

Enforcement Procedures Manual



State of Idaho
Department of Environmental Quality
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Acknowledgments

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Disclaimer

This Manual is intended to assist the Department of Environmental Quality staff and management with making enforcement decisions. This Manual is intended solely as guidance and does not have the force and effect of law. This Manual is not new law. If this Manual conflicts with any law, the law prevails. This Manual does not create a right or benefit, substantive or procedural, enforceable at law or equity by any party versus the Department of Environmental Quality, its employees, or any other person. This Manual does not substitute for any provisions, regulations or rules. The procedures in this Manual are not binding; the Department of Environmental Quality may make other decisions consistent with applicable law. The Department of Environmental Quality reserves the right at any time without notice to suspend, discontinue, or change any policies, practices, or procedures contained in this Manual.

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Abbreviations, Acronyms, and Symbols

§	section
CAS	compliance agreement schedule
CID	(EPA) Criminal Investigations Division
CO	consent order
DEQ	Idaho Department of Environmental Quality
EDMS	electronic document management system
EPA	US Environmental Protection Agency
EPHA	Environmental Protection and Health Act
IPDES	Idaho Pollutant Discharge Elimination System
HWMA	Hazardous Waste Management Act
LUST	leaking underground storage tank
NOV	notice of violation
RCRA	Resource Conservation and Recovery Act
SEP	supplemental environmental projects
SETS	Statewide Enforcement Tracking System
SWFA	Solid Waste Facilities Act
UST	underground storage tank
USTA	Underground Storage Tank Act

Executive Summary

The Idaho Department of Environmental Quality's (DEQ's) *Enforcement Procedures Manual* (Manual) was prepared for use by DEQ staff and management. The Manual is intended to provide the following:

- Training tool for new DEQ staff
- Reference tool for existing DEQ staff
- Define standard compliance and enforcement policies and procedures

This Manual describes the statutory authorities under which the compliance and enforcement components of the various DEQ divisions/bureaus/programs are implemented, and the policies and procedures used to achieve compliance. By employing the procedures in this Manual, DEQ staff can develop technically accurate and legally defensible enforcement actions. Adherence to the procedures in this document will promote agency credibility by establishing successful compliance/enforcement programs that are consistent, equitable, and accountable.

The Manual covers the following:

- Regulatory framework and authorities that are the foundation for the compliance and enforcement efforts taken by DEQ
- Descriptions of how DEQ determines if a violation of the law occurred; how DEQ may respond to violations of the law; and the process for referring enforcement actions for violations from the regional offices to the State Office
- Informal enforcement actions
- Administrative enforcement processes, including the various tools available to DEQ for taking enforcement actions
- Civil and criminal enforcement actions, including the purpose of pursuing civil or criminal enforcement actions and the process involved
- Records management and how the Idaho Public Records Act applies to DEQ's records
- Statewide Enforcement Tracking System (SETS)

This Manual is available to the public and may be used by the regulated community and public as an educational tool for understanding the authorities under which DEQ operates its compliance and enforcement programs.

As circumstances or policies change, this Manual is subject to revision. DEQ reserves the right to deviate from and change this Manual at any time without public notice.

For any questions regarding this Manual, please contact DEQ Idaho Pollutant Discharge Elimination System Compliance and Enforcement Officer Nicole Deinarowicz at 208-373-0591 or via email at Nicole.deinarowicz@deq.idaho.gov.

1 Introduction

DEQ is a state agency created by the Idaho Environmental Protection and Health Act of 1972 (EPHA), Idaho Code § 39-101, et seq., charged with ensuring clean air, water, and land in the state and protecting Idaho citizens from the adverse health impacts of pollution. As a regulatory agency, DEQ enforces state environmental regulations and administers federal environmental protection laws including the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act. DEQ manages a broad range of activities including:

- Assessment of environmental problems
- Oversight of facilities that generate air, water, and hazardous and solid waste pollution
- Prevention of releases and cleanup of contaminated sites
- Education, outreach, and technical assistance to businesses, local government agencies, and interested citizens

DEQ's Air Quality, Drinking Water Protection and Finance, Surface and Wastewater, and Waste Management and Remediation Divisions are responsible for developing, administering, and enforcing environmental laws and policies and coordinating their implementation statewide, which includes compiling, analyzing, and reporting environmental data and maintaining relationships with other state and federal agencies and environmental partners.

The Air Quality Division is comprised of three bureaus: Planning, Stationary Source, and Data. These bureaus are primarily responsible for protecting the state's outdoor (ambient) air quality to ensure compliance with state and federal health-based air quality standards.

The Drinking Water Protection and Finance Division is comprised of three bureaus: Drinking Water, Ground Water, and Grants and Loans (not discussed in this Manual). These bureaus are primarily responsible for ensuring drinking water from public drinking water systems in Idaho is safe, protecting ground water and other drinking water sources, and providing water infrastructure financing.

The Surface and Wastewater Division is comprised of three bureaus: Idaho Pollutant Discharge Elimination System (IPDES), Surface Water, and Wastewater Engineering. These bureaus are primarily responsible for protecting the state's surface and ground water resources from pollution and ensuring state water quality standards are met.

The Waste Management and Remediation Division is divided into three bureaus: Assessment and Compliance, Remediation, and Hazardous Waste. These bureaus are primarily responsible for monitoring and controlling the generation, treatment, storage, and disposal of wastes and responding to releases of hazardous substances in Idaho.

This Manual describes the statutory authorities under which the compliance and enforcement components of the various bureaus are implemented and the policies and procedures used to achieve compliance.

2 Regulatory Framework and Authorities

This section outlines the legal basis of DEQ's enforcement authority and provides an overview of the relevant laws for DEQ divisions (including bureaus and programs).

2.1 DEQ's Authority to Enforce Environmental Laws in Idaho

DEQ is an administrative agency created by statute. Statutes are laws enacted by the legislature and establish many of an agency's powers and functions. The Idaho Environmental Protection and Health Act of 1972 (EPA), Idaho Code § 39-101, et seq., declares that it is the policy of the state to provide for the protection of the environment and the promotion of personal health and to protect and promote the health, safety, and general welfare of the people of the state. Idaho Code § 39-102A(4) states that DEQ shall "carry out programs to protect human health and the environment, to enforce environmental laws and develop pollution prevention, compliance assistance and other environmental incentive programs." The EPA grants DEQ the powers and duties to protect the environment and public health through the use of enforcement authorities.

The administrative powers of DEQ are vested in the Director. The Director's powers and duties include creating and recommending rules, regulations, codes, and standards that may be needed to deal with problems related to environmental concerns to the Board of Environmental Quality (Board). The Director, under the rules, regulations, codes, or standards adopted by the Board, supervises the promotion and protection of the environment and the health of the people of Idaho. The powers and duties of the Director specific to protecting the environment include, but are not limited to, the following:

- Issuing licenses and permits as prescribed by law and the rules of the Board
- Supervising and administering programs to safeguard air quality and water quality and for the proper disposal of hazardous and solid waste
- Supervising and administering administrative units whose responsibility shall be to assist and encourage counties, cities, other governmental units, and industries in the control and/or abatement of environmental and health problems
- Enforcing laws, rules, regulations, codes, and standards relating to environmental protection and public health
- Authority to develop and propose regulations as necessary to ensure compliance with other state laws and federal laws

The Board consists of seven members appointed to 4-year terms by the Governor, with the advice and consent of the senate. Each member must be a citizen of the United States, a resident of the state of Idaho and a qualified elector. Not more than four of the Board members may be from any one political party. All members are chosen with due regard to their knowledge and interest in environmental protection and health. Each year the Board elects a chairperson, vice-chairperson, and secretary.

The Board generally meets three or four times per year. By affirmative vote of four of its members, the Board may adopt, amend or repeal the rules, codes, and standards of DEQ that are necessary and feasible to carry out the purposes and provisions of the EPA and to enforce the laws of Idaho. The rules and orders adopted become final and effective after submittal to the legislature for review, if not rejected by the legislature, have the force and effect of law, and may

deal with any matters deemed necessary and feasible for protecting the environment or the health of the state.

Finally, DEQ promulgates rules pursuant to its authority under the EPHA and various other statutes (section 2.3). These rules relate to the various DEQ divisions, including air, water, and waste. The rules may also incorporate federal regulations, where appropriate. As noted above, the rules promulgated by DEQ must be approved by the Board and the state legislature. Much of DEQ's enforcement actions come from enforcing these rules and the permits issued pursuant to the rules.

Internal agency procedures, interpretations, and guidance are not rules. Internal guidance does not have the force and effect of the law. For more information on rules versus guidance, see *DEQ Policy Statement PS20-04* found at electronic document management system (EDMS) record number 2016ADU2[v2].

2.2 Environmental Protection and Health Act

Most of DEQ's enforcement authorities are derived from the EPHA. This statute gives DEQ the authority to enforce specific rules, regulations, standards, plans, licenses, permits, certificates, or orders. The EPHA also contains provisions related to individual bureaus, such as the IPDES Bureau, and particular sites, such as Bunker Hill.

The central provisions of the EPHA related to enforcement include the following:

Idaho Code § 39-108—Provides DEQ enforcement authority to:

- Conduct a program of continuing surveillance and regular or periodic inspections
- Enter property to inspect or investigate possible violations of the law
- Proceed with administrative or civil enforcement actions for violations of the act, rule, regulation, permit, or order (administrative and civil enforcement processes implemented by DEQ are discussed in sections 6 and 7)
- Issue civil penalties or seek recovery of the state's expenses incurred by enforcing the EPHA
- Bring a civil action for an immediate injunction in emergency situations

Idaho Code § 39-109—Gives the Board or director the authority to request the Attorney General's Office to commence civil or criminal enforcement action.

Idaho Code § 39-116—Provides DEQ the authority to issue compliance schedules to any person who is the source of any health hazard or water pollution for which regulatory standards have been established to ensure timely compliance with those standards.

Idaho Code § 39-116A—Provides DEQ the authority to enter into a compliance agreement schedule with any person, which includes an enforceable schedule for actions necessary for the person to come into or maintain compliance as expeditiously as practicable with such statutes and rules.

Idaho Code § 39-117—Establishes the criteria for criminal misdemeanor charges and penalties for any person who willfully or negligently violates the provisions of the public health or environmental protection laws.

For additional information, refer to the EPHA at [Idaho Code § 39-101 through 176](#).

2.2.1 Statute of Limitations

The EPHA contains a two-year statute of limitations, pursuant to Idaho Code § 39-108:

No civil or administrative proceeding may be brought to recover for a violation of any provision of this chapter or a violation of any rule, permit or order issued or promulgated pursuant to this chapter more than two (2) years after the director had knowledge or ought reasonably to have had knowledge of the violation.

