federal funds to the state, or the requirements for eligibility of employers in this state for federal unemployment tax credits, as determined by the agency head.
5. The small business committing the violation previously violated a substantially similar requirement.
6. The owner or operator of the small business committing the violation owns or operates, or owned or operated a different small business which previously violated a substantially similar requirement.
7. The facility is federally owned.

You should consult your supervisor, program guidance, and your program's Assistant Attorney General to determine whether these exceptions apply.

## Does the Technical Assistance Program law apply?

If a small business requests a technical assistance visit (RCW 43.05 030)<sup>23</sup> and Ecology accepts the request, we may be limited in how we can pursue compliance. The same is true if Ecology offers a technical assistance visit under RCW 43.05. However, this does not apply to all programs, so staff need to check the specific requirements of their program.

The law defines technical assistance as including:

- Information on the laws, rules, and compliance methods and technologies applicable to the regulatory agency's programs.
- Information on methods to avoid compliance problems.
- Assistance in applying for permits.
- Information on the mission, goals, and objectives of the program.

If you observe or document violations during a technical assistance visit under RCW 43.05 you cannot proceed directly to enforcement using an order and penalty (except under certain circumstances); you must issue a Notice of Correction first. Then, if there is not voluntary compliance within the timeframes specified in the Notice, you may pursue enforcement actions. Be sure to refer to the rule for exceptions that may apply.

### Notice of Correction:

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<sup>23</sup> Chapter 43.05.030 RCW <https://apps.leg.wa.gov/rcw/default.aspx?Cite=43.05.030>

The goal is to achieve voluntary compliance with state environmental laws and rules. Agency policies and legislative intent directs staff to provide compliance assistance to the regulated community before initiating enforcement actions. However, in the absence of voluntary compliance, Ecology has the authority to require compliance. See the chapters on [Enforcement Options](#) and [Issuing an Enforcement Action](#).

RCW 43.05.060<sup>24</sup> prescribes a Notice of Correction (NOC) for violations of state environmental regulations that do not meet the exceptions of RCW 43.05.070<sup>25</sup> and are not found during a technical assistance visit.

Programs with delegated authority cannot use an NOC to enforce federal laws (e.g., Resource Conservation and Recovery Act (RCRA),<sup>26</sup> Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>27</sup> Clean Water Act (CWA),<sup>28</sup> and Clean Air Act (CAA).<sup>29</sup>

Technical assistance visits are considered compliance assistance when they take the form of inspections that provide assistance to the regulated community about various laws, regulations, and technical issues related to compliance. Technical assistance visits also have a specific definition in Chapter 43.05 RCW. Typically, technical assistance is the bulk of work that Ecology staff do in their daily activities. As it relates technical assistance visits, it takes on additional meaning and requirements. Almost all statutes that authorize Ecology to implement and enforce state law include descriptions of the agency's authority to conduct compliance and enforcement actions. During compliance inspections, Ecology staff regularly provide what is frequently called "technical assistance." Ecology staff often have a high level of technical knowledge and education, and a good understanding of legal and policy issues as well. Coupled with inspections and experience with many facilities, operations and sites, this technical proficiency and knowledge can be very helpful to regulated facilities.

## When to issue a Notice of Correction

It is appropriate to issue a Notice of Correction when a violation:

1. Has not been subject to prior enforcement or notice for the same or similar violations of the same law or rule.
2. Does not raise a likelihood of placing a person in danger of bodily harm, or of causing more than minor environmental harm, or of causing more than \$1,000 worth of physical damage to property.

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<sup>24</sup> Chapter 43.05.060 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=43.05.060>

<sup>25</sup> Chapter 43.05.070 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=43.05.070>

<sup>26</sup> Resource Conservation and Recovery Act <https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act>

<sup>27</sup> Comprehensive Environmental Response, Compensation, and Liability Act <https://www.epa.gov/superfund/superfund-cercla-overview>

<sup>28</sup> Clean Water Act <https://www.epa.gov/laws-regulations/summary-clean-water-act>

<sup>29</sup> Clean Air Act <https://www.epa.gov/laws-regulations/summary-clean-air-act>

A Notice of Correction must be in writing and must:

1. Describe the condition or conditions in violation.
2. Provide the text of the law and/or rule violated.
3. Describe how compliance may be achieved.
4. Provide a reasonable time to achieve compliance.
5. State the name and contact information of the person to be contacted if sending a request for more time.
6. Describe the process for getting an extension of time to comply.
7. State how and where to get technical assistance if needed.

Be sure to use your program's NOC boilerplate.

A business can request more time to comply with the NOC at least five days before the compliance deadline. Ecology must respond to requests in writing and we are not required to consider the requirements of the first time paperwork violation law (RCW 34.05.110). NOCs do qualify as prior notices of violation under the law's exceptions.

# Chapter 5: Civil Penalties

## Overview

Penalties are used to correct environmental regulatory violations and to deter future violations. It is not the function of a civil penalty to punish the violator. In nearly all cases, we issue civil penalties after other enforcement tools we have tried are not successful in returning a violator to compliance.

The purpose of a civil penalty is to:

- Change the behavior of the specific violator.
- Provide an economic incentive to comply.
- Act as a deterrent for similar non-compliant behavior by the regulated community in general.

## Determine the appropriate penalty amount

You need to take into account three factors when you determine the penalty amount. These three factors are based on the history of what the Environmental and Land Use Hearings Office (ELUHO)<sup>30</sup> boards use to determine if the penalty amount assessed was reasonable.

The three factors are:

1. The nature of the violation.
2. The prior behavior of the violator.
3. Actions taken by the violator to correct the problem.

### Nature of the violation

The most significant factor is the nature of the violation. This factor involves both the gravity and conditions of the violation. You should consider the specific criteria below:

Severity of the violation in terms of public health and/or environmental impact. These criteria may be addressed differently by the courts or the boards in different types of cases. Some legal requirements apply a strict liability standard for violations. You should consult with an Assistant Attorney General for advice on how this standard applies to your specific program.

- Violations in overburdened communities.
- Magnitude of the violation in terms of type or amount of pollutant and resources affected, and the duration and/or number of specific violations.
- Whether the violation was due to negligence, recklessness, or was intentional.

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<sup>30</sup> Environmental and Land Use Hearings Office <https://www.eluho.wa.gov/Home/Index>

- Precautions taken to prevent the violation.
- The purpose of the law they are violating.
- Financial incentives to violate requirements or to continue violation.

### Prior behavior of the violator

It is essential to have written documentation of when you first saw the violation and when you gave the violator the opportunity to make corrections. The courts and ELUHO boards consider the specific history of the facility cited.

You should consider the specific criteria below:

- Record of similar violations or a pattern of violations indicating general disregard of environmental laws and rules.
- Past efforts by Ecology to provide notice of the violation, and applicable corrective actions. Prior Warnings, Notices, Orders, or Penalties addressing the same or similar violations document Ecology efforts to bring the violator into compliance.

### Remedial Actions by the violator

Remedial actions should be considered because the primary purpose of monetary penalties is to eliminate the economic benefit of noncompliance by the violator and ensure a level playing field for the general regulated community. Remedial actions that cost as much or more than a penalty may be considered in determining the penalty amount. Remedial actions that have an ongoing effect in ensuring compliance in the future also may be considered.

You should consider the criteria below:

- Degree of cooperation in working toward compliance.
- Timeliness and appropriateness of corrective actions taken.
- Compensation paid or agreed to for damages to public resources.

## Economic benefit

The courts and ELUHO Boards may also consider whether the violation resulted in an economic benefit to the violator. The EPA offers a web-based model, BEN, which quantifies the economic benefit of a violation.<sup>31</sup> Other economic models offered by EPA calculate ability to pay or costs of a proposed Supplemental Environmental Project.

Consult your program's guidance to determine how to or whether you must use the EPA models.

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<sup>31</sup> BEN <https://www.epa.gov/enforcement/penalty-and-financial-models>

## Paying penalties

Penalties become due and payable to Ecology in one of three ways:

1. The violator does not appeal within 30 days after receipt of the penalty.
2. The violator appeals the penalty to the Pollution Control Hearings Board (PCHB),<sup>32</sup> within 30 days after receiving the penalty, and loses. If the violator does not appeal the decision, the penalty becomes due and payable within 30 days from the date the PCHB mails the Order.
3. The violator appeals the penalty, and before the decision, agrees to a Settlement Agreement. The Settlement Agreement specifies the manner and amount of penalties paid to Ecology.

If the payment is received by the due date, the Fiscal Office notifies the Ecology staff person responsible for issuing the penalty, and the staff responsible for updating the Docket Management System and Fiscal databases.

## Appealing penalties

If a violator wants to appeal a penalty, they must send their appeal to Ecology's Appeals Coordinator who will end copies to the Ecology staff person who issued the penalty and the Fiscal Office. If you receive an appeal directly, please contact both the Appeals Coordinator and the Fiscal Office to ensure they received copies. When the Fiscal office is notified of an appeal, they flag the eHUB system. For more information, see the chapter on [Appeals](#).

## Overdue penalties

If the violator fails to pay the penalty the Fiscal Office will start tracking it in their system and will notify the staff person who issued the penalty.

The staff person can ask the Fiscal Office to either:

- Refer the penalty to the AGO.
- Submit the penalty to collections.

The Fiscal Office will send a demand letter to the violator stating they will turn over the account to a collection agency or to the Attorney General's Office (AGO) to bring an action in Superior Court to recover the penalty unless the violator pays the penalty within 30 days from when the violator receives the demand letter.

If the recipient still fails to pay within 30 days of receiving the demand letter, the Fiscal Office will either initiate a referral to the AGO or submit the penalty to collections (See Executive Policy 21-05).<sup>33</sup>

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<sup>32</sup> Pollution Control Hearings Board <https://www.eluho.wa.gov/Board/PCHB>

<sup>33</sup> POL 21-05 <http://teams/sites/EXEC/policies/PolicyDocuments/POL21-05.pdf>



If collection is not successful, the penalty may be “written off” and no longer tracked by the Fiscal Office (See Executive Policy 21-06).<sup>34</sup>

## When to refer to an overdue penalty to the Attorney General’s Office

You can refer an overdue penalty to the AGO if it fits at least one of the following criteria:

1. The penalty amount is \$1,500 or more.
2. The penalty amount is \$1,500 or more when combined with other delinquent penalties issued to the same party.
3. The penalty is important to the program’s mission (for example, the penalized party is a repeat offender, the action would set a precedent, or the action is of public concern).

The Fiscal Office completes a Referral Form and sends it to the person identified in the penalty’s cover letter as the contact. The program contact:

1. Completes the parts of the form the program fills out.
2. Provides necessary documentation requested in the Referral Form.
3. Get the signature of the program representative.
4. Return the form and attachments to the Fiscal Office within three weeks.

