

# Enforcement Guidance for Field Staff



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maintaining and enhancing the  
quality of Oregon's air, land  
and water.*



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# Document Development

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# **Enforcement Guidance for Field Staff**

## 1. Purpose

The purposes of this IMD are (i) to direct staff about how to focus the agency's enforcement resources on the most important violations and violators and (ii) to promote consistency between offices and programs in determining which violations should receive formal enforcement, thereby creating fairness and predictability for the regulated public.

## 2. Applicability

This IMD is to be used by DEQ staff when determining how to respond to violations identified during compliance monitoring actions such as inspections, complaint response, and report review.

## 3. Summary

This IMD directs staff about what kind of response to take after identifying violations in DEQ program areas. Program-specific tables include individual directives for each violation type. This IMD also describes the steps of the enforcement process from identifying violations, through interpreting the guidance tables, to preparation of the referral, and what to expect in a formal enforcement case.

## 4. Background

DEQ administers state environmental laws to improve the ecological integrity of the Oregon's air, land, and water. These laws govern how the people and businesses may dispose of wastes to minimize the pollutant effects on public health and the environment. DEQ, in serving the public interest, emphasizes education and compliance assistance. However, these more-voluntary approaches are more effective when used as part of an integrated strategy that includes a strong compliance-monitoring and enforcement presence. Enforcement is a necessary part of a regulatory strategy because:

- A risk of penalties or other negative consequences such as publicity create “deterrence” which encourages would-be violators to attain and maintain compliance.
- Those who spend money on pollution-control equipment or other compliance expect DEQ to make sure they are not disadvantaged by violators who avoided these costs.
- DEQ must have processes and capacities to compel compliance and cleanup through legally binding processes as needed.

Enforcement should be applied in a fair and predictable manner. The circumstances and facts of each case will differ, but there are principles staff can use to reach consistency between individual staff, offices, regions and programs. This IMD assists in that process. The classifications were developed through a public rulemaking process and are fixed in rule. The enforcement guidance responses were

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developed by program staff and staff from the Department's Office of Compliance and Enforcement (OCE).

### 5. Definitions & Acronyms

Expedited Enforcement Offer (EEO) – Defined at OAR 340-012-0030(8) and -0170(2), an EEO is a written offer made by DEQ through its field staff to settle an alleged violation for a reduced penalty according to the program guidance tables in this IMD.

Field Citation or Field Penalty (FC) – Defined at OAR 340-012-0030(9) and in the 340-150 tanks division, a FC is a written offer made by DEQ through its field staff to settle an alleged violation of the underground storage tank rules for a reduced penalty according to the program guidance tables in this IMD.

Formal Enforcement Action (FEA) – Defined at OAR 340-012-0030(12), an FEA is a proceeding initiated by DEQ that entitles a person to a contested case hearing or that settles such entitlement. Examples include: penalty assessments, compliance orders, PDNs, MAOs, paid EEOs, and paid FCs. WLS, PENs, and NPVs are not formal enforcement.

Internal Management Directive (IMD) – A written directive from one or more managers to staff who report to that manager, expressing guidelines and/or specific direction about how and when to execute discretionary duties.

Mutual Agreement and Order (MAO) – An agreement between DEQ and an outside party to the entry of a Final Order from the Environmental Quality Commission.

No Penalty Justification (NPJ) – A document prepared by field staff recommending that DEQ refrain from issuing a penalty related to a violation or violations that the guidance tables of the Enforcement Guidance directs be referred for formal enforcement and possible penalties.

Notice of Permit Violation (NPV) – Defined at OAR 340-012-0038(3), an NPV is a document required by ORS 468.126 in some permit programs before initiation of formal enforcement. Because of various exceptions, NPVs are only required for violation of non-underground injection control requirements of water pollution control facility permits, and violations of non-municipal solid waste disposal permits. When to issue an NPV is spelled out in these program guidance tables.

Penalty Demand Notice (PDN) – A demand for stipulated penalties pursuant to a Mutual Agreement and Order for violations of that order.

Penalty Justification (PJ) – A document prepared by field staff recommending that DEQ issuing a penalty related to a violation or violations that the guidance tables of the Enforcement Guidance directs not be referred for formal enforcement and possible penalties.