To pursue violations of the EPHA, DEQ must enter into an administrative action, such as a consent order (CO) or compliance agreement schedule (CAS), or file a civil complaint in district court within two years from the day the violation was observed, discovered, or otherwise brought to DEQ's attention. Issuing a notice of violation (NOV) will not stop the statute of limitations from continuing to run. The statute of limitations does not necessarily start on the date the violation actually occurs but the date DEQ *discovered, or should have discovered*, the violation, such as during a site visit or technical/compliance assistance, the date a complaint is received, or the date an entity self-reports. A violation may be a discrete, one-time occurrence, or a continuing violation, where each day represents a new occurrence of the violation. When there are questions regarding whether a violation is a one-time occurrence or a continuing violation, DEQ staff should discuss with the Attorney General's Office prior to developing an enforcement action. Further descriptions of discrete and continuing violations are discussed in section 3.1.

Criminal violations of the EPHA (or other statutes) are also subject to a statute of limitations. For misdemeanors, the prosecuting entity must file the criminal complaint within one year from the date the crime occurs (Idaho Code § 19-403). For felonies, the prosecuting entity must file the criminal complaint or indictment within five years from the date the crime occurs (Idaho Code § 19-402).

Because DEQ is subject to a statute of limitations, it is imperative that DEQ make enforcement decisions and take enforcement actions in a timely manner. DEQ staff should seek the assistance of the Attorney General's Office for statute of limitations questions or concerns.

2.2.1.1 Tolling Agreements

If DEQ is approaching the statute of limitations on a potential violation, the agency may consider entering into a tolling agreement with the person or entity. The decision to enter into a tolling agreement is made on a case-by-case basis based on the circumstances surrounding the violation and the facility's or entity's willingness to continue negotiating.¹ In a tolling agreement, the person or entity agrees to waive their right to claim that the action cannot be brought due to the expiration of the statute of limitations. The tolling agreement is usually for some fixed amount of time, such as six months or one year. If a tolling agreement cannot be entered into, DEQ must

¹ There is no statutory definition of a tolling agreement. However, courts have found these agreements to be an enforceable type of contract.

enter into a CO or CAS or initiate a civil or criminal action before the statute of limitations expires. Otherwise, DEQ is barred from enforcing violations that are beyond the two-year statute of limitations. The tolling agreement gives both parties additional time to negotiate an informal or administrative resolution of the violations without pursuing a civil or criminal action.

DEQ staff should seek the assistance of the Attorney General's Office for negotiating and entering into tolling agreements.

2.3 Other Regulatory Authority

While the EPHA provides much of the statutory basis for DEQ's enforcement authority, additional state statutes may provide enforcement authority.

Water Quality—Idaho Code § 39-3601 through 3639 makes DEQ responsible for adopting and enforcing water quality standards that protect beneficial uses of the navigable waters of the United States within the state of Idaho.

Hazardous Waste Management Act of 1983 (HWMA)—Idaho Code § 39-4401 through 39-4432 provides enforcement authorities specific to hazardous waste. The HWMA protects public health and the environment from improper management of hazardous waste and includes a program to track and control hazardous wastes from the time they are generated through transportation, treatment, storage, and disposal (Idaho Code § 39-4402). HWMA also directs DEQ to promulgate rules consistent with the federal regulations that implement the Resource Conservation and Recovery Act (Idaho Code § 39-4404).

Hazardous Waste Facility Siting Act—Idaho Code § 39-5801 through 39-5820 requires owner/operators of prospective treatment, storage, and disposal facilities to obtain a siting license demonstrating the facility complies with the state's hazardous waste management plan.

Waste Tire Disposal Act—Idaho Code § 39-6501 through 6508 requires proper management of waste tires. This act sets forth standards for waste tire storage sites and transportation.

Sale and Disposal of Batteries—Idaho Code § 39-7001 through 7004 prohibits the disposal of lead-acid batteries in landfills and the incineration of those batteries and provides conditions on the sale of lead-acid batteries.

Idaho Solid Waste Facilities Act (SWFA)—Idaho Code § 39-7401 through 7421 establishes a program of solid waste management and facilitates the incorporation of flexible standards in solid waste facility design and operation. SWFA also enumerates the different duties and authorities of DEQ, the counties, and the health districts related to solid waste management.

Underground Storage Tank Act (USTA)—Idaho Code § 39-8801 through 8812 regulates underground storage tank (UST) systems in Idaho.

2.4 Federal Programs Administered by the State

Through state statutes and DEQ rules, DEQ administers federal environmental programs. In cases where DEQ has not been authorized to operate a particular program, that program is

administered and implemented by a federal agency, such as the US Environmental Protection Agency (EPA). When the state administers the program in lieu of the federal government, the state has *primacy, authorization, or delegation*. Primacy means the state has applied for and received the approval to administer and implement the program. To implement a federal program on the state level, the rulemaking process (described at <http://www.deq.idaho.gov/laws-rules-etc/deq-rulemakings/>) is needed to adopt the federal regulations into state rules, or a state-specific set of program rules must be drafted and adopted.

DEQ has primacy to administer the following federal statutes and programs:

- Clean Air Act
- National Pollutant Discharge Elimination System
- Resource Conservation and Recovery Act²
- Safe Drinking Water Act

3 Violation Determination and Response

This section discusses how to evaluate the information needed to make a violation determination and define the four types of enforcement responses.

3.1 Determining Violations

DEQ must evaluate all the information collected to draw conclusions about the potential violations. This process begins by determining what regulatory requirements apply. Some deficiencies may not rise to the level of a violation but must still be addressed. DEQ will bring deficiencies to a person's or entity's attention through an inspection report or other compliance-related correspondence and request they continue to work toward compliance.

Making a violation determination involves using the language in the applicable statute, rule, CO, CAS, or permit condition (i.e., a regulatory requirement) as a guide to determine whether the information collected demonstrates that a violation occurred. Using this approach, DEQ staff should have a good understanding of what regulatory requirement was violated and how it was violated. An explanation of how the operations observed or records reviewed fail to comply with a regulatory requirement is required in the compliance-related correspondence.

DEQ staff must base their compliance determination on factual information, including but not limited to, information collected during an inspection, through a complaint response, report review, noncompliance with a CO or CAS requirement, self-reporting by a person or entity. Staff should rely upon DEQ division interpretations, regulatory guidance, policies, procedures, and past division actions whenever possible in determining whether or not a statute, rule, permit, CO, or CAS was violated. Using factual information avoids the perception that decisions are made in an arbitrary or capricious manner. Further, without factual information, an action will likely not hold up in court. Each violation must be reviewed on its own merit, with case-specific considerations taken into account. Enforcement procedure documents that provide direction for

² RCRA is comprised of the three interrelated programs—Hazardous Waste, Solid Waste, and Underground Storage Tanks.

proceeding with an enforcement action once violations have been identified are available to each division (Table 1).

Table 1. Specific procedure documents on enforcement actions.

Division/Bureau/Program	Document Title	EDMS Record Number
Air	Compliance and Enforcement Roles and Responsibilities	2009ACF6
Drinking Water	EPA Enforcement Response Policy	2011ABP7
Hazardous Waste	EPA Hazardous Waste Civil Enforcement Response Policy	2015BCB2
IPDES	IPDES Enforcement Procedures Manual	2017FAG76
	IPDES Enforcement Response Guide	2016FAE3[v2]
Remediation Bureau (General Remediation/Mining)	General Remediation and Mining Enforcement Procedures	2015BAF10
Underground Storage Tank (UST) Leaking Underground Storage Tank (LUST)	UST/LUST Program Implementation Manual	2017BBB2221

Extenuating circumstances should be considered in making the final compliance determination. Determining whether extenuating circumstances exist at the time of the inspection or record review may have a significant effect on DEQ’s ability to determine if a violation occurred. An extenuating circumstance may include a facility shutdown or equipment malfunction. Document the extenuating circumstance and, to the extent possible, conduct an inspection or record review. An extenuating circumstance may still result in a violation, depending on the particular situation.

The period of noncompliance for a violation must be determined or estimated. Violations are categorized into the following groups:

Discrete—A violation resulting from an individual, distinct, or separate circumstance (i.e., one-time occurrence). The violation is not observed or documented as ongoing.

- Example 1—A drum of hazardous waste is not labeled properly although the person or entity has a standard operating procedure for labeling drums and has instructed employees in proper labeling procedure. The person or entity corrects the drum labeling violation during the inspection period.
- Example 2—A single visible or fugitive dust emissions violation, such as a brief open-burning event at a location or facility with an air permit.

Continuing—A violation resulting from an ongoing, persistent, or enduring circumstance or situation. The violation is observed or documented as ongoing over an extended time period that is substantiated by records.

- Example 1—A facility fails to perform an air emissions source test required by a certain date in a permit. The facility will remain in continuing, demonstrated noncompliance until the test is completed and the permit requirement has been met.
- Example 2—A facility operates an emissions source without the required control equipment is a continuing violation. The facility fails to obtain a permit before constructing an air pollution source and continues to operate the facility without the permit. The facility conducts an emissions test that results in noncompliance with an

emissions limit but continues to operate the facility without correcting the problem and demonstrating compliance through a new test.

Recalcitrant—A violation noted during a previous inspection or review. The violation might be characterized as recalcitrant based on DEQ’s knowledge of identical violations identified during a previous inspection or review of the location or facility. A recalcitrant violation can be either discrete or continuing but has been repeatedly identified and reported to the person or entity.

- **Example**—A violation was previously reported to a person or entity for prompt resolution but little or no action was taken to resolve the violation. On further assessment, the same violation is identified.

3.2 Responding to Violations

Once DEQ determines a violation occurred, the agency decides the appropriate course of action—informal, administrative, civil, or criminal. To ensure statewide consistency and avoid the perception that decisions are made in an arbitrary or capricious manner, DEQ staff rely on DEQ division interpretations, manuals, memorandums, policies, and procedures. If uncertainty or questions exist about determining the appropriate course of action, DEQ staff will contact the applicable enforcement coordinator at the State Office. As used in this Manual, the enforcement coordinator is a person at the program level designated to oversee enforcement actions.

If the State Office takes the lead on an inspection or compliance monitoring activity, the State Office will discuss any enforcement decisions with the appropriate regional office. When making a determination, the relevant regional or state office staff will consider the gravity of the violation based on the impact to human health and the environment, as well as any applicable policies or procedures.

To weigh the gravity of violations, the following terms identify violation categories:

1. **Major violations** deviate substantially from the regulatory requirement and create imminent or potential danger to human health or the environment. Major violations usually result in larger penalties.
2. **Moderate violations** deviate significantly from most but not all of the regulatory requirements, resulting in a less significant potential for danger to human health or the environment. Moderate violations usually result in smaller penalties.
3. **Minor violations** deviate somewhat from the regulatory requirements. Little or no potential danger exists to human health and the environment as a result of minor violations, and the minimum penalty is imposed.