The Fiscal Office then sends the Referral Form to the AGO; the form authorizes them to determine the next course of action for that specific penalty.

## Seeking Judgment in Superior Court

If the AGO decides seeking a judgment in Superior Court is appropriate, they will typically send a letter to the violator (with copies to the Fiscal Office and program contact) to inform them to pay the penalty within 30 days of receiving the letter. If the violator does not comply the AGO may file a complaint in Superior Court to obtain a judgment and seek statutory costs and fees in addition to the penalty.

If the penalty remains unpaid within 30 days, the AGO may pursue a judgment in Superior Court. If a judgment is obtained, the AGO will forward a copy to the Fiscal Office. The Fiscal Office will:

- Prepare a letter to the violator to inform them that judgment has been obtained and if they do not pay the penalty within 30 days, the judgment will be turned over to a collection agency.

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<sup>34</sup> POL 21-06 <http://teams/sites/EXEC/policies/PolicyDocuments/POL21-06.pdf>

- Send copies to the AGO and program contact. (Note: The statewide collection agency contract requires the violator receive a 30-day notice warning then they will be turned over to a collection agency.)

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# Chapter 6: Civil enforcement

## Overview

Civil enforcement is an administrative action that uses state civil authority to direct a facility, site, or property owner or operator to comply with state law or rule.

Civil enforcement is based on:

- A violation of, or a potential to violate state law or rule.
- Our authority to enforce that law or rule.

We must always issue enforcement action in writing. In cases where we give verbal direction, in the field, to stop or change an activity, we must always follow up in writing to document the issues and directions given.

Some laws that give us the authority to issue enforcement actions make that authority discretionary (e.g. 70A.300.120),<sup>35</sup> and others require action (e.g. RCW 90.48.144).<sup>36</sup> Some laws require us to notify the violator that violations exist, or the substantial potential to violate exists, before we issue an Order requiring compliance (e.g. RCW 90.48.120).<sup>37</sup> All three laws require us to first make a determination that a violation occurred, or may occur. We must support our determination with appropriate documentation

## Civil enforcement tools

Civil enforcement tools consist of:

- Compliance Assistance Warning letters or letters of non-compliance
- Notices
- Orders
- Penalties

Not all programs have legal authority to use all the tools listed, so be sure to check your program's authorizing laws and rules. Also, some programs such as Shorelands and Environmental Assistance, Solid Waste Management, and Air Quality, delegate enforcement authority to local government and we provide oversight.

Each program has guidelines, procedures, policies, and manuals for conducting investigations and issuing enforcement actions, be sure to refer to these.

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<sup>35</sup> Chapter 70A.300.120 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=70A.300.120>

<sup>36</sup> Chapter 90.48.144 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=90.48.144>

<sup>37</sup> IChapter 90.48.120 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=90.48.120>

Enforcement staff must use the current agency approved boilerplates<sup>38</sup> per Executive Policy 22-04<sup>39</sup> for enforcement actions.

## Compliance Assistance

Compliance assistance includes: Warning letters or letters of noncompliance, site visits, inspections, emails, phone calls, etc.)

These letters of action take many forms, and are one of our most frequently used enforcement tools to gain compliance. They typically cite:

- Minor or potential violations of environmental laws and rules observed during field visits.
- Review of facility self-monitoring results.
- Self-reported violations.
- Complaint reports.
- Actions the responsible party should take to correct them.

These action letters may also state that further enforcement action is possible if remedial actions are not properly completed within a specific time frame, or if the actions taken do not result in compliance. Links to, or copies of laws, rules and permit violations need to be identified. Rules referred to, should be included with the letter.

Staff working in Programs with delegated authority to enforce federal laws (e.g., RCRA, CERCLA, CWA, and CAA),<sup>40</sup> should review their program's guidance to determine if they may issue warning letters or letters of noncompliance.

Whether these action letters take the form of an inspection report, field warning ticket, checklist left with the site operator, or a letter from the agency, these actions are distinguished from other enforcement actions and are considered compliance assistance. In that they are not required by law and cannot be appealed to the Pollution Control Hearings Board (PCHB) or other adjudicative body. These letters do meet the prior notice requirement for issuing penalties under the Regulatory Reform Act (RCW 43.05).

We don't track compliance assistance, noncompliance or, warning letters in Ecology's Docket Management System (DMS) database. However, program may track these actions on their own.

## Notices

Notices include Notices of Violation (NOV), Notices of Correction (NOC), and other notices expressly authorized by law. A notice officially informs the recipient they have violated, or pose the potential to

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<sup>38</sup> Ibid.

<sup>39</sup> POL 22-04 <http://teams/sites/EXEC/policies/PolicyDocuments/POL22-04.pdf>

<sup>40</sup> Ibid.

violate, environmental laws and rules. The notice typically describes specific remedies to correct the non-compliant conditions. Sometimes we must issue a notice before an Administrative Order or Penalty, unless the violations are egregious or meet certain exceptions. You should review your program's statutory authority and RCW 43.05 to become familiar with issuing a notice.

Notices of Correction (NOC) and Notices of Violation (NOV) tend to be more structured than a warning letter, and in some cases the contents of the Notice are dictated by law. For example, most laws require Ecology to clearly explain in the NOC/NOV what the violations are, what laws or regulations are being violated, what may be done to correct the violation, when the corrections must be completed, who to contact for more information, and how to request an extension of time.

NOCs and NOVs are not appealable to a court or other jurisdictional authority such as the Pollution Control Hearings Board (PCHB).

Notices are not subject to the requirements of RCW 34.05.110, but do act as prior notices of violations under the law's exceptions.

#### Notices of correction (NOC):

RCW 43.05.060 prescribes a Notice of Correction for violations of state environmental laws and rules that do not meet the exceptions of RCW 43.05.070 and are not found during a technical assistance visit. Programs with delegated authority are not allowed to use Notices of Correction to enforce federal laws (e.g., RCRA, CERCLA, CWA, and CAA). Notices of Correction must be used for violations of state environmental laws or rules (see Enforcement Exceptions).

#### Notice of violation (NOV):

A Notice of Violation (NOV) is an enforcement action in response to a violation (refer to your program's guidance). Failure to comply with a NOV may be grounds for additional enforcement action, including orders and penalties.

#### Notice of state regulation (NSR):

A Notice of State Regulation is an Order issued by the Water Resource Program.

## Orders

An Order is a directive from Ecology to comply with environmental laws and rules or a request for more information. The recipient of an Order must comply with or appeal the Order within the timeframes mandated by the law unless granted a stay through a hearing, or agreement with Ecology.

An Order is a statement that we have determined:

- A violation is occurring (or is about to occur).
- What must be done to correct the violation.
- When the violation must be corrected. or

- A request for more information

Orders are authorized by law, and most Orders can be appealed. Depending on the authorizing law, appeals may go to the Pollution Control Hearings Board or directly to Superior Court.

We issue a variety of Orders:

### Agreed Order or Consent Order

Depending on the program, a negotiated agreement to resolve an environmental problem between Ecology and a cooperative regulated party is captured in an Agreed Order or a Consent Order. Some programs include a Stipulated Penalty as a condition in an Agreed Order or a Consent Order. These are typically performance based and require the regulated party to pay a set amount of money for violating conditions specified in the Agreed Order or Consent Order.

### Expense Order

We issue Expense Orders to recover state costs.

### Board and court Orders

The PCHB, SHB, or Superior Court also issues Orders to resolve appeals of Orders and other civil actions. Usually we provide oversight to ensure the violator is complying with the board's or court's Order.

We track Ecology orders in the Docket Management System (DMS) Enforcement Tracking Database, but each program also should track the Orders it issues.

## Civil Penalties

Civil penalties are specifically authorized by law. The laws set maximum penalty amounts, usually on a per day and/or per violation basis. Some laws also set minimum amounts. "Penalties" are civil monetary assessments while "fines" are criminal monetary assessments.

The purpose of a penalty is to:

- Change the behavior of the specific violator.
- Provide an economic incentive to comply.
- Act as a deterrent for similar non-compliant behavior by the regulated community in general.

Most of our penalties are governed by RCW 43.21B.300. Penalties may take the form of:

- Notices of Penalty.
- Field citations.
- Other legally authorized administrative means of imposing monetary penalties against a facility or individual.

RCW 34.05.110 applies to a penalty issued to a small business for a first-time paperwork violation or violation of other rule or law. Before issuing a penalty, you should determine whether the recipient is a small business as defined in RCW 34.05.110 (see Enforcement Exceptions).

Penalty recipients must appeal a penalty within the timeframes provided by law, or lose their appeal rights. If they fail to pay within the time allowed, the penalty becomes due and payable.

We track penalties in the Docket Management System (DMS), but each program should also track the penalties it issues.

For more information, see the chapter on [Civil Penalties](#).



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# Chapter 7: Criminal Enforcement

## Overview

Unlike civil violations, when Ecology investigates and prosecutes environmental crimes, we must have documentation that shows a violation of the law, and the violator's state of mind. Usually, the required mental state, under state law, is that the person committed the violation knowingly, willfully, or intentionally. Criminal prosecution also has a higher burden of proof to establish that the violator committed a crime.

In addition to specific environmental crimes, criminal prosecution may also involve related crimes. For example, any fraudulent reporting, false testimony, or fraudulent recordkeeping may also be considered a criminal action. Most Ecology programs have provisions authorizing criminal sanctions for certain violations. Criminal violations are not tracked in Ecology's Docket Management System.