Pre-Enforcement Notice (PEN) – Defined at OAR 340-012-0030(14) and -0038(2), a PEN is an informal written document that informs a person that DEQ has identified alleged violations and is considering formal enforcement. A PEN may also include compliance requests.



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Warning Letter (WL & WLO) – Defined at OAR 340-012-0030(25) and -0038(1), a WL is an informal written document that informs a person that DEQ has identified alleged violations but does not anticipate initiating formal enforcement. A WL may also include compliance requests and may also inform the person that a failure to comply with the requests may result in formal enforcement (Warning Letter with Opportunity to Correct (WLO)).

## 6. Directive

Staff are directed to apply this directive to all violations identified through compliance monitoring actions, unless a specific exemption applies. **This Directive applies to all violations of any statute, rule, permit or order enforceable by DEQ unless the violation is identified during an “immunity” or “TA visit” approved and adopted under the *IMD for Procedures for Adopting a Program that Uses Immunity from Enforcement (Appendix J)*.** If you have questions or need further information about any of this material, contact your program Environmental Law Specialist.

### 6.1 Determining whether a violation occurred

In determining whether a violation occurred, it is not enough to just believe that the conduct is wrong; DEQ must be able to show that the conduct is expressly prohibited by law. We do this by breaking down the rule or statute into its primary “elements” and making sure we have sufficient information on each. For example: ORS 468B.025(1) states: “*Except as provided in ORS 468B.050 or 468B.053 [i.e., the person has a DEQ permit allowing it], no person shall discharge any wastes into waters of the state if the discharge reduces the quality of the waters below the water quality standards . . .*” In determining whether a person violated this law, we must know and be able to show each of the following elements:

- i. The person does not have a permit allowing this discharge.
- ii. The one doing the discharge is a “person.”
- iii. The action was a “discharge.”
- iv. The muddy water was a “waste.”
- v. The place where the muddy water was discharged is “waters of the state.”
- vi. The discharge reduced the water quality below water quality standards.

Some elements are easy to determine and prove. For example, in determining whether the person has a permit, we only need consult our DEQ records and the staff who maintain those records. Similarly, the term “person” is defined at ORS 468.005(5) and includes a variety of types of individuals, associations, and businesses. In answering this, we typically determine how the violator is registered on the [Secretary of State Corporation Division](#) website. Some elements may be more legally complicated and require analysis of several related laws or rules. For example, “waste” is defined at ORS 468B.005(7) and refers to substances that cause “pollution” which is further defined at ORS 468B.005(3). Most elements will require some amount of evidence in the form of eyewitness observations (typically recorded in reports and photographs), written communications (self-monitoring reports, inspection reports, etc.), and samples and analytical results. Collection of evidence is essential to determining whether a violation occurred and in pursuing formal enforcement. For further information about common types of evidence and advice on how to collect them, consult the [Agency-wide Inspection Manual](#).

### 6.2. Is the conduct criminal?

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Occasionally, you may identify violations in which the violator acted *deceitfully, deliberately, or dishonestly*. Violations committed or covered up in this manner may be prosecuted as crimes. DEQ staff may identify these kinds of violations through inspections, report review or other means. DEQ coordinates with various local, state and federal criminal investigation agencies. If you are conducting an inspection and identify these types of violations, continue with your thorough inspection while on site. Then, contact the agency Environmental Crimes Coordinator (currently Susan Elworth at 503-229-5152). For further information about criminal violations and processes, consult the DEQ IMD on Conducting the Criminal Enforcement Program (Appendix I).

## 6.3. Applying the Guidance Tables

### 6.3.1 How to interpret the Tables

Once you have sufficient information to determine that a violation has occurred, you will need to determine whether the violation(s) should be referred for formal enforcement, issued an EEO, or whether the violator should receive only a warning letter. The process for determining an enforcement response is as follows:

1. Find the applicable program-specific guidance table for each violation (Tables are listed in Section 7 below and incorporated into this IMD).
2. Find the classification for each violation. The first two columns on the left of each Table list the rule citations and corresponding text for each classified violation in that program.<sup>1</sup> The “class” of violation is a designation by rule of the importance of the rule or statute violated to the environment or to the regulatory system. Classes range from Class III (least important) to Class I (most important). Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC). Note that the classifications are *not* the legal citations for the laws violated – they are a description of the importance of the violation. Every possible violation of DEQ rules is classified, but not every possible violation has a separate unique classification – some classifications group a number of related violation types while others divide violations into separate classifications according to certain facts about the violation. If none of the classifications in the program-specific Table fit the violation, use the Default classifications in Table 1.
3. Apply the guidance for that particular classification. The columns to the right of the citation and classification text specify what type of action to take for violations in that classification. Generally, the required action will be either a Warning Letter (WL or WLO), or a Pre-Enforcement Notice (PEN) with a referral for formal enforcement. In some programs, other required actions include a Notice of Permit Violation (NPV), a Field Citation (FC), and an Expedited Enforcement Offer (EEO). For more information about NPVs, see below. For general information about EEOs, see IMD on Expedited Enforcement Offer Considerations and Procedures (Appendix J) and the program-specific IMD for the individual program EEO or Field Citation program.

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<sup>1</sup> Tables for Spills and Dry Cleaners are arranged differently.

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4. Determine what action to take. If any one of the violations should be issued a PEN and referred, then send a PEN for *all* violations and refer all violations. Do not send a WL for some violations and a PEN for others. The decision point at the guidance-table stage is whether to expend resources on formal enforcement. If DEQ will initiate formal enforcement, then all violations will be considered for formal enforcement and possible penalty. Similarly, don't send a WL for some violations and an EEO for others.

### 6.3.2 Warning Letters and Pre-Enforcement Notices

DEQ sends two kinds of “informal” (*i.e.*, not subject to the legal contested-case process) letters to notify a violator about violations that DEQ has identified and what to expect next. DEQ sends Warning Letters (WLs) when we are not asking for further correction and are not referring the violations for formal enforcement. If corrective action is needed, DEQ sends a Warning Letter with Opportunity to Correct (WLO) with a deadline and states that continued violation will result in formal enforcement. DEQ sends a Pre-Enforcement Notice (PEN) when we anticipate referring the violations for a formal enforcement action that will likely contain a penalty and order for compliance. Both WLs and PENs should do the following:

- accurately describe the violation and the statute or rule violated;
- explain the actual or potential environmental consequences of the violation;
- inform the violator what needs to be done to correct the violation;
- inform the violator of the possible enforcement consequences of the violation; and
- inform the violator whom to contact.

#### 6.3.2.1 Duplicative and Cascading Violations

In both WLs and PENs, be sure to cite all the documented violations for which you have sufficient information and which are not *duplicative* or *cascading* as described below. In deciding whether to cite a particular violation in a WL or PEN, be firm, factual, objective, fair and helpful. There is no processes for a recipient of a WL or PEN to legally challenge the findings you make but citing erroneous or multiple violations for the same transgressions can cause a number of unintended effects. These can include: making the wrongful behavior seem worse than it really was, possibly affecting a recipient's credit and insurance; causing unnecessary grief for the facility's environmental staff; making it more difficult for us to track the recipient's steps towards compliance in the DEQ databases.

Only cite violations if you believe you have sufficient information that – *more likely than not* – the documented violation did occur. If you have concerns about other possible violations, but do not have sufficient information, you may ask for the additional information in the WL or PEN, and inform the recipient that an additional WL or PEN may be issued if DEQ discovers additional violations.

Don't cite *duplicative* violations where the exact same conduct violated more than one legal citation. For example, when a permitted source discharges a pollutant not specifically addressed in its permit, they may violate ORS 468B.025(1)(a) (“causing pollution”); ORS 468B.025(2) (“violating a permit”), or ORS 468B.050(1)(a) (“discharging without a permit”). If the discharge also violated water quality standards, that would be a second violation because it is not the exact same conduct – it would be illegal discharge plus discharging sufficiently high amounts of pollutants to cause the violation of standards. Similarly, a hazardous waste generator who stores hazardous waste for more than the time allowed could violate OAR

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340-100-0002 adopting 40 CFR 262.34 (“exceeding accumulating time”) or ORS 466.095 (“operating an illegal hazardous waste storage facility”).