Consider these factors when determining the appropriate enforcement recommendation:

- The amount and toxicity of the pollutant or substance released, emitted, discharged, treated, disposed, or improperly managed
- The potential harm to the public as a result of noncompliance
- The sensitivity of the receptors and/or the environment impacted or potentially impacted by the release, emission, discharge, treatment, disposal, or improper management
- The relevant compliance history of the person or entity and their responsiveness to correcting previous violations

- The responsiveness and/or cooperation exhibited by the person or entity in correcting discrepancies during an inspection/compliance monitoring activity or shortly after, constituting an objective good faith effort to comply based on the particular circumstances
- Whether circumstances beyond the control of the person or entity exist, such as equipment failure, unpredictable accidents, severe weather, or natural disasters
- The degree of negligence exhibited by the person or entity
- The degree of support for, commitment to, and implementation of environmental programs by the person or entity (i.e., training opportunities, designated environmental staff, required resources available, environmental programs in place, good housekeeping, and good recordkeeping systems)

3.2.1 Enforcement Discretion

Occasionally, certain violations do not align with, or translate into DEQ’s preferred or typical enforcement response. In these instances, the agency may elect to use its discretion and forgo an enforcement response or delay an informal response or administrative enforcement action. Use of discretion should be under the direct oversight of the appropriate State Office enforcement coordinator. DEQ’s decision for using discretion must be properly documented and preserved. Enforcement discretion does not excuse the violation; the person or entity may still be subject to enforcement by DEQ, EPA, or the public.

3.2.2 Field or Regional Enforcement

Field or regional enforcement is used by several divisions to immediately respond to an observed compliance issue or violation while in the field (Table 2). This enforcement type falls under either an informal or administrative action (sections 4.3 and 6.3). Staff is encouraged to follow their program’s enforcement policies, procedures, and manuals when employing field enforcement tools.

Table 2. Divisions that utilize field or regional enforcement.

Division	Document Title	EDMS Record Number
Air Quality	Air Quality Guidelines and Procedures for Issuing Regional Notices of Violation	2009ACF4
UST LUST	Section 4.2.2 of the UST/LUST Program Implementation Manual	2017BBB2221

3.2.3 Informal Enforcement

Informal enforcement is typically the first step in the enforcement process. Informal enforcement is used to notify a regulated entity of requirements they may be unaware of, isolated incidents out of their control, or minor or first-time violations where a warning is appropriate.

Informal enforcement does not require the Director’s signature. Actions such as inspection cover letters, notices to comply, and warning letters are informal enforcement.

Informal enforcement addresses minor or low priority violations and does not assess a penalty. Violations addressed through informal enforcement may be resolved expeditiously, involve relatively low costs to the person or entity, and require minimal oversight by DEQ. Informal enforcement is an effective tool for gaining compliance without resorting to an NOV or other proceeding.

Informal enforcement serves two purposes:

1. To identify to the person or entity the apparent deficiencies and/or violations that were observed as a result of an inspection, through a complaint response, report review, person or entity self-reporting, and other methods to identify deficiencies and violations
2. To request corrective measures be implemented within a given time frame to mitigate the deficiencies and/or violations

Section 4 describes the specific types of informal enforcement responses.

3.2.4 Administrative Enforcement

Administrative enforcement is a more formal process beginning with a referral to the State Office enforcement coordinator. The referral identifies and substantiates the claims for violations and requests the appropriate administrative enforcement action. Administrative enforcement actions require the Director's signature and may assess penalties.

The Underground and Leaking Underground Storage Tank program is not required to submit a referral or obtain the Director's signature on administrative enforcement actions.

Section 6 describes the specific types of administrative enforcement, and section 5 provides additional information on the referral process.

3.2.5 Civil Enforcement

Civil enforcement generally occurs when all reasonable attempts to resolve the violation through the administrative enforcement process have been exhausted and the parties cannot come to agreement. Civil enforcement is a court action brought in district court by the Attorney General's Office, in consultation with DEQ. All parties are bound to the rules of the courts (*Idaho Rules of Civil Procedure* and *Idaho Rules of Evidence*). Section 7.1 provides additional information on civil enforcement.

3.2.6 Criminal Enforcement

Criminal violations occur when a person or entity has knowingly, willfully, intentionally, or with criminal negligence acted in violation of the law. If criminal violations exist, DEQ may refer the enforcement action to the Criminal Division of the Idaho Attorney General's Office (AG's Criminal Division), EPA's Criminal Investigation Division, or other entities for further criminal investigation and/or prosecution of the violation. In either case, the DEQ division will remain involved with the case to the extent requested. Section 7.2 provides for additional guidance on criminal enforcement.

3.2.7 Other Response Options

The tools described below are also available under the EPHA and other regulatory authorities to help achieve compliance in certain circumstances.

3.2.7.1 Permit Modifications

Permit violations may be resolved through the permitting process. Occasionally, operational changes will no longer necessitate a specific permit condition governing a particular activity. Often, modifications to the permit may *resolve* situations of noncompliance related to some permit conditions. In these cases, the enforcement staff can coordinate with the permittee and DEQ's permitting staff to negotiate needed modifications to the permit, which may resolve any related violations. Modifying permit conditions can be included as a condition in a CO or CAS, or depending on the circumstances, the permit modification itself may serve to satisfactorily resolve the violation. During the compliance conference, discuss this option based on the specifics of the case.

3.2.7.2 Compliance and Technical Assistance

Educating the regulated community has become a national and state priority. Compliance assistance with environmental requirements is often accomplished through education and outreach efforts. This can include communicating to a person or entity aspects of a deficiency, explaining regulatory requirements and permit requirements, or providing guidance on how to comply with a particular permit condition. DEQ can assist with voluntary compliance by:

- Conducting site visits
- Providing in-person and telephone consultations, with follow-up as needed
- Developing and distributing user-friendly regulatory guides and industry-specific pollution prevention information
- Sponsoring and participating in workshops and seminars
- Working with trade groups
- Providing guidance on obtaining grants and loans
- Assisting with permitting requirements
- Conducting permit handoffs
- Referring the regulated community to other local, state, or federal agencies for relevant information

Compliance with environmental requirements can also be accomplished through technical assistance, such as advice or training related to the installation, operation, and maintenance of equipment. Technical assistance provides the person or entity with the expertise needed to gain compliance; however, DEQ will not prescribe a specific solution.

4 Informal Enforcement Action

DEQ staff may use various informal enforcement options instead of, or prior to, initiating an administrative enforcement action and should follow informal enforcement procedures established for their division.

Enforcement is any action taken by the agency notifying a regulated entity or person they are not complying with rules, statute, or permits and directing the entity to take action to remedy the noncompliance. Informal enforcement is used to notify a person or entity of requirements they may be unaware of, such as isolated incidents out of their control or minor or first-time violations where a warning is appropriate.

Informal enforcement is typically the first step in the enforcement process. DEQ reserves the right to initiate formal enforcement without prior informal enforcement based in part on the severity, negligence, or the intent behind a violation.

4.1 Inspection Cover Letter

Inspection cover letters (i.e., compliance notification letters) notify the person or entity of inspection results. Inspection cover letters include a summary of the findings with any alleged violations or concerns.

The inspection cover letter should:

1. Acknowledge that an inspection or compliance review of the person or entity was performed on a specified date
2. Notify the person or entity of the following:
 - a. Issues of noncompliance
 - b. Relevant rules, regulations, standards, permit, and CO or CAS conditions with which the person or entity is not complying
 - c. Discuss any relevant potential deficiencies or concerns that may affect the person's or entity's compliance status in the future
 - d. Any information necessary to address an issue of noncompliance, due date, and the method of how the requested information must be submitted to DEQ
3. Include the inspection report and relevant educational information

Verify with the enforcement coordinator if specific language, requirements, or legal language for the inspection cover letter is needed.

4.2 Warning Letters

A warning letter (e.g., Notice to Comply, Notice of Noncompliance, Notice of Deficiency, Notice of Intent to Enforce, or Compliance Assurance/Technical Assistance) can be used to gain compliance. If a warning letter is not successful at gaining compliance, it becomes part of the supporting documentation in an administrative enforcement action. To ensure statements are not included in the warning letter that may impact the agency's ability to initiate administrative enforcement in the future, regional staff should consult with the enforcement coordinator for their division on use and language when drafting the letter. Any coordination with the Attorney General's Office is to be handled by the enforcement coordinator then communicated back to the regional office. This ensures the division is apprised of what is being relayed to the deputy attorney general and the direction being provided from the Attorney General's Office.

The warning letter serves two purposes:

1. To identify to the person or entity apparent deficiencies and/or violations observed or discovered
2. To request corrective measures be implemented within a given time frame to mitigate the deficiencies and/or violations

Warning letters are reserved for addressing minor or low-priority discrete deficiencies and/or violations and do not assess a penalty. The deficiencies and/or violations addressed in a warning letter can be resolved expeditiously with relatively low costs and minimal oversight by DEQ.

At a minimum, the warning letter should:

- Notify the person or entity that they are violating relevant rules, regulations, standards, permit, CAS or CO conditions
- Describe the relevant rules, regulations, standards, permit, CAS or CO conditions the person or entity is not complying with
- Discuss steps the person or entity needs to take to return to compliance
- Inform the person or entity that a written response to the warning letter is required and must include evidence or documentation the deficiencies and/or violations have been resolved, or provide a timeline and steps the person or entity will take to resolve them
- Attach relevant educational information and correspondence

Upon DEQ's determination that the person or entity has satisfactorily remedied the violations cited in the warning letter, a Return to Compliance, Compliance Determination Letter, or similar letter, if warranted, should be issued by the DEQ staff that issued the warning letter.

If a response is required and the person or entity fails to respond either in writing or verbally to the warning letter, DEQ should attempt to contact and work with the person or entity to resolve the deficiency or violation. If the person or entity fails to cooperate with DEQ or inadequately responds to the warning letter, DEQ may move to the administrative enforcement process (section 6).

Verify with the appropriate enforcement coordinator if specific language, requirements, or legal language for the warning letter is needed.

4.3 Field or Regional Notices of Violation

A field or regional NOV is a citation issued by the regional office at, or near, the time of inspection identifying specific violations and the associated penalty dollar amount.

Field or regional NOV's are not used across all DEQ divisions; direct questions about their use to the respective bureau chiefs and/or enforcement coordinators.

5 Referral Process

Once staff determines an administrative enforcement action may be warranted, the region will compile a referral package (Table 3) and submit it to the appropriate person in the State Office. If an enforcement action involves multiple divisions and all divisions want to combine enforcement actions, the appropriate State Office staff will discuss combining enforcement actions and which

division will take the lead. The State Office will strive to determine and communicate to the region whether to pursue formal enforcement within a month of receiving the referral package.

Table 3. Referral forms utilized by the Divisions.

Division/Bureau/Program	EDMS Record Number
Air	2020ADN1
Drinking Water	
Hazardous Waste	
IPDES	
Solid Waste	
Wastewater	
Remediation Bureau (General Remediation and Mining)	2019BAP4
UST	2018BAH2
LUST	2018BAH1

5.1.1 Preparing the Enforcement Referral Package

The enforcement referral package should be conspicuously labeled as “*Enforcement Confidential*” and treated as a confidential attorney-client communication during a pending enforcement action. If public records are requested related to the enforcement action, consult with the Attorney General’s Office for assistance in determining whether a referral package is exempt from disclosure. Once the enforcement action is resolved, it is unlikely the information contained in the referral package will remain confidential.