## Most Used Washington Environmental Crime Statutes

### Water

- Violation of Water Pollution Control – gross misdemeanor – [RCW 90.48.140](#)<sup>41</sup>
- Water quality data – Falsified data – gross misdemeanor – [RCW 90.48.590](#)<sup>42</sup>
- Polluting water supply – gross misdemeanor - [RCW 70.54.010](#)<sup>43</sup>
- Furnishing impure water – gross misdemeanor - [RCW 70.54.020](#)<sup>44</sup>
- Placing poison or other harmful object or substance in food, drinks, medicine, or water – felony – [RCW 69.40.030](#)<sup>45</sup>
- Violation of Shoreline Management Act – gross misdemeanor – [RCW 90.58.220](#)<sup>46</sup>
- Unlawful Hydraulic Project Activities – gross misdemeanor – [RCW 77.15.300](#)<sup>47</sup>
- Reckless operation of a tank vessel – felony – [RCW 90.56.530](#)<sup>48</sup>
- Operation of a vessel while under influence of liquor or drugs – felony – [RCW 90.56.540](#)<sup>49</sup>

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<sup>41</sup> Chapter 90.48.140 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=90.48.140>

<sup>42</sup> Chapter 90.48.590 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=90.48.590>

<sup>43</sup> Chapter 70.54.010 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70.54.010>

<sup>44</sup> Chapter 70.54.020 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70.54.020>

<sup>45</sup> Chapter 69.40.030 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=69.40.030>

<sup>46</sup> Chapter 90.58.220 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=90.58.220>

<sup>47</sup> Chapter 77.15.300 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.300>

<sup>48</sup> Chapter 90.56.530 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.56.530>

<sup>49</sup> Chapter 90.56.540 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.56.540>

- Vessel abandoned or derelict upon aquatic lands—Causing a vessel to block a navigational channel— misdemeanor – [RCW 79.100.110](#)<sup>50</sup>
- Crimes against water code — Unauthorized use of water – misdemeanor – [RCW 90.03.400](#)<sup>51</sup>

## Air

- Violation of the Washington Clean Air Act – felony, gross misdemeanor – [RCW 70A15.3150](#)<sup>52</sup>

## Dumping/Substances/Transportation

- Defrauding a public utility – felony and misdemeanor – [RCW 9A.61.020](#)<sup>53</sup>
- Unlawful to dump or deposit solid waste without permit—Penalties—Litter cleanup restitution payment— gross misdemeanor – [RCW 70A.205.195](#)<sup>54</sup>
- Transporting or storing waste tires – gross misdemeanor – [RCW 70A.205.450](#)<sup>55</sup>
- Violation of the Washington Pesticide Application Act – gross misdemeanor - [RCW 17.21.150](#),<sup>56</sup> [RCW 17.21.310](#)<sup>57</sup>
- Violation of the Washington Pesticide Control Act – gross misdemeanor - [RCW 15.58.330](#)<sup>58</sup>
- Transportation, storage, disposal of hazardous substance – felony, gross misdemeanor – [RCW 70A.300.100](#),<sup>59</sup> and [RCW 70A.300.110](#)<sup>60</sup>
- Unlawful operation of facility (oil and hazardous substances) – felony, gross misdemeanor – [RCW 90.56.300](#)<sup>61</sup>

## Fish and wildlife

- Unlawful take or harassment of fish and wildlife – gross misdemeanor – [RCW 77.15.120](#)<sup>62</sup> and [RCW 77.15.130](#)<sup>63</sup>

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<sup>50</sup> Chapter 79.100.110 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=79.100.110>

<sup>51</sup> Chapter 90.03.400 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=90.03.400>

<sup>52</sup> Chapter 70A.15.3150 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70A.15.3150>

<sup>53</sup> Chapter 9A.61.030 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=9A.61.020>

<sup>54</sup> Chapter 70A.205.195 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70A.205.195>

<sup>55</sup> Chapter 70A.205.450 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70A.205.450>

<sup>56</sup> Chapter 17.21.150 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=17.21.150>

<sup>57</sup> Chapter 17.21.310 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=17.21.310>

<sup>58</sup> Chapter 15.58.330 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=15.58.330>

<sup>59</sup> Chapter 70A.300.100 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70A.300.100>

<sup>60</sup> Chapter 70A.300.110 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=70A.300.110>

<sup>61</sup> Chapter 90.56.300 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.56.300>

<sup>62</sup> Chapter 77.15.170 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.170>

<sup>62</sup> Chapter 77.15.230 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.230>

<sup>63</sup> Chapter 77.15.130 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.130>

- Waste of fish and wildlife – gross misdemeanor – [RCW 77.15.170](#)<sup>64</sup>
- Unlawful use of WDFW land or facilities – misdemeanor – [RCW 77.15.230](#)<sup>65</sup>
- Unlawful release or possession of fish, shellfish, or wildlife – felony, gross misdemeanor – [RCW 77.15.250](#)<sup>66</sup>
- Unlawful trafficking in fish, shellfish, or wildlife – felony – [RCW 77.15.260](#)<sup>67</sup>
- Providing false information regarding fish or wildlife – gross misdemeanor – [RCW 77.15.270](#)<sup>68</sup>

### All-purpose

- Public nuisance – misdemeanor - [RCW 9.66.010](#)<sup>69</sup> and [RCW 9.66.030](#)<sup>70</sup>
- Deposit of unwholesome substance – gross misdemeanor - [RCW 9.66.050](#)<sup>71</sup>
- Littering – gross misdemeanor - [RCW 70A.200.030](#)<sup>72</sup> and [RCW 70A.200.060](#)<sup>73</sup>
- Violation of Industrial Safety & Health Act – gross misdemeanor - [RCW 49.17.190](#)<sup>74</sup>

### False information

- Offering false instrument for filing or record – class C felony - [RCW 40.16.030](#)<sup>75</sup>
- Making a false statement to a public servant – gross misdemeanor - [RCW 9A.76.175](#)<sup>76</sup>
- Obstructing a law enforcement officer – gross misdemeanor - [RCW 9A.76.020](#)<sup>77</sup>
- See also media-specific statutes

## Recognizing possible criminal activity

Evidence of criminal wrongdoing may be quite subtle. The possibility of criminal activity should be considered whenever investigating a high-impact, controversial, or complex case. Ecology inspectors should be alert to the types of findings listed below as red flags that may indicate criminal action:

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<sup>64</sup> Chapter 77.15.170 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.170>

<sup>65</sup> Chapter 77.15.230 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.230>

<sup>66</sup> Chapter 77.15.250 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.250>

<sup>67</sup> Chapter 77.15.260 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.260>

<sup>68</sup> Chapter 77.15.270 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=77.15.270>

<sup>69</sup> Chapter 9.66.010 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=9.66.010>

<sup>70</sup> Chapter 9.66.030 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=9.66.030>

<sup>71</sup> Chapter 9.66.050 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=9.66.050>

<sup>72</sup> Chapter 70A.200.030 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=70A.200.030>

<sup>73</sup> Chapter 70A.200.060 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=70A.200.060>

<sup>74</sup> Chapter 49.17.190 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=49.17.190>

<sup>75</sup> Chapter 40.16.030 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=40.16.030>

<sup>76</sup> Chapter 9A.76.175 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=9A.76.175>

<sup>77</sup> Chapter 9A.76.020 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=9A.76.020>

- Conflicting data. Two sets of books, inconsistent monitoring reports of the same incident, questionable signatures, or questionable data submitted on required reports.
- Conflicting stories. When an inspector is led to believe one thing, but finds something quite different in records or through observation, or in attempts to cover-up a violation.
- Deliberate or negligent actions. When an employee says he was told to do something illegal, such as waste dumping, illegal water quality discharges, spills, or air releases.
- Claims of ignorance about requirements. This may be challenged when records displaying prior knowledge are discovered, or others make statements indicating knowledge during interviews.
- Any conduct that may show an intentional and willful violation of the law could be a criminal action.

Generally, experienced inspectors will have a “gut-feeling” when something just “doesn’t seem right.” These “gut” reactions should not be ignored. Look further into the situation and keep in mind the potential for criminal activity.

## Handling possible criminal violations

A common mistake made by civil inspectors is to “back away” from an inspection or investigation when evidence of possible crime is discovered. The better reaction is to continue conducting a thorough inspection and completely document findings.

Keep in mind, Ecology’s civil inspection may be the best or only opportunity to gather the vital evidence needed for enforcement, including a criminal enforcement. It is not appropriate to use a civil inspection as a way to circumvent the constitutional restrictions on criminal investigations. If the inspector suspects criminal activity when conducting an inspection, the inspector should continue the inspection in the normal course of business collecting information for their civil investigation, following Ecology policies and procedures.

## Do’s and don’ts

Do’s:

- Share information with the EPA’s Criminal Investigation Division (or other federal agency with criminal authority over the case). This information may be used to establish probable cause for getting a search warrant by a criminal investigator to further investigate possible criminal activities.
- Stay objective and limit the scope of inspections to what is allowed by law or the administrative search warrant.
- Make detailed observations, take detailed notes and photos, but use caution to remain within the scope of your authority. Be thorough. Document your interactions and conversations.

Don’ts:

- Do not collect evidence you normally would not collect.

- Do not go in areas you normally would not go in or that are outside the scope or authority of your position.
- Never promise or state that information or evidence a person provides, including statements made at the inspection site, cannot or will not be used in a criminal proceeding. Do not state that suspected violations can or will be addressed by an enforcement action.
- Do not use the threat of criminal investigation or civil enforcement to obtain consent or other benefit connected with an inspection, civil enforcement, or criminal enforcement. Do not mention or discuss criminal enforcement on-site or during a compliance inspection.

### How to make a referral on a suspected environmental crime?

Referrals should be made by the person identified in the referring program’s policies and procedures. If the program does not have a policy or procedure that addresses criminal referrals, the referral should be made by the program’s Section Manager, ECT representative, or the employee who investigated the violation.

If an Ecology employee becomes suspicious that an environmental crime was, is being, or will be committed, the employee should:

1. Consult with their Section Manager to determine if a criminal referral should be made. If a criminal referral is needed, go to step 2.
2. All referrals should be made by phone. Call the appropriate office:
  - a. Ecology’s Criminal office at (206) 389-2027.
  - b. EPA-Criminal Investigation Division (CID) at (206) 553-8306.
    - i. Inform the Assistant Attorney Generals (AAG) of any referrals to EPA-CID.
3. If requested, provide the assigned EPA-CID agent or AAG with:
  - a. Pertinent information
  - b. Documents
  - c. Photos
  - d. ERTS complaints
  - e. Inspection reports, etc.

Use email or whatever form of delivery requested by the agent. See [Chapter 11 Records and Public Disclosure at a Glance](#) for details about the Washington State Public Records Act (RCW 42.56).<sup>78</sup>

### What happens after I make a referral to EPA-CID?

When a referral is made to EPA-CID, it is categorized as a “lead”. At this point the referral has not been opened as a formal case or assigned a case number. For most cases, it may be awhile before the

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<sup>78</sup> Chapter 42.56 RCW <https://app.leg.wa.gov/RCW/default.aspx?cite=42.56>

assigned agent at EPA-CID has a chance to follow up on the referral. However, if you referred a case, don't be reluctant to check with CID every three to four weeks to stay up to date on the status of the referral.

### **What happens when the EPA-CID agent follows up on the referral?**

When the EPA-CID agent follows up on the referral, they have two choices:

- Open a case file
- Return the referral back to Ecology or some other state or local agency.

If EPA-CID opens a case file on one of our referrals, they are responsible for the criminal investigation. If we decide to also pursue a civil action, we should consult with EPA-CID and our AAG on the process for parallel proceedings for civil and criminal investigation.

If EPA-CID returns one of our referrals or forwards the referral elsewhere, is considered closed for EPA-CID. Should new information come to light on the original referral, that further supports a criminal investigation, we need to submit a new referral to EPA-CID with the new information along with the original referral.