Avoid citing “cascading” violations where a second violation necessarily follows from the first. Whether it necessarily follows from the first is subject to discretion. For example, if a permitted source did not conduct required monitoring, it necessarily will not have properly recorded the monitoring data.

For additional information about how OCE manages duplicative and cascading violations with regard to assessing penalty, see IMD on Assessing Multiple Penalties (Attachment F). If you have any questions about cascading or duplicative violations or how to handle related corrective actions, contact the Environmental Law Specialist for the program.

### 6.3.2.2 Citing Violations from Another Program Area

Generally, inspectors should cite, in WLs and PENs, all violations for which there is sufficient evidence to prove the violation occurred. However, inspectors may identify violations in programs other than the one for which they work. Some ways to handle those violations include:

- If the issues are far outside the expertise of the inspector, if significant follow-up work appears to be necessary, if or if the other violations would escalate a WL to a PEN based on the Guidance, then refer the violation(s) to the appropriate DEQ program. E.g., an open-burning inspector who finds abandoned drums of hazardous waste might refer that situation to the hazardous waste program instead of adding it to the open-burning WL.
- If unsure about the evidence or law, discuss the circumstances and violation with the appropriate program inspector or ELS, and decide whether those violations should be included in the WL or PEN.
- If there is sufficient evidence and the law is understood, then cite the other violations in the WL or PEN.
- If the violations don’t fit one of the above circumstances, then explain your observations in the WL or PEN and describe the “other issues.”

In deciding whether to cite the other program violations in a formal enforcement action, the ELS will discuss the violations with other ELSs for reasons of consistency. If there is to be an order that would necessitate work (such as reviewing a cleanup report or conducting a follow-up inspection) requiring report review or other follow up from another program, the ELS will verify that the program has the capacity and willingness to follow up.

### 6.3.2.3 Amending Warning Letters and Pre-Enforcement Notices

If, for any reason (*e.g.*, new information, additional discussion about statute, rule, permit or order interpretation) you discover that one or more of the violations you alleged in a WL or PEN did not actually occur, the Department must send an amended WL or withdrawal of the WL to document that the issue is closed. If a PEN has been sent, be sure to confer with OCE before withdrawing any of the allegations.

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Once a determination has been made that a violation cited in a WL or PEN did not occur, the Department has 30 days to issue its amended or withdrawn WL or PEN notice. (*see* OAR 340-012-0038(1) and (2)). Templates for these are available in the Word template folders under the Enforcement tab.

### 6.3.3. Special case of the Notice of Permit Violation

ORS 468.126 requires that DEQ give an advance warning of enforcement and opportunity to correct ongoing violations before DEQ issues a civil penalty for certain permit types and permit violations. DEQ implements this statute by issuing a Notice of Permit Violation (NPV). An NPV does not convey rights to contested case appeal and requires the recipient to respond within *five* days with either (1) a written certification that the permitted facility is complying with all terms and conditions of the permit or (2) an acceptable proposed plan and schedule to bring the permitted facility into compliance.<sup>2</sup> As described below, there are numerous exceptions to when an NPV is required such that it is seldom actually needed.

OAR 340-012-0038(3)(e) lists the numerous exceptions to the NPV requirement. NPVs are only issued for some violations of Water Pollution Control Facility Permits and non-municipal Solid Waste Disposal Permits and even then only in some circumstances. If the program specific guidance directs a possible NPV, follow the decision tree in Figure 1 to determine whether an NPV may apply to any particular violation.

Evaluate each permit violation separately using Figure 1 and take the following action, as applicable.