The referral package should contain a complete summary of the inspection or compliance monitoring activity with the following information:

- Responsible party
- Enforcement action requested
- List of potential violations, including the date the violations occurred or were discovered, what rule/permit/agreement term was potentially violated, and any associated Content Manager record numbers
- Description of how DEQ become aware of the potential violations
- The impact the potential violations and the location impacted
- The preferred remedy and preferred timeline for each violation
- Background information and/or a chronology of events
- Discussion of complex technical or regulatory issues
- Discussion of any extenuating circumstances
- Previous relevant compliance history
- Degree of cooperativeness exhibited by the person or entity
- DEQ’s statement on the overall compliance status of the person or entity
- All documents pertinent to the case or a list all EDMS reference numbers of the documents (e.g., inspection reports and associated evidence, justifications, written correspondence, phone logs, emails, and memoranda)

Register the referral package in DEQ’s EDMS according to the Filing Index developed for the enforcing division and mark as confidential.

DEQ staff should complete the referral within the time frame specified by the division policies; however, to preserve statutory limitations, the referral should not be more than one year after the violation was discovered. Refer to EPA's Office of Enforcement and Compliance Assurance at: *The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations*.

Generally, the decision to proceed with an administrative enforcement action is made by the State Office enforcement coordinator in consultation with other State Office staff. Whether the State Office decides to proceed will be communicated to the regional office. The decision will be documented, provided to the regional office, and registered into DEQ's EDMS.

5.1.2 Other Agency Referrals

Information about potential violations may come from other local, state, or federal agencies (e.g., health districts or tribes). In some circumstances, DEQ will refer cases to other agencies for further action under their authorities. Referrals from other agencies should be sent to the appropriate regional office manager and routed via normal procedures.

DEQ has entered into several memoranda of understanding with agencies to define the roles and responsibilities and clarify the authority between each agency (www.deq.idaho.gov/laws-rules-etc/memoranda-of-understanding/).

6 Administrative Enforcement Action

When DEQ determines that any person or entity is likely in violation of any provision of the EPHA and/or any of the federal environmental protection laws implemented by DEQ, or rules, permits, or orders issued or promulgated pursuant to the same, DEQ may commence an administrative enforcement action. DEQ staff should follow procedures established for the appropriate division for administrative enforcement actions.

6.1 Authority for Administrative Enforcement Action

Pursuant to the EPHA, Idaho Code § 39-108(3)(a), as well as statutes identified in section 2.3, DEQ has the authority to bring administrative enforcement actions against any person or entity that DEQ has determined is in violation of any provision of the EPHA or any rule, permit, or order issued thereunder. Idaho Code § 39-108(3)(a) describes the different components of an administrative enforcement action: (1) issuing the NOV, (2) scheduling and holding a compliance conference, and (3) entering into a CO. Idaho Code § 39-116A gives DEQ the authority to enter into a CAS.

6.2 Purpose of Administrative Enforcement Action

The legislative intent of the administrative enforcement process under the EPHA and in specific regulatory programs administered by DEQ was to avoid costly litigation for the regulated community and DEQ.

Administrative enforcement is a more informal process than the civil or criminal enforcement processes and involves less investment by technical and legal staff. If the agency maintains more

control of the outcome through the negotiation process, a resolution can often be reached more quickly than through the judicial system. Negotiations are more technically than legally driven and demand less attorney involvement. Information is likely to be obtained more easily from both parties, allowing a free flow of ideas. The administrative process allows DEQ to use regulatory flexibility when warranted. Settlements through the informal administrative enforcement process may result in a lower negotiated penalty. It is beneficial for all parties to attempt to work through the more informal administrative enforcement process to achieve successful resolution, before other options are considered.

6.3 Field or Regional Notices of Violation

A field or regional NOV is a citation issued by the regional office at, or near, the time of inspection identifying specific violations and the associated penalty dollar amount. For more information on field or regional NOVs refer to Table 2 in section 3.2.2.

6.4 Notices of Violation

An NOV is a formal, legal means of informing the responsible person or entity that an alleged violation has occurred. An NOV is signed by the Director. Idaho Code § 39-108(3)(a)(i) requires the following elements in an NOV:

1. Notification of the apparent violations (by specifically citing the legal provisions violated) discovered by DEQ as a result of an inspection or a compliance review
2. Assessment of civil penalties for each violation
3. Invitation to negotiate a CO³ that prescribes the terms and conditions the person or entity must follow to resolve the violation and return to compliance

The NOV shall inform the recipient of an opportunity to confer with DEQ in a compliance conference concerning the alleged violation within 20 days of receiving the notice, unless a later date is agreed to. The notice may require a written response within 15 days of receipt of the NOV. The response to the NOV establishes a mutually acceptable date, time, and place for the compliance conference.

Issuing an NOV is generally reserved for more serious, ongoing, or recalcitrant violations of environmental regulations. These types of violations may require more complex and more costly corrective measures than violations cited in a warning letter and may include lengthy time frames to return the recipient to compliance. An NOV may also address additional minor or moderate violations identified as part of an inspection or compliance review.

It is imperative to identify the responsible party for an NOV. An NOV may be issued to a business, an entity (such as a homeowners association), a permittee, an individual, or an operator. If the NOV is issued to a business or entity, check the *Idaho Secretary of State's* website to find the correct legal name (as opposed to a “doing business as” name). When the responsible party does not own the real property where the violation occurred, DEQ may also

³ An NOV will not include an invitation to negotiate a CAS because a CAS is entered into without the issuance of an NOV, and the CO and CAS are set forth in different sections of the EPHA.

issue the NOV to the owner of the real property or provide a copy of the NOV to the property owner.

If a payment of civil penalty is required, the appropriate enforcement coordinator in the State Office, who is responsible for monitoring receipt of payment, will forward a one-page penalty tracking sheet (EDMS record number 2019ADN2) to DEQ's Financial Office and enter the payment deadline milestones into SETS. Payments received by the Financial Office are entered into the accounting system. The Financial Office will email the enforcement coordinator when penalty payments are received and will include the payment receipt. The enforcement coordinator will enter the necessary information into SETS and register the payment receipt into DEQ's EDMS. If a scheduled penalty fee is amended, the enforcement coordinator must notify the Financial Office with the following information:

1. Name of respondent
2. Penalty due date
3. Original fee amount and amended fee amount
4. Reason for adjustment

The NOV, in all its stages of preparation, is considered an *enforcement confidential* document. It can be released to the public only after it is signed by DEQ's Director and is received by the recipient, pursuant to the Idaho Public Records Act, Idaho Code § 74-101, et seq.

Verify with the appropriate division enforcement coordinator if there is an NOV template available. There may be specific language, requirements, or legal language that needs to be included.

6.5 Compliance Conference and Negotiation

Pursuant to [Idaho Code § 39-108\(3\)\(a\)\(ii\)](#) of the EPHA, the compliance conference allows the person or entity to explain the circumstances of the alleged violation cited in an NOV and, where appropriate, propose a remedy for damage caused by the alleged violation and ensure future compliance. A compliance conference occurs before an agreement is entered into. If the recipient and DEQ agree on a plan to remedy damage caused by the alleged violation and ensure future compliance, they may enter into a CO formalizing their agreement. The CO may include a provision for payment of any civil penalty and a scheduled time frame for compliance.

If an NOV is issued, the recipient has 15 days from the time they receive the NOV to contact DEQ to request and schedule a compliance conference. As specified in the EPHA, the conference must be scheduled within 20 days. If an NOV was not issued, the enforcement coordinator will contact the person or entity regarding attending a compliance conference to discuss entering into an agreement. Either way the compliance conference occurs before the agreement is entered into. Once the compliance conference is scheduled, the enforcement coordinator should send a confirmation letter or email confirming the date, location, and any special considerations that have been agreed upon. If the recipient does not wish to travel to the State Office in Boise to attend the compliance conference, the enforcement coordinator should offer to hold the meeting at the nearest DEQ regional office or via conference call.

When scheduling a compliance conference with the appropriate DEQ staff and person or entity, determine if the person or entity will be represented by an attorney and if that attorney will be present at the conference. If so, DEQ must be represented by the Attorney General's Office at the conference. Notify the person or entity of this policy when the compliance conference is scheduled. The enforcement coordinator should also inform the person or entity that the conference is their opportunity to present additional information to resolve the alleged violation. Encourage the recipient to be prepared to present their case, including good faith efforts made to resolve the noncompliance. DEQ staff who observed or discovered the noncompliance should be present at the compliance conference to provide background information and clarification and to take notes for the file record.

Before the compliance conference, hold a preconference meeting between the enforcement coordinator, regional office personnel, and the bureau chief. A deputy attorney general may be requested to attend the preconference meeting. In the meeting, discuss all critical aspects of the enforcement action to determine the goals of the compliance conference, establish the enforcement *bottom line* for negotiation purposes, and discuss various negotiation strategies to anticipate the person's or entity's response to violations and the assessed penalties, if any.

When the compliance conference begins, the enforcement coordinator takes the lead, introduces participants, and documents individuals attending the meeting. The coordinator explains the compliance conference will provide the person or entity with an opportunity to explain circumstances surrounding the alleged violation, negotiate the terms and conditions of either a CAS or CO to resolve the violations, and discuss the assessed penalty, if any.

A compliance conference may last a few hours or a few days, depending on the number of alleged violations and the complexity of the issues involved. If it appears the person or entity is not willing to enter into a CAS or CO or is not negotiating in good faith, DEQ may elect to pursue civil action in district court to compel compliance (section 7.1). If the person or entity appears to be negotiating in good faith, the enforcement coordinator may, at their discretion, continue to negotiate beyond any statutory time frames.

During the compliance conference, the enforcement coordinator may suggest the parties break from negotiations to caucus. Caucusing provides a brief period for the parties to discuss issues privately before continuing to work towards settlement. At the end of the compliance conference, the enforcement coordinator will summarize and document—as specified by the division's policies—each party's position and agreed time frames for submitting additional information. The person or entity may need to provide additional information to DEQ to support their case or may request DEQ provide additional information.

By the end of the compliance conference, the enforcement coordinator determines whether the person or entity is willing to enter into a CAS or CO. If so, the enforcement coordinator explains that DEQ will draft the CAS or CO, including the conditions agreed to by the parties during the compliance conference and any changes that may affect any assessed penalty. The enforcement coordinator explains that the person or entity will have the opportunity to review, comment on, and factually correct the draft CAS or CO, along with any other required steps before execution of the CAS or CO (e.g., bureau-specific public comment periods). Negotiations may continue until both parties agree on the terms and conditions of the CAS or CO.

If negotiations are unsuccessful, the enforcement coordinator may refer the case to the Attorney General’s Office for filing of a civil action (section 7).

6.6 Consent Orders—Idaho Code § 39-108

Pursuant to [Idaho Code § 39-108\(3\)\(a\)\(iv\) and \(v\)](#) of the EPHA, if the recipient of an NOV and DEQ agree on a plan to remedy damage caused by the alleged violations and to ensure future compliance, they may enter into a CO formalizing their agreement (Table 4). The Department typically enters into a CO with a person or entity to (1) address a violation cited in the NOV and/or (2) set forth the requirements the person or entity must perform to address an issue of noncompliance.