## **Parallel proceedings**

It may be possible to pursue both civil and criminal enforcement actions at the same time. These are called parallel proceedings. Once a case has been referred to the criminal investigators for action, further civil enforcement should be coordinated with the criminal investigators to make sure any civil actions don't interfere with the criminal investigation. A criminal investigation does not preclude other regulatory or administrative actions from happening. These include inspections, responses to complaints, normal permitting activities, and other routine administrative matters.

Suspected criminal actions may also be brought to the attention of law enforcement divisions of other agencies, including the:

- National Oceanic and Atmospheric Administration (NOAA)<sup>79</sup>
- U.S. Fish and Wildlife Service (USFWS)<sup>80</sup>
- Bureau of Land Management (BLM)<sup>81</sup>

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<sup>79</sup> National Oceanic and Atmospheric Administration <https://www.noaa.gov/>

<sup>80</sup> U.S. Fish and Wildlife Service <https://fws.gov/>

<sup>81</sup> Bureau of Land Management <https://www.blm.gov/>

## EPA-CID's criteria for initiating criminal investigations

EPA-CID uses the following criteria<sup>82</sup> to evaluate each matter on a case-by-case basis when they determine whether a criminal investigation should be initiated into alleged environmental violations.

1. Nature of the violation
  - a. Was the violation committed knowingly, intentionally, or willfully?
  - b. Was the act a major violation of the applicable laws or regulations?
  - c. Did the violator know the act was a violation?
  - d. Did the violator try to hide the violation, file false reports, or tamper with monitoring equipment?
  - e. Does Ecology have strong evidence of the violation (e.g., samples, admissions, witness statements, photographs, and complete written documentation)?
2. Potential for harm
  - a. Was there actual or potential harm to public health or the environment caused by the violation?
  - b. Did an illegal discharge, release, or emission result in actual damage to the environment?
  - c. Did the violation cause a serious threat of harm to human health?
  - d. Does Ecology have evidence of the threat or damage to public health or the environment?
3. Compliance history
  - a. Does Ecology have evidence of previous violations at this facility or by this person?
  - b. Has Ecology previously notified the violator of the applicable laws or regulations?
  - c. Has Ecology taken previous civil enforcement actions against this violator?
  - d. Have civil or administrative remedies been adequate?
4. Motivation behind the environmental violations
5. Deterrent effect
  - a. Would a criminal enforcement have a positive deterrent effect on the violator and on the regulated community?

## When do you Call EPA CID?

If your complaint/inspection/case involves any one of the following:

- History of Repeated Violations: Repeated enforcement activities or actions have failed to bring a violator into compliance. A history of repeated violations will enhance CID's ability to prove that a violator:
  - was aware of environmental regulatory requirements,
  - had actual notice of violations and

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<sup>82</sup> Environmental Protection Agency Website: <https://www.epa.gov/enforcement/criminal-enforcement>



- then acted in deliberate disregard of those requirements.
- Deliberate Misconduct Resulting in Violation: A deliberate illegal act warrants criminal investigation, i.e., the violator intended to break the law.
- Concealment of Misconduct or Falsification of Required Records: Ecology and EPA must be able to rely on data received from the regulated community. If submitted data are false, the regulatory agencies are prevented from carrying out their mandate.
- Tampering with Monitoring or Control Equipment: The overt act of tampering with monitoring equipment leads to the certain production of false data which threatens the scientific validity of regulatory decisions.
- Operation without a Permit, License, Manifest, or Required Documents: Violators that ignore regulatory requirements altogether should be criminally investigated.
- Failure to Report an Actual Discharge, Release or Emission: An identifiable and significant harmful impact on human health or the environment.

Key EPA-CID Case Factors:

- Hazardous or Toxic Waste
- Ongoing, Continuing or Repetitive Violations
- Death or Serious Bodily Injury
- Disruption of Public Utility or Evacuation of a Community
- Substantial Cleanup (>100k)
- Does Not Have Required Permit
- Violated Permit
- Executive or Manager Involved
- Public Official Involved
- Criminal History for Company or Individual
- False Statement (Lie) to Ecology

**Role of Ecology inspectors in a criminal case**

Once information about suspected criminal activity is given to EPA-CID or to other law enforcement entities, inspectors may be asked to help in the criminal investigation.

Inspectors may be asked to:

- Provide advice to the investigative and prosecution teams.
- Review analytical and regulatory information.
- Help with search warrants or other evidence collection.

- Review evidence.
- Testify in judicial proceedings.

### **Timeliness is important**

The timeliness of the information the inspector provides may be critical.

Some factors to consider include:

- Crime scene preservation.
- Destruction or loss of evidence.
- Need to stop an ongoing violation.
- Locating witnesses, and the witness's memory.
- Suspects collaborating to "get their stories straight".
- Statute of limitations (five years for most federal environmental violations, two years for most state violations).

### **Prosecution**

Criminal cases investigated by the EPA-CID and by other law enforcement entities may be prosecuted in either federal or state courts. Ecology will try to direct suitable cases to state courts where appropriate. Whether a case will or will not be prosecuted or where a case will be filed will be determined by the prosecutor; either the U.S. Attorney or the local Prosecuting Attorney or Attorney General's office. A prosecutor may choose not to prosecute a case for a variety of reasons. But, the EPA-CID and the Attorney General's Office have cooperative relationships with most prosecutors and will seek a prosecution of priority criminal referrals.

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## Chapter 8: Appeals

### Appeals to the Pollution Control Hearings Board or Shorelines Hearings Board

#### What is the PCHB?

The Pollution Control Hearings Board (PCHB) is part of the Environmental and Land Use Hearings Office. The PCHB hears appeals from orders and decisions made by Ecology and other agencies as provided by law. Their sole function is to provide litigants a full and complete administrative hearing, as promptly as possible, followed by a fair and impartial written decision based on the facts and law. The PCHB is not affiliated with Ecology or any other state agency.

The PCHB consists of three members, who are appointed by the governor and confirmed by the State Senate for staggered six-year terms. One of the three must be an attorney. All are salaried employees of the State, who also serve on the Shorelines Hearings Board.

#### What is the Shorelines Hearings Board?

The Shoreline Management Act, ("SMA") Chapter 90.58 RCW provides for the management of development along the state shorelines. Local government has the primary responsibility for initiating the planning required by the SMA and administering the regulatory program consistent with the policy and provisions of the Act. Ecology acts primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of the SMA.

Local government administers and issues shoreline substantial development, conditional use, and variance permits. Approvals by local government of shoreline conditional use and variance permits must be reviewed by Ecology, which then issues the final decision. Local government and Ecology can also issue fines under the SMA.

The Shorelines Hearings Board hears appeals from these permit decisions, and from those shoreline penalties jointly issued by local government and Ecology, or issued by Ecology alone. The SHB is not affiliated with any other unit of government.

Three of the SHB members, who also serve as the PCHB, are full time employees, appointed by the governor and confirmed by the senate. At least one member is an attorney.

The three other members, who serve part time are:

- The State Land Commissioner or designee.
- A representative from the Washington State Association of Counties.
- A representative from the Association of Washington Cities.

In appeals involving a single family residence or certain structures serving a single family residence, the appeal may be heard by a panel of three board members, at least one and not more than two of whom shall be members of the PCHB.

## Appeals to Superior Court

Ecology or the violator can appeal PCHB and SHB decisions to Superior Court under the Administrative Procedure Act, RCW 34.05, once all the administrative options have been exhausted (RCW 34.05.534). All administrative appeals from such boards to Superior Court (and from Superior Court to the Court of Appeals or Supreme Court) are, with narrow exceptions, reviewed on the record compiled in front of the administrative body that first decided the case. The Court will make its decision based on that record.

## What may be appealed?

All hearings before the SHB or PCHB are formal. The PCHB and SHB only have jurisdiction to hear and decide appeals from decisions made by:

- Department of Ecology
- Air pollution control boards
- Local health departments
- Conservation districts
- Department of Natural Resources
- Department of Fish and Wildlife
- Parks and Recreation Commission.

The PCHB jurisdiction is limited to the following types of cases detailed in [RCW 43.21B.110](#)<sup>83</sup>.

## What is the appeal process?

A violator can appeal an Ecology decision to the PCHB or SHB within 30 days of the date they receive the decision. They must file the appeal directly with the PCHB or SHB, and serve a copy of the appeal on Ecology. Appeals served on Ecology are received by the agency's Appeals Processing Desk, and copies are sent to the Fiscal Office – Accounts Receivable and the Attorney General's (AG) Office. The original is forwarded to the issuing program. If you receive an appeal, be sure the appeal is copied to Ecology's Appeals Processing Desk.

In accordance with [WAC 371-08-335\(3\)](#)<sup>84</sup> an appeal may be filed with the board.

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<sup>83</sup> Chapter 43.21B.110 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=43.21B.110>

<sup>84</sup> Chapter 371-08-335 WAC <https://apps.leg.wa.gov/WAC/default.aspx?cite=371-08-335>

An appeal is considered filed with the PCHB or SHB on the date the board actually receives the notice of the appeal, not the date the notice is mailed. When the PCHB or SHB receives the notice of appeal, they will acknowledge receipt.

The date stamped on the appeal notice is evidence of the Ecology filing date. The PCHB or SHB may require additional copies be filed. Email appeals are not accepted. Notify AG's Office for instructions if you receive an email appeal.

Once the appeal is filed, an Assistant Attorney General (AAG) is assigned to the case. The AAG and the Ecology staff person or persons involved in the case should discuss the case soon after it is assigned. All legal decisions regarding the case are the responsibility of the AAG after consulting with Ecology staff.

The hearings board will set a hearing date. At the hearing, the parties will present evidence and witnesses, much like in court. It is likely the hearings board will call upon the staff person, who conducted the investigation and developed the RFE, to testify. There is no jury. Only the members of the PCHB or SHB hear and decide the case. Once the case is concluded, the board member or members hearing the case will review it and make a decision. Both the violator and Ecology may appeal the hearings board determination to Superior Court within 30 days.

Orders that are appealed remain in effect unless a stay of the order is granted by the hearings board. If the violator requests a stay, the board will hold an expedited hearing to consider the request. If a stay is granted, the order is suspended until the hearings board makes a final decision, after a formal hearing. Ecology may also grant a stay avoiding the hearing process.

## Preparing for an Appeal

During the appeal process, the AAG assigned to the case and the opposing attorney will communicate about the case and attempt to find a solution that can be agreed upon by all parties. In some situations, there may be:

- Motions.
- Requests for public records.
- Depositions.
- Other legal procedures.

Most of the time, the opposing counsel will request all records related to their case. They might also request public records related to other cases. They often request agency manuals, policies and procedures.

The AAG assigned to the case will issue a litigation hold memo that requires all records related to the case, to be preserved.

Public record request and litigation holds, related to appeals, can impact staff workload. The best practice for staff to prepare for a potential audit and records requests is to organize files and all documentation related to the case, when preparing the order and/or penalty.