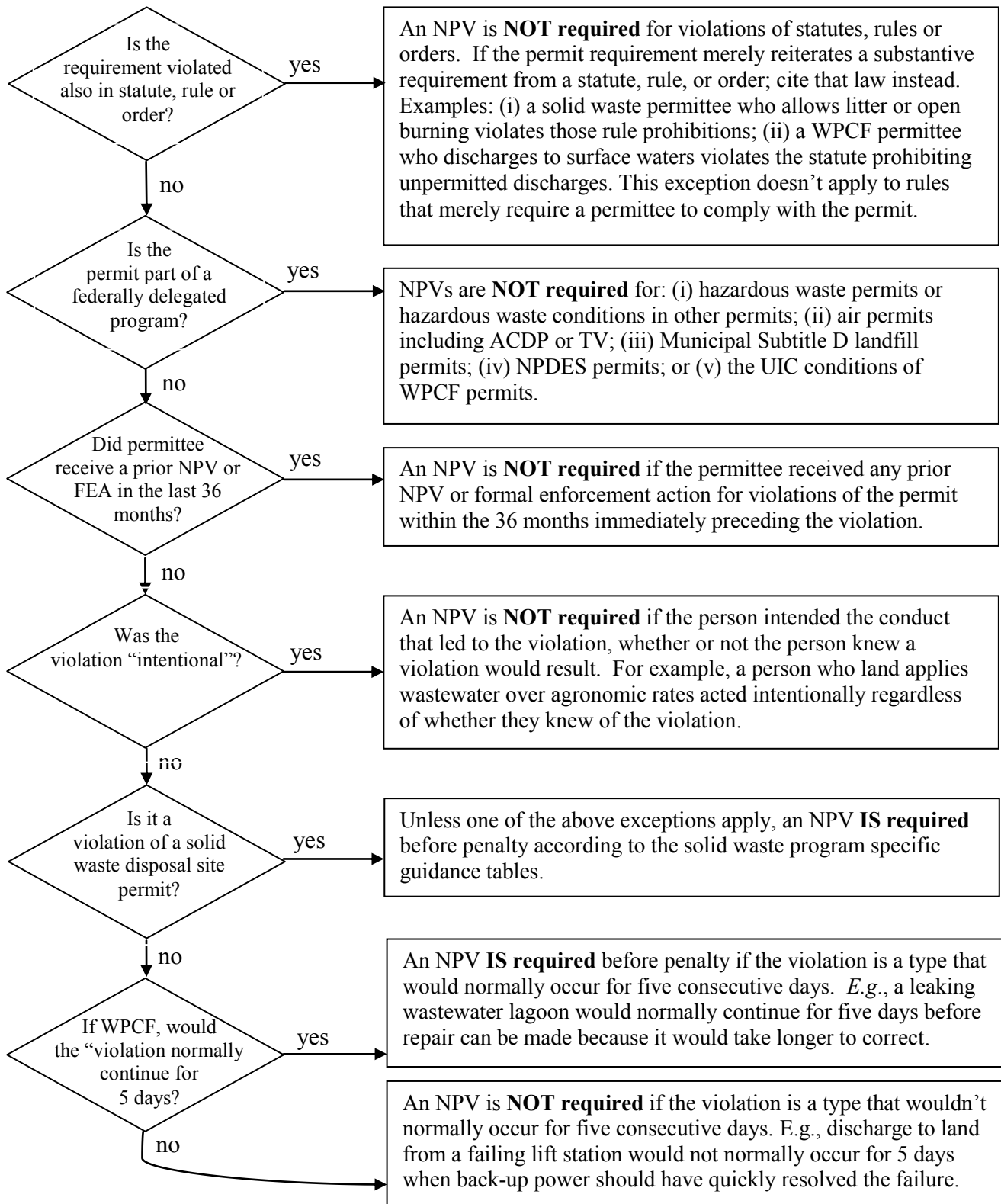
- a) If the NPV *is not* required for any of the permit violations, send the WL or PEN (as applicable under the guidance) for all violations including permit violations and non-permit violations.
- b) If an NPV *is* required for any of the permit violations, send a PEN (see Word template “Warning Letter Template with NPV referral”) and refer to OCE for issuing an NPV. Note that, once issued, the law requires a response from the violator within 5 days so we need the violator to be prepared for quick action
- c) If an NPV would be required for any of the permit violations, but the violation hasn’t been repeated such that the guidance doesn’t require an NPV yet, send a WL (see Word template “Warning Letter Template with NPV warning”) to notify the violator that continued violation will lead to an NPV.

Figure 1. The decision-tree below describes whether an NPV is required.