A CO is a formal agreement, usually resulting from more serious or numerous issues of noncompliance, repeated noncompliance, and/or obstinate violators. A CO must be signed by the person or entity (Refer to section 3 of DEQ’s [Records Management Manual](#) for acceptance of electronic signatures) followed by DEQ’s Director, at which time the CO becomes legally binding. The CO may include a provision providing for payment of an assessed civil penalty. A CO precludes any civil enforcement action for the same alleged violation.

Table 4. Consent Order templates utilized by the Divisions.

Division/Bureau/Program	EDMS Record Number
Air	2019ADN3
Drinking Water	
Hazardous Waste	
IPDES	
General Remediation	2020ADN5
UST	2015BBB220a
LUST	

a. Use of this CO template is restricted to the respective enforcement coordinators.

If the person or entity does not comply with the terms of the CO, DEQ may seek and obtain, in any appropriate district court, specific performance of the CO and such other relief as authorized by EPHA. The regional office with jurisdiction is responsible for monitoring the person’s or entity’s compliance with all of the conditions agreed to in the CO via SETS.

If a payment of civil penalty is required, the appropriate enforcement coordinator in the State Office, who is responsible for monitoring receipt of payment, will forward a one-page penalty tracking sheet (EDMS record number 2019ADN2) to DEQ’s Financial Office and enter the payment deadline milestones into SETS. Payments received by the Financial Office are entered into the accounting system. The Financial Office will email the enforcement coordinator when penalty payments are received that will include the receipt of payment. The enforcement coordinator will enter the necessary information into SETS and register the receipt of payment into DEQ’s EDMS. If a scheduled penalty fee is amended, the enforcement coordinator must notify the Financial Office with the following information:

1. Name of respondent
2. Penalty due date
3. Original fee amount and amended fee amount

4. Reason for adjustment for auditing purposes

6.6.1 Press Releases

Though not part of DEQ's standard process, there could be instances where DEQ may issue a press release about the person or entity that has entered into an agreement with DEQ to demonstrate to the public the person's or entity's commitment to return to compliance. DEQ may also issue a press release on their successful return to compliance. If the process is not discussed in the division's enforcement procedures manual, staff should approach their division administrator.

The content of a press release should be drafted by the enforcement coordinator, reviewed by the appropriate regional staff, and approved by the bureau chief and division administrator. The News Release Request form is available on the intranet at: <http://deq.intranet/forms-templates.aspx?records=10&type=Outreach&sort=nameAscending>.

Once the content is approved, the News Release Request form is submitted via email to the Communications and Outreach Division for posting.

6.6.2 Compliance Schedules in the Consent Order

Setting compliance schedules in COs ensures the person or entity demonstrates progress in achieving compliance. DEQ considers the amount of time necessary to achieve compliance when setting schedules. Time limits are discussed by DEQ and the recipient or their representatives during the compliance conference, and an agreed-upon schedule is set. A short time frame may be set for submitting documentation that must be developed by the recipient. A longer time frame may be set for cleanup actions or planning/modifications that need to be taken if such delayed action would not pose an imminent threat to human health, public safety, or the environment.

6.6.3 Consent Order without Notice of Violation

In some situations, a CO may be negotiated without the prior issuance of a warning letter or NOV. The discretion to negotiate a CO in these cases lies with the enforcement coordinator, regional office, Attorney General's Office, and bureau chief. The CO may still provide for stipulated penalties, payment of penalties, performance of supplemental environmental projects (SEP), and other sanctions.

A CO negotiated directly without prior issuance of an NOV can result in agreeing to corrective measures that immediately address or stabilize the situation. This results in minimizing the threat to the public and the environment. In instances where the person or entity is willing to commit necessary resources to address any noncompliance issues or to ensure compliance, retaining the flexibility to move directly to a negotiated CO may prove effective in resolving the matter expeditiously and to the benefit of all.

Issuing a CO without an NOV (or a CAS, section 6.7) may be an option under certain scenarios:

1. A person or entity performs environmental assessments or audits at its facility resulting in the discovery of violations or releases into the environment.

2. The person or entity recognizes its responsibility to comply with environmental regulations and is committed to further investigating and mitigating the area of concern.
3. The person or entity promptly notifies DEQ of the area of concern and of their intent to mitigate the area of concern. The person, entity, or DEQ may request to enter into a CO with DEQ oversight and a statement of resolution.
4. A person or entity promptly notifies DEQ of a petroleum release into the environment, response, and corrective action.

6.7 Compliance Agreement Schedules—Idaho Code § 39-116A

Another enforcement tool available to DEQ is a CAS. Like a CO, a CAS is an enforceable, bilateral agreement negotiated between DEQ and the person or entity. A CAS must be signed by the person or entity (Refer to section 3 of DEQ's *Records Management Manual* for acceptance of electronic signatures), followed by DEQ's Director, at which time the CAS becomes legally binding.

A CAS includes an enforceable schedule for actions necessary for the person or entity to come into or maintain compliance with applicable statutes and rules as expeditiously as practicable. Unlike a CO, a CAS is entered into without prior issuance of an NOV and does not include penalties. Unless otherwise dictated by rule, DEQ typically enters into a CAS with a person or entity that (1) is proactively trying to maintain, or come into, compliance; (2) is working with DEQ to address issues of future or current noncompliance; and/or (3) has limited resources.

By statute, a CAS may be entered into if the person or entity demonstrates to DEQ's satisfaction that the schedule is appropriate and all of the following are considered:

1. Protection of public health
2. Protection of environment
3. Ability of the person or entity to pay for costs of compliance
4. Current fiscal obligations of the person or entity
5. Other factors as determined by DEQ or the Board

When entering into a CAS, it may be helpful to initiate a conference with the person or entity. Similar to a compliance conference held when an NOV is issued, a conference can be used here to discuss the alleged violation or issue of non-compliance and how the violation or issue will be remedied. For a complete discussion of the compliance conference, see section 6.5.

The regional office with jurisdiction is responsible for monitoring the person's or entity's compliance with all of the conditions agreed to in the CAS and documenting those activities in SETS. The term of a CAS shall not exceed 10 years, although successive agreements may be entered into. Agreements shall provide for annual meetings between DEQ and the person or entity to reassess whether, considering the factors listed above, the schedule and other terms of the agreement are still appropriate. The person or entity may request an annual meeting by contacting the regional office. If the person or entity does not contact DEQ and the region feels a meeting is warranted, the regional office may set up an annual meeting on its own. The CAS is enforceable pursuant to EPHA, [Idaho Code § 39-116A](#).

A CAS template can be found at EDMS record number 2019ADN4.

6.8 Consent Order and Compliance Agreement Schedule— Termination and Amendment

6.8.1 Consent Order and Compliance Agreement Schedule Termination

After the regional office determines the CO and CAS conditions and terms have been completed to DEQ’s satisfaction, or for other reasons, the division administrator, at the request of the State Office enforcement coordinator, may terminate the CO or CAS. A person or entity may request that the CO or CAS be terminated. COs and CASs include specific language regarding how a person or entity may request termination. Alternatively, the regional office may recommend to the enforcement coordinator that CO or CAS should be terminated.

All termination letters must be signed by the respective division administrator, as delegated by the Director (Table 5). Once the termination letter has been sent to the person or entity, the enforcement case is considered resolved, and the case is closed. The enforcement coordinator is responsible for closing the case in SETS. A copy of the termination letter is maintained by DEQ according to DEQ’s *Records Management Manual*. Copies are distributed to the Attorney General’s Office and relevant DEQ offices. The case information and termination letter are entered into SETS and any division-specific database.

Table 5. Delegation of authority memoranda.

Division	Document Title	EDMS Record Number
Air Quality	Delegation of Authority Given to Air Quality Administrator to Sign Air Quality Consent Order and Compliance Agreement Schedule Terminations	2019ADG57
Waste Management and Remediation	Delegation of Authority Given to Waste Management and Remediation Administrator to Sign Waste Management and Remediation Consent Order, Schedule and Criteria, and Compliance Agreement Schedule Terminations	2019ADG67
Water Quality	Delegation of Authority to Sign Water Quality Consent Orders and Compliance Agreement Schedule Terminations	2020ADG4

6.8.1.1 Division-Specific Enforcement Options

Several divisions use additional tools to address noncompliance. The Air Quality Division may issue a Notice to Comply in lieu of an NOV for first-time violations of a minor nature of the Rules for the Control of Air Pollution in Idaho, *IDAPA 58.01.01*. The Drinking Water Division has authority under *IDAPA 58.01.08.007* to assign a disapproved designation to a public water system. The UST program has authority under *IDAPA 58.01.07.500* to prohibit fuel delivery (implements red-tagging) for specific violations. Refer to Table 6 for additional information.

Table 6. Additional tools utilized to address noncompliance.

Division	Document Title	EDMS Record Number
Air Quality	Air Quality Guidelines and Procedures for Issuing Notices to Comply	2009ACF5
Drinking Water	Disapprove/Reapprove A PWS	2012AME3
	Public Water System Disapproval Process	2016ABP12
UST	Section 4.2.3 of the UST/LUST Program Implementation Manual	2017BBB2221

6.8.2 Extensions

If justified, DEQ may grant an extension to the terms and actions due dates established in the agreement schedule of a CAS or in the CO requirements. In the written extension request, the person or entity must document that the extension is necessary and justified. DEQ will perform a completeness review on the extension request. If the documentation is not acceptable, a prompt revision will be requested, or the extension request may be denied. The process for granting an extension varies depending on the length of time of the requested extension.

The following procedures are to be followed when processing an extension request:

1. In order for DEQ to consider the extension request, the person or entity must provide the request in writing; e-mails are acceptable. The request must include the proposed timeline and the justification for the extension.
2. The regional administrator may extend the timeline for first time extensions that result in an extension of six months or less in length.
 - a. Extensions may be granted after a thorough review of the file and all pertinent regional staff has provided input.
 - b. If the time extension is deemed appropriate, the regional administrator will forward a copy of the signed extension letter to the appropriate enforcement coordinator at the state office and appropriate division administrator.
The regional office will register the signed extension letter into DEQ’s EDMS and make the appropriate updates in either SETS or the UST/LUST database.
 - c. If the regional office considers denying the extension, they must inform the appropriate enforcement coordinator at the state office and coordinate the response with appropriate DEQ staff.
3. For extensions exceeding six months in length and any requests beyond the first extension regardless of whether or not they resulted in an extension of six months or less in length, the regional office must send an electronic copy of the written request and related documents to the appropriate enforcement coordinator at the state office.
 - a. The enforcement coordinator will coordinate a meeting with the regional staff, appropriate state office staff, and division administrator to determine the appropriate course of action.
 - b. The final determination will be made by a letter sent from the appropriate division administrator. The enforcement coordinator at the state office will register the

signed document into DEQ's EDMS and make the appropriate updates in either SETS or the UST/LUST database.

6.8.3 Amendments

If justified, DEQ may amend an administrative enforcement document. Amendments to the scope, terms, or conditions other than extensions of time must be made through a formal amendment process. This process mirrors the existing processes for enforcement referrals and developing a CO or CAS (sections 6.6 and 6.7). DEQ staff must work with the appropriate enforcement coordinator to formally amend a CO or CAS.