## Which cases cannot be heard by the Pollution Control Hearings Board and Shorelines Hearings Board?

The PCHB and SHB are quasi-judicial bodies with limited jurisdiction. This means they may only hear cases they are specifically authorized by law to hear. Cases that may not be heard by the PCHB and SHB are:

- Hearings relating to the formation of air quality authorities and air quality standards, and hearings to settle disputes regarding certain uses of groundwater.
- Cases related to Ecology's adjudication of water rights as established in [RCW 90.03](#)<sup>85</sup> and [RCW 90.44](#).<sup>86</sup>
- Orders issued to compel compliance with an Oil Spill Contingency Plan or Prevention Plan under [RCW 90.56.270](#)<sup>87</sup>, and Orders issued to recover state expenses under [RCW 90.56.400](#).<sup>88</sup>
- Prosecution of environmental crimes.

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<sup>85</sup> Chapter 90.03 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.03>

<sup>86</sup> Chapter 90.44 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.44>

<sup>87</sup> Chapter 90.56.270 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.56.270>

<sup>88</sup> Chapter 90.56.400 RCW <https://apps.leg.wa.gov/RCW/default.aspx?cite=90.56.400>

# Chapter 9 - Settlement Guidelines

## Introduction

After Ecology issues an enforcement action and the violator submits an appeal, the PCHB and SHB will strongly encourage the parties to settle the case and avoid a formal hearing.

Settlements usually fall into two categories:

1. Traditional settlements: Reduce a penalty or revise an order to avoid litigation.
2. Innovative settlements: May divert assessed penalty amounts to a Supplemental Environmental Project (SEP).

Follow this guidance when the appellant proposes a settlement to resolve administrative enforcement actions. This guidance will focus primarily on innovative settlement categories, principles, and procedures.

## Settlement objectives

Ecology's settlement objectives are to:

- Achieve compliance with state environmental laws and rules.
- Address public health violations.
- Mitigate or restore damage done to the environment, where possible.
- Encourage use of pollution prevention strategies to reduce future generation of wastes.

## Role of the Attorney General's Office

The Attorney General's (AG) Office plays an important role in the settlement process. This means we must coordinate all settlement decisions with the AG's Office. Once a case is appealed, it is assigned to a specific Assistant Attorney General (AAG) who becomes the primary point of contact between the parties. The AAG's role will vary depending on facts and circumstances of the case. At a minimum, the AG's Office is available to advise staff regarding settlement decisions, draft settlement language, and enter the settlement agreement with administrative boards and courts.

If the other party proposes settlement negotiations, notify the AAG well in advance of negotiations to discuss:

- Case strategy
- Settlement position.
- Case weaknesses and strengths.



## Expedited Enforcement Action Offer

Some Ecology programs allow for an Expedited Enforcement Action Offer (EEAO). An EEAO is when we propose a settlement to an offending facility that reduces the recommended penalty by one-third. If considering an EEAO, notify AAG in advance of proposed settlement negotiations. Be prepared to postpone negotiations if the AAG is unavailable or wants to conduct pre-hearing discovery before settlement negotiations begin.

## Signature authority for settlements

Settlements must be signed at the management level at which the original penalty or order was signed. The settlement must also be signed by the AAG assigned to the case, as well as the appealing party and their attorney if represented by one. The appealing party should always sign first. Once the settlement is fully executed, the AAG forwards it to the administrative board or court for “entry” and requests the appeal be dismissed.

Some settlement agreements contain language that compels the violator to pay the full amount of the penalty if they are found by Ecology to be out of compliance with the terms and conditions of the settlement agreement.

## Innovative settlements

Innovative settlement actions should reduce or eliminate the risk posed to public health or the environment identified in the penalty or order. These actions can be characterized as “beyond compliance”. Ecology, when feasible, will elevate consideration of settlements that benefit overburdened communities impacted by pollution violations.

Penalty reductions will not be made for:

- Actions or activities already required by law.
- Actions or activities identified by a law, rule, or government requirement that will become enforceable in the future.

## Innovative settlement proposals

Innovative settlement proposals must include the following three general elements:

1. The proposal must result in environmental benefits beyond correcting existing violations and providing assurances regarding future compliance.
2. The penalty paid, plus the net cost of the innovative proposal, must reflect the gravity of the violation and the economic benefit of noncompliance (if quantifiable).
3. There should be a relationship between the nature of the violation and the environmental benefit sought through the proposed settlement.

## Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) proposals should satisfy the three elements above and conform to one or more of the following five categories:

- **Pollution prevention.** A pollution prevention project is one that substantially reduces or prevents pollutants from being generated. These projects will often involve changing an industrial process, substituting fuels and materials to prevent pollution, and closed loop recycling and reuse.
- **Environmental restoration, enhancement and monitoring.** An environmental restoration project is one that not only repairs environmental damage, but goes beyond repair to enhance the environment in the vicinity of the violating facility. Spill cleanups required by law do not fall under this category. Included in this category are proposals to donate money to a local government or nonprofit agency to help a specific environmental program or project, or to conduct a research project (preferably in the vicinity where the violations occurred).
- **Environmental auditing.** An environmental auditing project is one where the violator takes on auditing practices (in addition to those already required by law) designed to correct management and/or environmental practices where deficiencies seem to be contributing to violations, whether recurring or potential.
- **Public awareness.** Public awareness projects include publications, broadcasts, education, or seminars aimed at the regulated community. These projects underscore the importance of environmental compliance and pollution prevention. They can also include distributing technical information about how to comply with environmental laws. These projects can be accomplished through donations to nonprofit groups. Violators who fund or implement a public awareness project must agree to state publicly that the project was undertaken as part of a settlement to resolve environmental violations. Public awareness materials developed as a result of an innovative settlement must be reviewed and approved by Ecology.
- **Public Health.** Public health projects benefit overburdened communities to reduce a public health risk. Communities of color, Tribes, indigenous peoples, and low-income populations have been, and continue to be, disproportionately exposed to environmental conditions that can adversely affect their health or exacerbate existing health disparities. Projects that reduce health disparities in environmentally overburdened communities will be prioritized. This may include projects that increase public awareness about the connection between environmental exposures and health, advance understanding of environmental justice issues and concerns, and foster and strengthen community partnerships. Tribal consultation, and coordination with appropriate federal, state, or local public health agencies, and community health services is encouraged.

## Settlement principles

The principles in this section should be applied with some flexibility to account for the differences in each case. Decisions to deviate from these principles should be made after consulting with your section or program manager, and the attorney who is assigned to your case.

Things to consider or required	Things to avoid or not allowed
Settlements must comply with regulatory requirements (they may include a negotiated compliance schedule).	Settlements must avoid rewarding (or the appearance of rewarding) noncompliance in order to prevent the effect of creating a market advantage.
Settlements must be measurable and require the violator to prove they have completed the work or complied with the agreement.	Ecology should not agree to SEPs that require significant Ecology resources such as providing technical assistance, participation in the project, frequent monitoring, or valuation of services provided or capital improvements made.
Ecology should consider whether the violator has demonstrated a good faith effort to come into compliance when determining whether to accept a proposed settlement. (Good faith is demonstrated by, among other things, the violator's willingness and effort to correct violations in a timely manner once they are discovered).	Settlements must avoid rewarding (or the appearance of rewarding) noncompliance in order to prevent the effect of creating a market advantage.
Settlements that result from a violation in an overburdened community must benefit the impacted community.	Donations of money or services made to local government or nonprofit agencies may not be considered charitable contributions or business expenses for purposes of computing corporate business and/or income taxes.
A violator must have the technical and financial ability to successfully complete the actions proposed.	Donations or capital improvements already set for funding during the normal course of business may not be part of any settlements.
Tax benefits may be allowed for capital improvement projects that are dependent on depreciation and use of other tax accounting methods for funding.	Settlements cannot propose capital improvements that are necessary to comply with a law or regulation, unless the improvements exceed legal requirements and create environmental enhancements that would not otherwise be realized.

Things to consider or required	Things to avoid or not allowed
<p>A study may be a project or activity if its specific purpose is to explore pollution prevention, reduction, or elimination at, or due to, the facility where the violation(s) occurred. Studies should be allowed only when there is reasonable likelihood that technically feasible and cost effective solutions can be identified, and the violator commits to implementing one or more of the study solutions. For the purposes of this guidance, “cost effective” means a company is capable of recovering its capital investment in the project in less than ten years.</p>	<p>Credit given for capital improvements may not exceed 50 percent of the total dollar value of structures, equipment, or labor for design, installation, or construction. Operation and maintenance costs are not eligible.</p>
<p>Settlements involving a federal facility contractor must include a provision prohibiting (to the extent possible) the contractor from seeking cost reimbursement from the federal government for expenditures made under the settlement. This includes the payment of any penalty.</p>	<p>Generally, the cost of a settlement should not exceed 80 percent of the original penalty imposed.</p>
<p>Settlements of penalties that are \$10,000 or more, or of high public interest must be accompanied by a press release. Work with your program or regional Communication Manager to draft the press release (See <a href="#">Executive Policy 20-03</a>).<sup>89</sup> Involve the communications manager early and often.</p>	

## Settlement procedures

The following procedures apply to all settlements - innovative and traditional:

- Settlements of penalties and orders that have been issued may not be signed until after an administrative appeal has been filed. This restriction is important for two reasons:
  - A violator may lose their right to appeal if 30 days expire after receipt of enforcement while the violator is negotiating with Ecology or expecting Ecology to settle. The violator may try to hold Ecology responsible.
  - Penalties under appeal are not considered debts to the state. This gives Ecology the flexibility to reduce penalties during settlement negotiations.

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<sup>89</sup> POL 20-03 <http://teams/sites/EXEC/policies/PolicyDocuments/POL21-03.pdf>

- Settlement negotiations should be initiated by the appealing party. However, when program management believes settlement will further Ecology’s compliance objectives, Ecology may inform the appealing party we will consider settlement proposals.
- Specific proposals must come from the appealing party. If asked, Ecology staff may provide the appealing party examples of settlements, including types of activities Ecology has agreed to in the past. To avoid the perception that we are promoting any particular project or action or that Ecology is directing funding, staff should not suggest contributing money or resources to a specific organization or agency during settlement negotiations.
- Work with the assigned AAG to set deadlines for negotiations. A deadline will force both parties to think through their respective positions, resulting in more meaningful negotiations. The AAG may want to do pre-hearing discovery before negotiations start. Formal negotiations should conclude no later than 45 days prior to the scheduled hearing date to allow time to prepare for hearing.
- Normally, all negotiations are conducted between those who have authority to make binding settlement decisions. An AAG will normally attend all settlement negotiations.
- SEP Settlements must include:
  - Project completion dates.
  - Specific language describing tasks that must be performed.
  - Language requiring proof of completion.
  - An Ecology contact who will monitor performance under the Agreement.