6.9 Public Notice on Proposed Settlement of an Administrative Enforcement Action

Only the IPDES Bureau issues a public notice on a proposed settlement of an initial administrative enforcement action (e.g., CAS or CO resulting from an NOV). CASs that preempt violations and amendments or other changes may go through public notice at DEQ's discretion. Public notice will provide a minimum of 30 days for public comment as required by [IDAPA 58.01.25.500.04.c](#) and is posted according to Department procedures found at <http://deq.intranet/communications-and-outreach/news-releases-ads.aspx>.

6.10 Compliance Schedule Orders—Idaho Code § 39-116

Another enforcement tool used by the divisions is compliance schedule orders, which are unilateral and issued to facilities to address compliance issues. Compliance schedule orders may also be used when regulatory standards are issued with an effective future date or at future successive dates. These orders identify and establish appropriate actions and schedules for facilities to comply with regulatory standards in a timely manner.

Before issuing a compliance schedule order, DEQ should attempt to gain cooperation by providing the person or entity notice identifying all of the following:

- Applicable statutes and rules that must be complied with
- Events or occurrences that necessitate the order
- The proposed terms of the order

Inform the person or entity that a conference with DEQ will be conducted to discuss the proposed terms of the order if requested within 15 days of receipt of the notice. If requested, DEQ shall meet with the person or entity and shall solicit the person's or entity's cooperation in the selection of the terms of the order. The compliance schedule order may be issued at any time after the conference, if one is requested, and the expiration of 60 days following the receipt of the notice. Compliance schedule orders are enforceable pursuant to [Idaho Code § 39-108](#). Once signed by the Director, the compliance schedule is legally binding. The regional office with jurisdiction is responsible for monitoring the person's or entity's compliance with all of the conditions agreed to in the compliance schedule order via SETS. Unlike a CO, a compliance schedule order may be challenged by an administrative appeal to the Board as provided in [Idaho Code § 39-107\(5\)](#). The compliance schedule order shall be effective and enforceable during an

administrative appeal, unless the Board or its designated hearing officer issues a stay of the order.

6.11 Schedule and Criteria

If an owner or operator of a petroleum storage tank system has a confirmed release but cannot reach an agreement through a CO for investigation and/or corrective action on impacts to soil, ground water, and/or surface water, Idaho's "Water Quality Standards" ([IDAPA 58.01.02.852.07.c](#)) authorize DEQ to establish a schedule and criteria with which owners and operators shall comply. Before establishing the schedule and criteria, DEQ must provide a CO to the owner or operator. The owner or operator is given 30 days to negotiate the terms of the CO with DEQ. If the terms of CO cannot be agreed upon, the schedule and criteria follow the administrative CO process (section 6.6). The terms of the schedule and criteria are not negotiated or signed by the responsible party because it is not voluntary. Once signed by DEQ's Director, the schedule and criteria is legally binding. The schedule and criteria establishes actions and time frames to meet requirements of IDAPA 58.01.02.852.05 and 852.06. The regional office with jurisdiction is responsible for monitoring the person's or entity's compliance with all of the conditions in the schedule and criteria via SETS.

6.12 Pollution Prevention

In 1990, Congress passed the Pollution Prevention Act, describing pollution prevention as any practice that "reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal" (42 U.S.C. § 13102(5)(A)(i)).

While the assessment of civil penalties often serves as an effective deterrent for noncompliance, it does not ensure future compliance, nor does it directly result in a decrease in pollution or waste. The goal of incorporating the pollution prevention approach into the enforcement process is to gain additional environmental benefit by reducing or eliminating pollution at its source and move the person or entity beyond compliance to a net positive environmental benefit. This approach often requires developing innovative solutions to complex technical and regulatory problems (www.deq.idaho.gov/pollution-prevention/).

DEQ staff should promote pollution prevention-related activities to the regulated community while conducting inspections and providing compliance or technical assistance. DEQ discusses pollution prevention options when negotiating conditions in COs and has negotiated pollution prevention projects as conditions in COs under the *DEQ Policy Statement PS20-13, Supplemental Environmental Projects* found at EDMS record number 2014ADU8[v3].

6.13 Penalties

Penalties serve as deterrence, ensure fair and equitable treatment of the regulated community, and limit the economic benefit of noncompliance.

6.13.1 Monetary

To assist in the penalty calculation and assessment process, DEQ's State Office bureaus developed penalty policy documents (Table 7) based on *EPA's 1984 Policy on Civil Penalties*. The goals of penalty assessment are as follows:

- **Deterrence**—The penalty assessed must not only recover any economic benefit gained by the person or entity but also impose an additional monetary or other burden commensurate with the gravity of the violation.
- **Fair and equitable treatment of the regulated community**—Extenuating or aggravating circumstances must be taken into account. Adjustments may be made to the penalty for the degree of willfulness, history of noncompliance, degree of cooperation, and ability to pay.
- **Swift resolution of environmental problems**—Retaining the flexibility to reduce penalties when the person or entity has remedied or begun to remedy the problem provides incentives for swift remediation. Disincentives to delay the resolution process can be provided by per-day fines for continuing violations.

The EPHA gives DEQ the authority to assess civil penalties for violating statutes, rules, permits, or orders. The EPHA provides for the assessment and collection of penalties of up to \$10,000 per violation or \$1,000 per each day of continuing violation, whichever is greater. The Hazardous Waste Bureau, IPDES Bureau, and the UST Program have additional statutory authority for assessing penalties in greater or varying amounts.

Current division-specific penalty policies are listed in Table 7. The respective penalty policy should be referenced when determining penalties. Other divisions may develop penalty policies in the future. Staff developing penalties should contact the respective divisions to determine if there is a division-specific penalty policy.

These policies are implemented when calculating and assessing penalties in environmental enforcement action. Each policy employs some variation of the EPA matrix (gravity + economic benefit-adjustment factors).

The policies provide guidelines for adjusting a penalty based on extenuating or special circumstances. DEQ staff takes the following into account:

1. Violator's good faith effort to comply with the requirements
2. Degree of willfulness and/or negligence on the part of the violator
3. History of noncompliance (typically an upward adjustment for recalcitrant behavior)
4. Violator's ability to pay
5. Any unique or unanticipated factors

Each policy contains a worksheet to assist DEQ staff in calculating the assessed penalty, documenting the justification for the penalty, and documenting penalty adjustments that may occur after settlement negotiations.

Table 7. Division-specific penalty policies.

Division/Bureau/Program	Document Title	EDMS Record Number
Air	DEQ Policy Statement PS20-05 Air Quality Administrative Penalties	2016ADU4[v2]
	Standard Operating Procedure Air Quality Administrative Enforcement Penalty Process	2008AAF47
Drinking Water	Drinking Water Penalty Policy DW-03-02	2013ABI110
	Water Quality Administrative Penalty Guidance Document	2013AFN12
Ground Water, IPDES, Source Water, Wastewater, and Surface Water	Water Quality Administrative Penalty Guidance	2013AFN12
Hazardous Waste	DEQ Policy Statement PS20-12 Hazardous Waste Management Act Civil Penalties	2016ADU11[v2]
	RCRA Civil Penalty Policy	2015BCB3
LUST	DEQ Policy Statement PS18-03 Leaking Underground Storage Tank (LUST) Program Penalty Policy	2018ADU3
Remediation Bureau (General Remediation and Mining)	General Remediation and Mining Enforcement Procedures	2015BAF10
UST	DEQ Policy Statement PS18-02 Underground Storage Tank (UST) Program Penalty Policy	2018ADU2

6.13.1.1 Penalty Justifications

When calculating penalties for violations, the enforcement coordinator must document the rationale for determining the assessed penalty amount. This should be documented directly on the penalty calculation worksheet.

The enforcement coordinator is responsible for ensuring the penalty is appropriate, fair, and consistent with penalties assessed for violations at other facilities with similar circumstances and that the penalty assessment is fully justified based on the supporting information for the violations. The penalty calculation worksheet shall be reviewed by the appropriate regional staff, bureau chief, division administrator, and the Director.

After enforcement negotiations and settlement, if penalties are adjusted, justification for the adjustment should be documented and included in DEQ's EDMS.

6.13.1.2 Stipulated Penalties

Stipulated penalties are fixed or adjustable sums of money that a person or entity agrees to pay if the terms of an order or agreement are violated. Application of stipulated penalties may be based on the number of violations, period of noncompliance of the violation, and/or the severity of the violation. Stipulated penalties are an effective enforcement tool for encouraging compliance with these agreements.

Stipulated penalties may also be included in an order when penalties have been waived, in full or in part, based on a person's or entity's good faith efforts, inability to pay, or other factors.

6.13.1.3 Cost Recovery

Pursuant to Idaho 39-108(6), DEQ may seek reimbursement of certain expenses incurred through enforcement activities. Section 39-108(6) states:

“[A]ny person who has been determined to have violated the provisions of this act or the rules, permits or orders promulgated thereunder shall be liable for any expense incurred by the state in enforcing the act, or in enforcing or terminating any nuisance, source of environmental degradation, cause of sickness or health hazard.

The enforcement coordinator, through the Financial Office, should set up a specific accounting code to allow accurate tracking of staff hours and expenses incurred. The decision to include cost recovery in an administrative enforcement document should be discussed with appropriate staff and the Attorney General’s Office.

6.13.2 Supplemental Environmental Project

The person or entity may propose that another environmentally beneficial activity or supplemental environmental project (SEP) be included in the terms of a CO if, during the process of negotiating a CO, any of the following become apparent:

1. The person or entity has corrected all of its violations, leaving only the issue of penalty payment to negotiate.
2. The person or entity is willing to perform actions above and beyond the regulatory requirements.
3. Both parties agree extenuating circumstances exist that prevent the violation from being corrected.

Idaho Code § 39-108(5)(b) and *§ 39-4414(1)(c)* define a SEP as follows:

- An environmental beneficial project that the person is not otherwise required to perform, by any federal, state, local law or regulation, or agreement, which:
 - Prevents pollution
 - Reduces the amount of pollutants reaching the environment
 - Contributes to public awareness of environmental matters
 - Enhances the quality of the environment

In evaluating a particular SEP proposal, the Idaho Legislature concluded that DEQ may give preference to projects that:

- Relate to the violation or the objectives of the underlying statute that was violated
- Enhance the quality of the environment in the general geographic location where the violations occurred

A SEP proposal shall, at a minimum, include the following:

1. Time frame, including specific dates, for implementing the SEP
2. Methods of record keeping used to document implementation and expenditures expected in conducting the SEP
3. Projected budget for the project, including a breakdown of costs for equipment, labor, and capital

4. Nature and amount of any tax benefits to be claimed by the person or entity as a result of SEP implementation

Each proposed SEP will be evaluated by the enforcement coordinator, bureau chief, division administrator, regional staff, and Attorney General's Office. An example of SEP language for a CO, as well as other helpful information, is provided in the DEQ Policy Statement PS20-13, Supplemental Environmental Projects (2014ADU8[v3]). Additional information is found in *Incorporating Pollution Prevention into Enforcement* (EDMS record number 2017AGC17).

Once a SEP has been successfully negotiated and included as part of a CO, the regional office will monitor completion of the SEP activities as part of the terms and conditions agreed to in the CO and documented in SETS.

7 Civil and Criminal Environmental Enforcement Actions

DEQ has options for taking an enforcement action to court. This section discusses when civil or criminal actions is warranted, how to refer a case for civil or criminal enforcement, provides an overview of the civil and criminal enforcement process, and describes the respective roles of DEQ staff and the Attorney General's Office during a civil or criminal enforcement action.

7.1 Civil Enforcement Action

Civil enforcement involves a court action brought in district court by the Attorney General's Office, in consultation with DEQ. Civil enforcement actions are generally reserved for situations where the case cannot be resolved through cooperation or when immediate action is needed. In a civil action, DEQ can seek penalties and an injunction to compel compliance.

7.1.1 Authority for Civil Enforcement Actions

Pursuant to the EPHA, Idaho Code § 39-108(3)(b), DEQ has the authority to pursue a civil action in district court:

The director may initiate a civil enforcement action through the attorney general as provided in section 39-109, Idaho Code. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred and may be brought against any person who is alleged to have violated any provision of this act or any rule, permit or order which has become effective pursuant to this act. Such action may be brought to compel compliance with any provision of this act or with any rule, permit or order promulgated hereunder and for any relief or remedies authorized in this act. The director shall not be required to initiate or prosecute an administrative action before initiating a civil enforcement action.

7.1.2 Purpose of Civil Enforcement Action

Civil action is used to compel compliance and obtain penalties for violating statutes, rules, orders, or permits. This action is more resource-intensive than an administrative enforcement action and requires a significant time commitment from DEQ staff and attorneys to pursue the case. Although civil cases rarely go to trial, each case should be managed with the assumption

that it may. These cases are often settled late in the litigation process after a considerable cost has been incurred by all parties.

Civil actions are most often initiated when all reasonable attempts to resolve the violation through the administrative enforcement process have been exhausted, and the parties cannot come to agreement, or the person or entity has shown little or no willingness to resolve a past violation and/or pay a penalty.

A civil action can also be initiated without first pursuing the administrative enforcement process. The following are circumstances under which DEQ may choose to pursue civil enforcement in lieu of administrative enforcement or when administrative enforcement has proven unsuccessful:

- Person or entity fails to schedule a compliance conference within 15 days of receipt of the NOV, or after the expiration of a reasonable time frame granted by DEQ.
- Person or entity has demonstrated a history of noncompliance or recalcitrant behavior, has created unnecessary delays, is uncooperative, or generally does not negotiate in good faith to remedy a current or past violation.

DEQ may bring a civil action for an immediate injunction in an emergency situation presenting imminent and substantial threat to human health and/or the environment, when time is unavailable to negotiate, or if the person or entity is not willing to negotiate an acceptable remedy. The injunction asks the court to halt any discharge, emission, or other activity violating the law.

7.1.3 Preparing a Civil Referral

Requests for civil action are prepared by the enforcement coordinator, reviewed and approved by the appropriate regional administrator, bureau chief, and division administrator, and then routed to the Attorney General's Office. The Attorney General's Office is responsible for conferring with appropriate DEQ staff to determine whether to file a civil complaint in district court. After receiving the referral, the deputy attorney general will seek concurrence from DEQ's Director that a complaint should be filed. Once the decision is made to file a civil complaint, the Attorney General's Office needs access to the entire file to proceed with litigation preparation.

DEQ should refer a case for civil action as quickly as possible because of the two year statute of limitations. The Attorney General's Office may need significant time to prepare the case for filing in court. The Attorney General's Office cannot file a civil case if the statute of limitations has passed.

DEQ may prepare a civil referral package or use the referral package typically prepared by the region (EDMS record number 2020ADN1). Beyond what is contained in a typical referral package, DEQ should also include a warning against disclosure to demonstrate these communications are subject to the attorney-client privilege.

7.1.4 Attorney and DEQ Roles during the Enforcement Process

The deputy attorney general assigned to a civil case will pursue the case using the court system. Actions may include filing a complaint, preparing motions, performing and responding to discovery, conducting depositions, and preparing for trial. The deputy attorney general also

provides legal advice to DEQ throughout the process and is responsible for keeping the agency informed as the case moves forward.

The deputy attorney general may put a *litigation hold* on document retention once a civil case is initiated. This hold alerts DEQ staff that they should retain all documents related to the case until litigation is completed or the deputy attorney general releases the litigation hold.

The enforcement coordinator is responsible for ensuring DEQ policies and procedures have been followed, all relevant aspects of the compliance investigation have been explored, and all alleged violations are thoroughly documented. DEQ staff should assume that information collected during an inspection, through a complaint response, report review, noncompliance with a CO or CAS requirement, self-reporting by a person or entity will end up in court and be meticulous, objective, and professional.

Once the Attorney General's Office has filed a civil complaint, DEQ staff will provide technical assistance to the attorney assigned to the case.

7.2 Criminal Enforcement Action

Criminal enforcement involves prosecuting a person for committing a crime. In a criminal action, the State or federal government seeks to punish a person, typically through imprisonment and/or fines.

7.2.1 Authority for Criminal Enforcement Actions

Statutory authority for DEQ to initiate criminal enforcement actions is found in the EPHA. Idaho Code § 39-117 states a person is guilty of a misdemeanor punishable by a fine for the following:

- Willfully or negligently violating the non-air quality environmental protection laws or the terms of any lawful notice, order, permit, standard, rule, or regulation issued pursuant to such laws
- Knowingly violating the air quality public health or environmental protection laws or the terms of any lawful notice, order, permit standard, or rule issued pursuant to such laws
- Willfully or negligently violating any IPDES standard or limitation, permit condition, or filing requirement or knowingly making any false statement, representation or certification in any IPDES form, in any notice or report required by an IPDES permit, or knowingly rendering inaccurate any monitoring device or method required to be maintained

In addition to a misdemeanor punishable by a fine, a person may be subjected to a higher penalty and potential imprisonment if they knowingly release any *hazardous air pollutant* or an *extremely hazardous substance* into the ambient air and know at the time that they place another person in imminent danger of death or serious bodily injury (Idaho Code § 39-117).

HWMA, [Idaho Code § 39-4415](#), also provides that a person is guilty of a misdemeanor punishable by a fine and potential imprisonment for the following:

1. Knowingly making any false statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used to comply with the HWMA
2. Knowingly violating any provision of this chapter or any permit, standard, regulation, condition, requirement, compliance agreement, or order issued or promulgated pursuant to this chapter

In addition, a person committing a criminal violation of an environmental protection law may have committed other misdemeanor or felony crimes such as fraud, conspiracy, or creating a public nuisance. Federal environmental statutes enforceable by EPA and the US Department of Justice make certain environmental violations felonies.

In Idaho, the following agencies are authorized to investigate and prosecute criminal environmental crimes:

- Idaho Attorney General's Office's Criminal Division
- Idaho Department of Law Enforcement
- County Prosecutors Offices
- United States Attorney's Office, District of Idaho
- Idaho Department of Environmental Quality
- US Environmental Protection Agency Criminal Investigations Division

The EPA Criminal Investigations Division (CID) investigates criminal violations for the majority of environmental regulations for all media in Idaho. Idaho does not have a state criminal investigation program that solely prosecutes violations of environmental laws, but the AG's Criminal Division may prosecute environmental violations, among other crimes. The ultimate prosecution of violations of environmental laws is conducted by the AG's Criminal Division, local county prosecutor's office, or the US Attorney's Office.

7.2.2 Purpose of Criminal Enforcement Actions

Generally, criminal enforcement is reserved for the most grievous violations of environmental laws. Criminal cases may be distinguished from civil cases by their greater magnitude, willfulness, negligence, and/or fraudulence.

The decision whether to pursue criminal or civil proceedings, or refer the case to a criminal prosecutor/investigator (e.g., EPA CID), is made by DEQ's Director in consultation with the Attorney General's Office, division and regional administrator, and appropriate DEQ program staff. Criminal prosecutions or threats of criminal prosecution will not be initiated without approval by DEQ's Director or Deputy Director. DEQ and the Attorney General's Office will coordinate with the criminal prosecutor/investigator (e.g., EPA CID) in a timely manner to ensure the statute of limitations is not exceeded.

DEQ's Director will consider the following when determining whether the state should initiate prosecution:

1. Significant potential environmental harm or threat to human health
2. Identifiable defendant
3. Bad faith conduct by the defendant including:

- a. Deceit
 - b. Fraud
 - c. Intent to conceal
 - d. Flagrant disregard for legal requirements or DEQ directives
4. Determining if DEQ's goals will be achieved through civil or administrative enforcement
 5. Whether the acts constitute a crime under federal law
 6. Opinion of the deputy attorney general criminal liaison that the case constitutes a state crime
 7. Criminal prosecution declined by EPA CID and/or the US Department of Justice

A civil or administrative environmental enforcement action and a criminal action may be pursued against a person or entity based on the same set of facts. Case-by-case, the prosecuting attorney must decide whether to pursue the two types of proceedings concurrently or to suspend prosecution of one proceeding (usually the civil one) pending completion of the other case.

A criminal action is more resource-intensive than an administrative enforcement action and will require a significant time commitment from DEQ staff and attorneys in pursuing the case.

7.2.3 Criminal Enforcement Process

7.2.3.1 Field Investigations of Possible Criminal Violations

DEQ does not have dedicated criminal investigators but will rely on, and coordinate with, criminal investigators with the AG's Criminal Division, county prosecutors' offices, and other appropriate entities (e.g., EPA CID). When an investigator or other DEQ staff becomes aware of conduct they believe should be referred for criminal investigation and/or prosecution, the following steps should be taken:

1. **Public health, safety, and personal security**—Call 911 or the Idaho State Communications Center at (208) 846-7610 to address any emergency situation posing imminent danger to public health and safety. If the situation poses a threat to personal security, DEQ staff should take appropriate steps to remove themselves from the situation and notify their supervisor.
2. **Evidence collection**—If there is not an immediate threat to public health or personal security, DEQ staff should contact the appropriate State Office division to ensure staff trained in criminal investigations, following DEQ's property access authorities and investigation and sampling protocols, are available for evidence collection.
3. **Scene security**—If consent to search or inspect is denied and evidence could be destroyed before collection, DEQ staff should remain on the premises (but not on the actual property where access was denied) to observe while a warrant or necessary equipment is obtained or contact local law enforcement to secure the area before departing the site. DEQ staff should never place themselves at risk. If no alternative exists but to leave the scene unsecured, DEQ staff should document the scene's condition as best as possible by recording field notes and taking photographs before leaving.

7.2.3.2 Notification Process and Referral to EPA's Criminal Investigations Division

DEQ places a high priority on any cases that may warrant criminal prosecution. While external time limits may exist, the notification process, which includes notifying DEQ management and legal, should be completed in an efficient and timely manner. Follow the procedures below unless an emergency requires immediate notification of EPA CID or other law enforcement personnel.