Ecology’s Fiscal Section does not track innovative settlements.

## Chapter 10: Enforcement Communications Plans

The public, stakeholders and the news media often view environmental compliance work – by Ecology or other agencies – as having important impacts on environmental protection, community values, and economic resources. Communications planning helps prepare the agency for outreach and for the response that comes from our issues and projects.

Communications managers or outreach specialists work with staff and managers to plan messaging, strategies, and tactics for both internal and external communications.

Communications plans can help compliance staff and communicators provide information, outreach or response to any part of the enforcement process that generates interest.

Communications plans can be general or specific. For example, a program or region may wish to have a general plan for a geographic area and develop plans for specific facilities or actions as needed. Communications staff use templates to jump start plan writing. Plans can range from a brief format – such as a short situation summary with key messages or talking points – to several pages as needed to address a complex situation in greater depth.

Clear communication supports the public’s right to understand and engage in processes that affect their communities, and provides Ecology input that informs our work and decision-making.

Communications managers consider current events, political climate, and a variety of other factors when developing communications plans. Communications planning does not aim to make things more complicated, rewrite enforcement documents, or oversimplify the issues.

The role of communications planning in enforcement is to support the action being issued by Ecology and it should not be used for driving the action or act as a deterrent to issuing it.

A strong communications plan developed before issuing enforcement actions will help staff and executives answer the tough questions before they’re asked, identify important stakeholders to notify, and can prevent extra work in the end. Communications plans are key for keeping our messaging consistent for staff and executives who need to deliver information about our work.

### Preparing news releases

#### When is a news release required?

All fines and settlements for more than \$10,000 require a news release (see [Executive Policy 20-03](#)).<sup>90</sup> How Ecology chooses to communicate about enforcement actions is not negotiable.

A penalty or settlement of less than \$10,000, or a noteworthy administrative action, may need a communications plan, and possibly a news release. This need can arise when:

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<sup>90</sup> Ibid.

- There has been prior or ongoing public interest in the situation.
- Prior news coverage.
- There is a significant, immediate threat to human health, property, or the environment.

The communications manager consults with the program manager and determines a communications strategy.

News releases are typically sent to local news organizations, although the distribution may be wider if the penalty involves a situation that has broad interest.

News releases must never be part of settlement negotiations, per [Executive Policy 20-03](#).<sup>91</sup>

News releases are written in a style and tone appropriate for the target audience – reporters and news outlets. The purpose is to relay Ecology’s work in a concise and accurate manner that encourages coverage of our news.

### News release process

The Enforcement Process flow chart, Best Practices document, and the Management Review Process to insure all steps are complete for penalties greater than \$5,000, or those considered to be significant. Details for the news release process are included in the appendices

- Appendix A Enforcement Process flow chart,
- Appendix B Best Practices Enforcement-related Communications, and
- Appendix C Enforcement Action Management Review Process.
- Appendix D Management Review Process to insure all steps are complete for penalties greater than \$5,000, or those considered to be significant.

Steps are as follows:

1. Communications manager drafts a news release using information provided by the program staff who are developing the enforcement action.
  - a. To the extent possible, the communications manager is informed about a pending action at the beginning of the planning process for penalties, noteworthy administrative actions, or settlement filing (with a court or hearings board).
  - b. Program staff should brief the communications manager of a pending major penalty or significant enforcement when developing the Recommendation for Enforcement (RFE).

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<sup>91</sup> Ibid.

The RFE should provide sufficient background to explain the violation, even if the calculations haven't been completed.

- c. The communications manager must have access as needed to other documents that help describe the violation and reason for the action.
- d. The communications manager will need to know if the case has additional context.

For example:

- i. Is there any companion or related compliance action to this penalty, such as an order or an action by another program?
- ii. Since the violation, has it been corrected or is it in the process of being corrected?
- iii. Was or is another agency involved in the case, such as a local government?
- iv. Does this case face any deadline, such as a statute of limitations?

## 2. Program team and review

- a. Program Management determines which staff members and managers are resources for the Communications Manager, and which staff member will be available to assist with or respond to media inquiries.
- b. The program manager determines whether the program manager's or section manager's approval is the final level of program review of the draft news release and communications plan.
- c. The communications manager reviews the part of the draft penalty packet cover letter that refers to the news release.

## 3. Communications manager peer review (recommended, not required):

- a. The communications manager obtains review of the draft news release and communications plan from another Ecology communications manager.
  - i. If the regional communications manager is the lead for these products, the peer could be the program communications manager.
- b. The communications manager may obtain informal review from the Assistant Communications Director of drafts of the news release of communications plan.
  - i. Doing so can help the communications manager and program team address the specific style and content expectations needed for a successful formal review.

## 4. The Assistant Communications Director reviews the news release for content and agency style before approval.

- a. Ecology retains final say on the content of its news releases.
- b. Depending on the penalty, the news release may need to be reviewed and approved by the Communications Director, Deputy Director, Director, and/or Governor's office, and undergo further revisions.

## 5. 24-hour courtesy review for penalties

- a. When possible, the timing of the issuance of a penalty should be coordinated with current practices that govern or limit when news releases are issued.



- b. A copy of the final draft news release is included in the penalty packet sent to the recipient.
    - i. In most cases this will occur in real time via phone notification and email delivery of the penalty packet. Where email delivery is not possible, the review period begins upon confirmation of receipt.
  - c. The communications manager and program team review the response and decide whether to accept, reject, or negotiate modifications with the recipient.
  - d. The news release is generally issued within two working days after the issuing program has confirmed that the recipient has received the penalty or has been notified.
6. A news release is issued for a settlement if the original penalty had one.
- a. The news release is issued within two working days after the settlement is filed with the appropriate court or appeals board.
  - b. Brief the communications manager at the earliest possible point in the settlement process.
  - c. Whenever possible, the communications manager works with the Ecology settlement team to develop a news release for review and approval per the process in step 4, above, prior to the settlement's submission to the appeals board or court so that the news release can be issued in a timely manner.
  - d. When the settlement is collaborative or constructive:
    - i. The news release can be developed in parallel to the final negotiations, especially after the basic principles or framework of the settlement are reached.
    - ii. The news release is not developed as part of the settlement negotiations per se, but the parties have an opportunity to reach agreement on the news release's wording.
  - e. When the settlement is not collaborative (e.g. arriving at a monetary figure solely or primarily to avoid further litigation expense):
    - i. The process in step 5 may be used after the settlement is signed.
    - ii. A time limit longer than 24 hours may be given, but plan to complete (not issue) the news release before the board's or court's final action.
  - f. Review and approval:
    - i. Assistant Communications Director approval, per step 4, is required.
    - ii. Peer review and informal review, per step 3, is recommended.
  - g. AAG or program team notify communications manager of board or court action as quickly as possible.
7. Finalize, post to web and social media, and distribute to media.

## Working with news media

### After a penalty or settlement news release

Most media calls, in response to a news release, will come to the contacts listed in it. In many cases, your communications manager will be the lead spokesperson on enforcement actions, and related roles will already have been decided and listed in the communications plan. The plan also can list messages and answers to expected or potential questions. The secondary contact on the news release – usually a manager or expert staff member – should by this point be prepared to assist the communications manager or participate in an interview.

If speaking to a reporter isn't part of your role, explain that another Ecology representative will return the call soon, but do take the name, media affiliation, phone number, email address and the time and date of the reporter's deadline for our return call. Then contact your regional or program communications manager and your supervisor.

### Whenever a reporter calls

If a reporter calls, Ecology has to answer, but not necessarily you! In fact, you're the one with questions to ask: the reporter's name, media affiliation, phone number, email address, and the deadline for the story. You also can ask about the story the reporter is working on and what information is needed.

Then contact your regional or program communications manager and your supervisor. They will coordinate on the response, usually with staff familiar with or involved in the reporter's topic. Your communications manager will coordinate and manage an interview and respond to any potential needs for follow up.

**Routine inquiries from reporters:** It's always best to work with your communications manager and supervisor when talking to reporters. Sometimes you can simply answer requests for basic information, but always let them know of your interaction.

Calls that appear to be "routine" may, in fact, relate to a larger story that communications managers might be aware of. Also, some reporters may reach out to multiple staff on the same topic. It's important to work with your communications manager to ensure that there is one lead for the topic, no matter how routine it may seem. If you have any doubt, or find that the "simple" or "routine" interview is expanding, take the reporter's information and confer with your communications manager and supervisor.

### **Inquires dealing with high-profile, sensitive or policy issues:**

Staff should respond directly only if they have been assigned to do so for a specific issue. Compliance staff will not likely have such roles. Gather the reporter's information and notify your communications manager and supervisor. Communications managers help with planning and messaging when responding to these types of inquiries.

## Criminal enforcement actions and the media

Any media inquiries regarding ongoing and completed criminal investigations should be addressed by the criminal investigating agency. Alert your supervisor and your program communications manager should you receive an inquiry regarding criminal investigations or enforcement.

## Environmental Justice Communications & Outreach

Environmental Justice (EJ) focused outreach is an important element of communications planning, and part of Ecology's commitment to involving affected communities and the public to better understand our compliance and enforcement work. Because enforcement and compliance work affects diverse communities across the state, meaningful and inclusive outreach and public engagement must reflect the characteristics of the audience and needs of the community.

Inclusive public engagement and appropriate notification help ensure Ecology meets environmental justice commitments and non-discrimination requirements under federal Civil Rights law (Title VI). This means developing communications that address engagement barriers and reach a broad audience by meetings public participation non-discrimination obligations and promoting best practices as detailed in the [Procedural Safeguards Checklist](#).<sup>92</sup>

Communications and outreach planning will incorporate demographic information for the intended audience and potentially affected population, including impacts to communities of color, low income populations, Tribes, and indigenous peoples. Population characteristics that might create barriers to meaningful involvement will also be assessed, such as geographic and linguistic isolation, educational attainment, literacy, and age. These EJ considerations in communications planning may be based on the EJ analysis completed by program staff (see [Chapter 3: Issuing an Enforcement Action](#)). Additional demographic data may be found using online mapping tools, census data, and through consultation with program staff, local agencies and community organizations.

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<sup>92</sup> Procedural Safeguards Checklist [https://www.epa.gov/sites/production/files/2020-02/documents/procedural\\_safeguards\\_checklist\\_for\\_recipients\\_2020.01.pdf](https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf)

# Chapter 11: Records and Public Disclosure at a Glance

The Washington State Public Records Act ([Chapter 42.56.RCW](#))<sup>93</sup> defines “public record” and lays out public agencies’ responsibilities for disclosing public information. To promote open government, the law is broadly interpreted in favor of disclosure, and the exemptions are few.

All Ecology employees are custodians of Ecology records and must manage them according to standards, regulations, and Ecology policy and procedure. Employees are responsible to keep records organized in accordance with approved retention schedules and coordinate with their program/regional [Records & Information Management \(RIM\) Coordinator](#)<sup>94</sup> for guidance managing the records you produce.

Be mindful, factual and professional when creating records. Examples of public records include but are not limited to:

- Email and other electronically stored information (ESI).
- Handwritten statements on sticky notes and in the margins of documents you are reviewing.
- Documents produced as a result of agency business.
- any other documented evidence of agency business, regardless of format.

Never document anything you don’t want on the front page of the newspaper or the headlines of the evening news.

Responding to requests for public records is a top priority for all Ecology staff and requires immediate attention. If you receive a records request directly, whether it is on the agency request form, by letter, fax, email, phone, or in person, it needs to go to your Public Disclosure Coordinator immediately and they will inform the requester on how to properly submit a request.

All public records requests must be submitted to the Headquarters Public Disclosure Office for processing. Staff must work with their Public Disclosure Coordinators to look for all identifiable records, within the scope of the public records requests, in locations where the records are likely to be found. Public records can be in any medium, electronic or physical. [Administrative Policy 20-13](#)<sup>95</sup> provides helpful information on how Ecology responds to public records requests.

Ecology has formal policies and procedures for managing records and public disclosure, and specific guidance for things like managing draft documents, email messages, and other electronic information; understanding the lifecycle of your records; and working with retention schedules. All of this information is available on [Ecology’s Records Management](#) intranet web page.<sup>96</sup> And because all

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<sup>93</sup> Chapter 90.56 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=42.56>

<sup>94</sup> Records & Information Management (RIM) Coordinator  
[http://awwecology/sites/asi/records/Shared%20Documents/RIM\\_PD\\_CoordinatorList.pdf](http://awwecology/sites/asi/records/Shared%20Documents/RIM_PD_CoordinatorList.pdf)

<sup>95</sup> Ecy Policy 20-13 <http://teams/sites/EXEC/policies/PolicyDocuments/POL20-13.pdf>

<sup>96</sup> Ecology’s Records Management <http://awwecology/sites/asi/records/SitePages/Home.aspx>

Ecology employees handle public records, you are required to take Records and Public Disclosure training within six months of being hired, and as required.

# Chapter 12: Employee Liability

## You can be sued

Can I be personally responsible if my “on the job” action or activity causes harm?

Yes, but if you act in good faith and within the scope of your employment when the harm occurs, then the state may defend you and pay any damages.

## Representation by the Attorney General

As a state employee, state law provides you some protection if you were to be sued for damages as a result of performing your official job duties. [Chapter 4.92 RCW](#)<sup>97</sup> sets procedures related to legal actions and claims against the state. RCW 4.92.060 through 4.92.160 specifically address tort claims and lawsuits against state agencies, officers, and employees.

You may request the Attorney General’s Office to defend you, at state expense, under RCW 4.92.070.

- If the Attorney General’s Office decides your acts or omissions were within the scope of your official job duties, or were purported to be, in good faith, they will accept you as a client and you are obligated to assist and cooperate in the defense of the lawsuit.
- If the Attorney General’s Office decides you were not acting in good faith and within the scope of your employment when the harm occurred, then the state will not defend you or pay your damages.

If possible, the state will settle cases through direct negotiation or mediated negotiation with the proponent. Where there is a lack of liability or negotiations fail to reach settlement, cases are tried before juries.

You do not have to be represented by the Attorney General and may hire your own lawyer. However, the state will not pay for your lawyer nor any settlement or judgment that results from your lawsuit.

## Harm comes in many forms

Whether there is legal liability for a given action or inaction that results in harm depends on the facts of each case. For example, if a state employee fails to properly perform a required inspection, the state could be liable for any resulting harm to the inspected party.

Harm may also occur when there is physical damage to persons or property, or when promises are made, relied upon, and then broken. An example could be an employee assuring a regulated entity that a particular action will not result in an enforcement action, and the entity relies on the statement but is then penalized for that action.

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<sup>97</sup> Chapter 4.92 RCW <https://app.leg.wa.gov/rcw/default.aspx?cite=4.92>

In general, an employee may not be held liable for activities required by law or rule, or for implementing a law or rule, even if that law or rule is later found to be invalid. However, where an employee acts without reasonable care in conducting their official duties, or in bad faith, and another is harmed, they may be found liable. An example would be operating a state-owned car in a wrongful or negligent way that results in harm to another.

## Minimizing the risks

If you are concerned that your job-related actions or decisions may put the agency or state at risk, discuss the situation with your supervisor. Your supervisor may wish to contact the program's Attorney or the Risk Management Officer to discuss the issue further and take appropriate actions to lessen the legal risks.

## Know your job

Know your job description and follow agency policies and guidelines. Only take those actions you are authorized to take, and do your job in a professional manner. If you have a question about an activity, call your supervisor first before you act.

## Think before you speak

What you say or write may be used against you. A friendly discussion in the field may become the basis for a future lawsuit. Speak clearly and do not make promises that are beyond your authority to make. Remain professional at all times.

## Address all violations

Always address violations as you encounter them. Otherwise, the violator may think that Ecology does not consider the violation important and will not issue an enforcement action. This may create a problem if Ecology or another state or local agency decides to take an enforcement action later to address the violation. Be sure to document in writing your attempts to gain compliance in the field. Take field notes and pictures, and keep a telephone log.

## What to do if you are sued

- Don't panic.
- Let your supervisor know.
- Send a written request to the Attorney General's Office and ask if the state will represent you and pay your damages if you lose.
- Along with your request, provide a detailed account of the facts that led to the lawsuit.
- If the Attorney General's Office grants your request, they will tell you what to do next.

When the Attorney General's Office represents a state employee and the presiding court finds the employee was acting within the scope of his or her official duties, any judgment by the court will not become a lien upon any property of the employee.





## Requesting representation

The Torts Division of the Attorney General's Office defends tort claims and lawsuits against all state agencies, officers, and employees, as well as related appeals. The division includes Attorneys and professional staff with offices located in Seattle, Tacoma, Olympia, and Spokane.

To obtain representation, request the Attorney General authorize your defense at the expense of the state by completing and submitting AG Form #163 - Request for Individual defense by the Attorney General, through your supervisor. Forms are available from the Ecology's Risk Management Officer, from the Attorney General division that represents your agency, or from:

Attorney General's Tort Claims Division  
7141 Cleanwater Drive SW  
PO Box 40126  
Olympia, WA 98504-0126  
(360) 586-6300

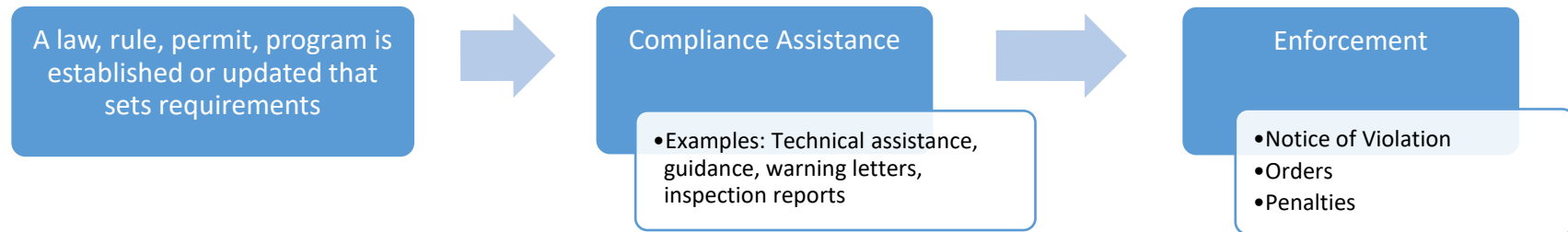
Submit the completed form to the Assistant Attorney General representing Ecology, along with any documents served on you. The Assistant Attorney General may request information from you and may investigate whether the legal requirements for your defense are satisfied.

As part of the request for representation process, the Assistant Attorney General will submit your request to Ecology's director for his or her recommendation. The assistant attorney general will then forward your request to the Deputy Attorney General, who will independently review the request and notify you whether the request is approved.

# Appendix A



## Compliance Assistance and Enforcement at the Department of Ecology



### Philosophy and Approach

We know that regulated entities want to, and most often do comply with environmental requirements, such as laws, rules, permits, etc. We understand that when compliance can't be achieved, this can be for a variety of reasons. To help reach compliance we use reasonable discretion, within our authority, in how we employ escalating levels of enforcement with the following in mind:

- Seriousness of the violation (such as, public health and environment impacts)
- Violations in overburdened communities
- Whether it was a knowing and willful violations of the requirements
- History and responsiveness of the violator
- Resources available for compliance including financial assistance

In general, we start with compliance assistance. However, in some cases where there is an immediate threat or harm to the environment or public health (an oil spill for example), it may be appropriate to move directly to enforcement. Further, we may move to enforcement when the violation involves areas with environmental justice considerations, such as low-income populations, communities of color, and indigenous populations.

## Compliance Assistance

One of our main agency approaches is to provide compliance assistance which includes support, actions, and other communications to help entities reach compliance. Support and action can include:

- Technical assistance: Calls, visits, letters, emails, meetings, guidance documents, checklists, tip sheets, and posters
- Inspection(s) and report describing the results of the inspection
- Corrective action letters (sometimes called Notices of Correction, Non-compliance letters)