1. **Notify DEQ management**—DEQ staff shall, as soon as practical, but within two working days after becoming aware of factors indicating possible criminal conduct, inform their supervisor, bureau chief, regional administrator, and division administrator of the circumstances and possible evidence relating to potential criminal violations.
2. **Notify Attorney General's Office**—The regional or division administrator (or designated representative) should contact the deputy attorney general's criminal liaison as soon as practical, but within two working days of being briefed by DEQ staff. The regional or division administrator should set up a conference call with the deputy attorney general's criminal liaison and appropriate DEQ staff within five working days of notification. The regional administrator, division administrator, and/or DEQ staff shall advise the deputy attorney general of all facts and circumstances, including any evidence collection and preservation undertaken.
3. **Notify DEQ Director**—If the deputy attorney general deems it appropriate, the regional and division administrators shall consult with DEQ's Director or Deputy Director to determine appropriate steps to be taken, including whether to pursue criminal investigation through the AG's Criminal Division, county prosecutor, or notify EPA CID. This consultation should occur within five working days of the initial conference call with the deputy attorney general's criminal liaison.
4. **Notify EPA CID**—If deemed appropriate by DEQ's Director or Deputy Director and the Attorney General's Office, the deputy attorney general's criminal liaison shall promptly notify EPA CID or other criminal case contacts.
 - a. If DEQ's Director or Deputy Director is unavailable, the appropriate division administrator in consultation with the deputy attorney general's criminal liaison will determine whether EPA CID should be notified.
 - b. If intermediate managers and/or the deputy attorney general cannot be contacted, DEQ staff may contact DEQ's Director and/or EPA CID directly. DEQ staff should attempt direct contact only if, in their judgment, circumstances require immediate action.

In certain cases, EPA CID or other criminal law enforcement agencies may initiate direct contact with DEQ staff. This may include being present during an emergency response action or an inspection, telephone conversation, or office visit. Staff should share information openly, answer questions truthfully, and provide any assistance appropriate under the circumstances. As soon as possible, staff shall notify their respective regional or division administrator, bureau chief, and deputy attorney general's criminal liaison and provide a summary of the contact, including whether EPA CID or other criminal law enforcement agencies asked for additional information or further assistance.

7.2.3.3 Roles of DEQ Staff and Others During Criminal Enforcement Process

DEQ Staff—Before criminal proceedings are initiated, DEQ staff must ensure all DEQ policies and procedures related to each specific division have been followed, relevant aspects of the compliance investigation have been explored, and alleged violations have been thoroughly documented (Table 1, section 3.2).

Often, DEQ must continue to regulate a person or entity that is under investigation and may be contacted by the person or entity. When this occurs, staff should avoid commenting on or answering questions about the investigation or any alleged violations. If contacted by a person under investigation, staff should keep a communications log that includes a list of who contacted the staff member, the dates and times the person contacted DEQ, and a brief description of what was communicated. DEQ should also keep a communications log of contact DEQ has with other people, beyond the person or entity that is under investigation that also involves the investigation. If DEQ is contacted by an attorney, DEQ should refer them to the Attorney General’s Office.

When an investigation starts, staff should avoid referring to the entity being investigated or the matter in disparaging or conclusory ways, either orally or in writing (e.g., “the facility committed fraud”). Instead, remain factual as much as possible—impersonal, passive voice is one useful way to do this. For example, instead of stating “X falsified the samples” (which is personal, active, and ultimately conclusory), or even “samples were falsified” (this is impersonal and passive, but is still conclusory), one might state “there are discrepancies/issues with/questions about/irregularities with the samples.”

Idaho Office of the Attorney General—DEQ’s Director and the Environmental Quality Section of the Attorney General’s Office have designated a deputy attorney general criminal liaison to establish a single point-of-contact for legal consultation and communication on criminal matters. The deputy attorney general criminal liaison is the principal advisor to DEQ’s Director and staff regarding investigating and prosecuting criminal cases. The deputy attorney general criminal liaison also communicates and coordinates with EPA CID, US Attorney’s Office, the Idaho AG’s Criminal Division, county prosecutors, and Idaho Department of Law Enforcement concerning potential criminal conduct.

While the deputy attorneys general in the Environmental Quality Section represent DEQ, the deputy attorneys general in the AG’s Criminal Division represent the State of Idaho. However, the Idaho AG’s Criminal Division may provide trained criminal investigators upon request to assist in processing a scene for evidence and interviewing of witnesses. The AG’s Criminal Division will also train DEQ staff to ensure a basic understanding of what to do if a criminal violation is suspected.

If the deputy attorney general criminal liaison happens to be unavailable as a first point-of-contact, contact the Attorney General’s Office assistant at (208) 373-0494, and the matter will be routed to another deputy attorney general for assistance.

EPA CID—As a full United States Code Title 18 federal law enforcement agency, EPA CID has the power to investigate all criminal acts, both environmental and non-environmental. EPA CID can be contacted at:

US Environmental Protection Agency
Criminal Investigations Division
95 W. Bannock Street, Suite 900
Boise, ID 83702
Office: (208) 378-6516
Fax: (208) 378-5770

To ensure state and federal criminal enforcement agencies work together to share information and avoid duplicate efforts, the Attorney General's Office participates in the Idaho Environmental Enforcement Task Force.

8 Records Management and Public Records Act

DEQ enforcement records may include documents generated by DEQ employees and documents maintained by DEQ. Proper records management ensures information necessary to support enforcement actions is preserved. Records maintained by DEQ may be subject to public review under the Idaho Public Records Act, [Idaho Code § 74-101, et seq.](#)

8.1 Records Management

When bringing an enforcement action, DEQ relies on documents created and maintained by staff. Records relevant to an enforcement action may include field notes, inspection reports, internal memorandums, emails, letters, permits, documents submitted by an external person or entity, and previous enforcement documents. These documents must be managed properly. Lack of necessary documentation may preclude an enforcement action.

The policy and procedure for managing records is DEQ's [Policy Statement PS18-05, Policy for Records Management](#). The policy states all DEQ records shall be retained according to the record's classification, record type, and retention period identified in the approved DEQ [Record Retention Schedule](#) (EDMS record number 2010AIC3). DEQ's [Records Management Manual](#) outlines the procedure for actively managing DEQ documents. DEQ records should be retained in electronic format and managed through the agency's EDMS. Particular records of evidentiary value (i.e., CO, CAS, fiscal documents) that contain an authority signature must be kept in paper format per the Records Management Manual.

Various types of records may become integral to an enforcement action, while others may require additional processing or management:

- **Verbal complaints**—When a complaint is received by phone or in person, the complaint must be documented accurately in DEQ's Complaint Tracker. If a complainant wishes to remain anonymous, DEQ will do everything in its power to protect information that might disclose the person's identity.
- **Digital pictures**—Digital pictures taken for compliance and/or enforcement must be stored in DEQ's EDMS. Photographs should not be enhanced or altered. If photographs are altered, keep an original version of the photograph. As stated in the [DEQ Records Management Manual](#), the following information should be entered in the EDMS notes

section of the record (or attached to the photographs): who took the picture, where it was taken, and the date it was taken.

- **Confidential information**—Documents that qualify or potentially qualify as confidential information should be marked as such and kept in the confidential folder in DEQ’s EDMS. Marking documents confidential alerts DEQ staff of the claim, which is important for public records requests. Because a document has been marked as confidential, it does not necessarily mean the document is confidential—attorney review is required for the determination.
- **Field Notes**—Generated by DEQ staff in various forms (e.g., logbook, notebook or loose-leaf pages), these notes record field activities and constitute a public record. Field notes must be scanned and entered into DEQ’s EDMS.

For information about retention periods for the records, consult DEQ’s Records Retention Schedule (EDMS record number 2010AIC3).

8.2 Public Records Act

The Idaho Public Records Act provides “Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute” (Idaho Code § 74-102). All DEQ records are available for inspection by the public unless a record is specifically exempted from public review.

The policy for public records requests is contained in DEQ’s *Policy Statement PS18-06, Policy for Public Records Requests*. Each division, bureau, or regional office has a designated public records custodian, and all public records requests should be routed through that person. Pursuant to the Public Records Act, DEQ must respond to every public records request within three days of receipt, unless additional time is needed. Unless the public record requested is a list or in list form, DEQ cannot ask the requestor the reason for the request.

When access is not allowed to a document or a portion of a document that falls within the scope of the request, the request is denied. Denials are based on exemptions listed in the statute, including the following:

- **Investigatory records**—A document may be withheld from the public if disclosure of the document would interfere with an ongoing investigation or enforcement action, reveal the identity of a confidential source, or disclose investigative techniques and procedures.
- **Attorney-client privilege**—Communications between DEQ and the Attorney General’s Office may be exempt from disclosure.
- **Confidential business information**—The Idaho Public Records Act lists several exemptions related to confidential business information. The trade secret exemption covers information claimed to be confidential that, if disclosed, would be economically valuable to competitors. Voluntarily submitted environmental audit reports may also be exempt.

All denials must be reviewed by an attorney and responded to in writing. Any denial of a public records request should be coordinated with the public records custodian.

9 Statewide Enforcement Tracking System (SETS)

SETS is an agency-wide system used to track compliance with the milestones in the enforceable orders (COs, CAS, compliance schedule orders, and court orders) resulting from an administrative or civil enforcement action. SETS is not used to track the administrative enforcement action process or the development of the enforcement order.

DEQ staff may access this agency application at <http://apps/admin/sets/>. Details on the use of SETS and specific instructions are provided under Help in the SETS menu or at EDMS record number 2018ABL2.

10 References

Idaho Code. 2019. “Board—Composition—Officers—Compensation—Powers—Subpoena—Depositions—Review—Rules.” Idaho Code §39-107.

Idaho Code. 2019. “Commencement of Civil Enforcement Actions—Criminal Actions Authorized—Duties of Attorney General.” Idaho Code §39-109.

Idaho Code. 2019. “Commencement of Prosecutions for Felonies.” Idaho Code §19-402.

Idaho Code. 2019. “Compliance Agreement Schedules.” Idaho Code §39-116A.

Idaho Code. 2019. “Compliance Schedules.” Idaho Code §39-116.

Idaho Code. 2019. “Consistency with Federal Law.” Idaho Code §39-4404.

Idaho Code. 2019. “Criminal Violation—Penalty.” Idaho Code §39-117.

Idaho Code. 2019. “Declaration of Policy and Statement of Legislative Intent.” Idaho Code §39-3601.

Idaho Code. 2019. “Exemptions.” Idaho Code §39-4402.

Idaho Code. 2019. “Hazardous Waste Management Act of 1983.” Idaho Code §39-4401.

Idaho Code. 2019. “Idaho Environmental Protection and Health Act.” Idaho Code §39-101.

Idaho Code. 2019. “Idaho Solid Waste Facilities Act.” Idaho Code §39-7401.

Idaho Code. 2019. “Idaho Underground Storage Tank Act.” Idaho Code §39-8801.

Idaho Code. 2019. “Investigation—Inspection—Right of Entry—Violation—Enforcement—Penalty—Injunctions.” Idaho Code §39-108.

Idaho Code. 2019. “Misdemeanors.” Idaho Code §19-403.

Idaho Code. 2019. “Public Records Act.” Idaho Code §74-101.

Idaho Code. 2019. “Public Records—Right To Examine.” Idaho Code §74-102.

- Idaho Code. 2019. “Remedies.” Idaho Code §39-4414.
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