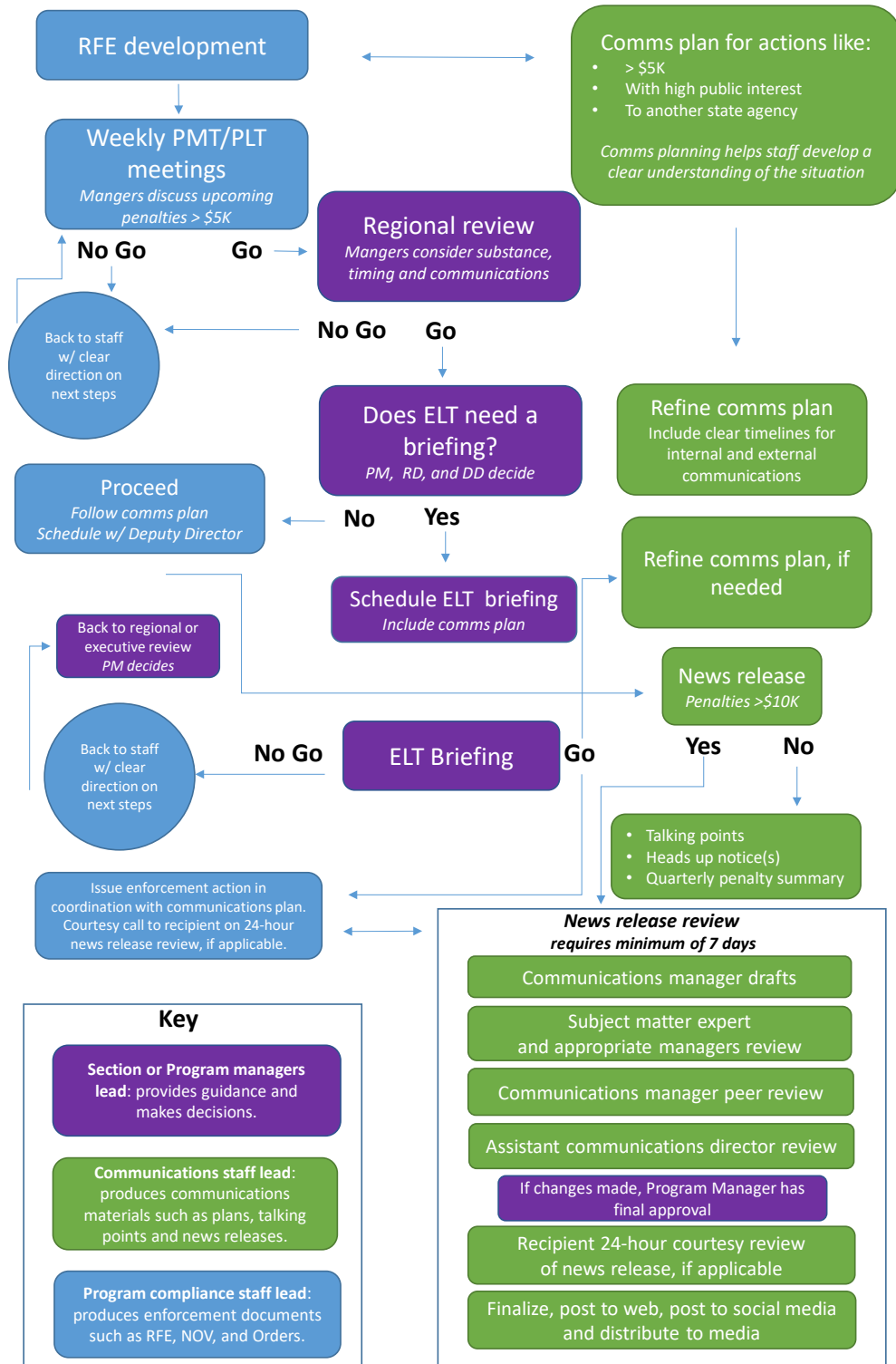
## Enforcement

When enforcement takes place, we inform the entity that caused the non-compliance, just as we would when providing compliance assistance. Enforcements are actions defined in statutes that authorize us to enforce the regulatory requirements that we are implementing. Enforcement actions do not include those actions (for example compliance assistance) authorized under in RCW 43.05 Technical Assistance Act or other technical assistance directed in the program's authorizing statutes. (For example in RCW 90.03.605).

# Appendix B

## Enforcement processes

*Estimated timeframe minimum 6 weeks from RFE to issuing action and announcement*



# Appendix C



## BEST PRACTICES Enforcement-related communications

### Communications planning

The Communications team develops plans to prepare the agency for outreach, and the response that comes from our issues and projects. Communications managers plan messaging, strategies, and tactics for both internal and external communications with help from staff.

A strong communications plan developed before issuing enforcement actions will help staff and executives:

- Answer the tough questions before they're asked.
- Identify important stakeholders to notify.
- Prevent extra work in the end.

Communications plans are key for keeping our messaging consistent for staff and executives that need to deliver information about our work. Communications managers consider current events, political climate, and a variety of other factors when developing communications plans. Communications planning does not aim to make things more complicated, rewrite enforcement documents, or oversimplify the issues.

Communications plans can be used for different types of enforcement actions, not just fines. All fines and settlements for more than \$10,000 require a news release (as outlined in *Administrative Policy 20-03: Publicizing Penalties and Settlements*). How Ecology chooses to communicate about enforcement actions is not negotiable.

### Involving the Communications Team

#### When to involve a communications manager on enforcement actions

- Early and often. If you are considering an enforcement action, tell your program and/or regional communications manager. Any enforcement action has potential to become an issue to manage. Here are the most common examples:
  - Fines and settlements more than \$10,000 require a news release and communications plan.
  - Fines more than \$1,000 are included in the quarterly penalty summary news release and may require a communications plan.
  - Orders that require a significant financial investment to comply may need a communications plan.
  - Actions taken that are likely to be covered by news media.
- Brief your communications manager during the development of your "Recommendation for Enforcement" document.
  - Your Communications Manager can use a draft to develop a communications plan in a parallel process, which also helps gain a better understanding of the circumstances that prompted the action.
- Briefing your Program Leadership/Management or the Executive Leadership Team? Invite your communications manager.

#### What communications managers need from you

- The documentation of violations such as an Order, NOV, NOC, RFE or settlement terms. Draft versions are ok.
- Your review and feedback on communications products to ensure accuracy.
- Answers to questions like:
  - What are the associated processes for this action? For example, can it be appealed and how?
  - What are we requiring them to do? What happens if they don't?
  - Why does this matter, environmentally?
  - Is there a history of non-compliance or other violations?
  - Are there educational messages we could incorporate?
  - Are there any unusual details about this enforcement action?

### **What you can expect from communications managers**

- Communications Managers will work with staff on the development of a timeframe in which we deliver internal and external communications products for review such as: briefings, communication plans, news releases, and talking points.
- Communication Managers draft communication products and provide drafts for review and input.

### **Additional considerations to help determine the level of internal communication and stakeholder outreach that may be needed**

- Does this affect other programs or regions?
- Should program, regional or executive management teams be informed?
- Who are all of the possible stakeholders that might take interest in our action? (examples: landowners, environmental groups, businesses, legislators, local governments, state and federal partners).
- Is the action potentially high profile?
  - Are the violators politically connected?
  - Is it happening in a large media market?
  - Is the violator a public entity?
  - Is the violator a large company? Locally, nationally or internationally.
  - Is the violation considered a hot topic – in the news or the legislature?

## **Communications Team process**

### **News release process**

News releases must never be part of the negotiation per Administrative Policy 20-03.

News releases are written in a style and tone appropriate for the target audience – reporters and news outlets. The purpose is to relay Ecology's work in a concise and accurate manner that encourages coverage of our news.

1. Communications Manager drafts using enforcement and compliance information provided.
2. Subject matter expert and appropriate managers review.
3. Communications Manager peer review (recommended, not required).
4. Assistant Communications Director reviews for content and agency style before approval. If edits are required repeating steps 2 and 4 may be needed.
  - a. Depending on the penalty, the news release may need to be reviewed and approved by the Communications Director, Deputy Director, Director, and/or Governor's office.

**5. 24-hour courtesy review for penalties and settlements only**

- a. A copy of the final draft news release is provided with the penalty/settlement to recipients or settlement parties for factual review, not approval.
- b. Settlement parties may provide a quote, the communications manager accepts, rejects, or negotiates the quote.

6. Finalize, post to web and social media, and distribute to media.

**Communications planning process**

1. Communications Manager drafts using enforcement and compliance information provided.
2. Subject matter expert and appropriate manager's review.
3. Living document – modified as needed.

# Appendix D

## Memo from Deputy Director Zehm

July 30, 2018

TO: Environmental Program Managers and Regional Directors

FROM: Polly Zehm, Deputy Director

SUBJECT: Enforcement Action Management Review Process

The purpose of this memo is to provide clarity of roles and timing for Program Managers and Regional Directors in decision-making for enforcement actions. This is primarily for penalties over \$10,000, but can also include penalties of lesser amounts and administrative orders that contain extensive requirements. *The exception to this process is the Nuclear Waste Program, which will work directly with the Deputy Director on proposed enforcement actions.*

Program Management/Program Leadership Teams shall discuss recommendations for enforcement at their weekly or bi-weekly conference calls or meetings. The purpose of these discussions is to determine which actions the program supports moving forward and establish a desired timeframe for issuance. If the Program Manager supports proceeding with the action, the Section Manager (or Regional Unit Manager for SPPR) will inform the appropriate Regional Director, sharing the desired timeframe for issuance. If actions cross regional boundaries, each Regional Director should be informed. NOTE: The Program or Regional Communication Manager should have already been engaged by lead enforcement staff regarding the proposed enforcement action prior to the Program Management/Leadership Team discussion.

If a decision is made not to proceed with an action, the appropriate Section Manager will immediately advise the lead enforcement staff who developed the enforcement recommendation of that decision.

Regional Directors will determine whether to have their Regional Management Team provide a regional review of the proposed action for the purposes listed below. Every effort will be made to have the regional review occur the week following notification to the Regional Director.

The purposes of the regional review are to:

- Facilitate coordinated processing of actions within regions and across the agency;
- Enhance cross-program awareness of situations and relationships with those subject to regulations and requirements – within regions and across the agency;
- Support effective communication planning;
- Apply experience and learning from past enforcement actions to advance appropriate and durable actions;
- Ensure compliance assurance strategies support the agency's mission; and



- Take advantage of Regional Management Team members' knowledge of the region.

Regional Directors, based on their knowledge of the political and regulatory issues of the region, may recommend delay in issuing the enforcement, changes to the communications plan, or other changes to facilitate timely and effective enforcement. The Section Manager (or SPPR Unit Supervisor) will inform the lead enforcement staff of any changes.

The Regional Director and Program Manager will determine, with the Deputy Director, whether the recommended enforcement action should be scheduled for presentation at an Executive Leadership Team meeting. Every effort will be made to schedule a briefing within two weeks. The Program Manager, Section or Unit Manager will communicate to the lead enforcement staff member whether an ELT discussion will occur.

Programs are encouraged to involve the lead enforcement staff who developed the recommended enforcement action. The appropriate Communication manager will participate in Regional and/or Executive team meetings when the action is being discussed.

To summarize, enforcement actions subject to Regional and Executive Management review are:

- Penalties of \$10,000 and above;
- Actions with important cross-program implications (even if less than \$10,000);
- Actions with a high degree of sensitivity and/or community interest (even if less than \$10,000);
- Enforcement actions, other than penalties, that are likely to be highly visible, controversial or expensive to implement -- such as an Administrative Order or Notice of Correction; and
- Enforcement initiatives, such as the announcement of business sector sweeps or other focused efforts will also be reviewed prior to announcement and implementation by the program.

**The Deputy Director is tracking all penalties over \$5000. Program Managers are responsible for notifying the Deputy Director of those penalties, ideally four weeks or more before the date the program is expecting to issue the penalty order.**

Date of final document: July 30, 2018

Deputy Director Signature: 