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<sup>2</sup> Water-quality permittees technically have a third option under ORS 468.126(1)(c), which is that the recipient could request that DEQ assess a penalty through a public hearing process described at ORS 468B.032 and that the recipient would pay the costs of the public process. This was designed to ensure that DEQ action eliminated the need for citizen suits. Changes in the law eliminate any benefit this option had to a recipient and it is extremely unlikely that any recipient would choose that option. For additional information on this option, contact Les Carlough or Jenny Root in OCE.

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### 6.3.4. Issuing an Expedited Enforcement Offer (EEO) or Field Citation (FC)

Some Programs issue EEOs (as of March 2015 these include: stormwater, oil and hazardous materials spills, hazardous waste, onsite sewage, open burning, and dry cleaners). The underground storage tank program issues a similar FC. These documents are issued by field staff and serve the purpose of giving notice to a violator that DEQ is initiating enforcement but offers to settle the matter for a greatly reduced penalty. This process allows DEQ to conclude formal enforcement actions faster and without the cost associated with drafting legal notices and performing hearings and appeals. If the violator does not wish to settle with an EEO or FC, DEQ will initiate formal enforcement using its normal processes. Consult the specific program Guidance table to determine when to issue an EEO or FC and follow the directions in the program internal management directive for EEOs or FCs. Programs wishing to develop an EEO program should consult the Internal Management Directive for EEO (Appendix L) and Section 6.6 below about amending the Guidance.

### 6.3.5. Seeking deviation from the Table (NPJs and PJs)

The tables in the Guidance are designed to ensure that DEQ addresses important violations with the appropriate amount of agency resources. This is the way DEQ creates a consistent, agency-wide, multi-region strategy for enforcement. While staff must follow the action directed by the Guidance, there may occasionally be **exceptional circumstances** not considered by the Guidance tables that warrant some other action.

In order to seek approval for deviation from the guidance tables, an inspector may draft either a:

- No-Penalty Justification (NPJ) Memo to propose not sending an EEO or referring a violation for penalty when the Guidance table directs the EEO or referral because of exceptional circumstances (e.g., extreme and unforeseeable event beyond the control of that person which prevents compliance), or
- Penalty Justification (PJ) Memo to propose sending an EEO or referring a violation for penalty which otherwise would not receive an EEO or penalty under the guidance tables because of exceptional circumstances (e.g., the person violated the law in an egregious or flagrant fashion but the Guidance directs multiple WLs).

Each justification memo must summarize the facts and the particular and truly exceptional circumstances justifying the deviation. In deciding whether exceptional circumstances exist, you might consult the binder of past approved NPJs that your office may keep or consult the ELS assigned to the Program. Do not send the WL, EEO or PEN until you have received approval. Route the memo for approval to the Regional Manager, Regional Administrator, and Manager of the Office of Compliance and Enforcement. Once you have received approval from each of these persons, you may take the approved action.

### 6.4. Making a referral for formal enforcement

Referrals for formal enforcement are made by submitting to the Office of Compliance and Enforcement a hard copy of a Referral Form and attaching information related to the case. Referral templates, tailored to the specific program areas, are available in the Word template folders under the Enforcement tab. The referral contains the following parts:

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**6.4.1 Cover Page** – This page is used for assignment and tracking information that is entered by OCE and a timeline of the events leading to the referral.

### 6.4.2. Enforcement Referral Questionnaire

This area of the referral contains information and details about the violator, whether the violator is a “significant noncomplier” or “high priority violator” and details about how we know, based on the evidence that all the elements of the violation can be shown. In filling out the questionnaire, provide factual information, even if you believe it “hurts” DEQ’s case. It is better for the ELS to have an objective recitation of the facts so they can better prepare the case strategy than to have a set of facts that have been culled to present only those favorable to DEQ. These questions are not intended to be duplicative of your inspection report or your WL or PEN. They should involve a more detailed or focused distillation of the information gathered during your inspection, so please do not just say “see inspection report” or “see PEN” unless these documents describe all the necessary details. Answering these questions thoroughly now should cut down on the back and forth that is needed once an ELS is assigned to the case. In addition, if the information is gathered now, it is much more likely to be fresh in your mind. The questionnaire typically requests information on the following:

- Violation status – Detail what has been corrected, when it was corrected and what remains of concern.
- Past compliance history – You may have compliance information that is unavailable to the ELS who will be preparing this case. For example, do you know about conversations that went on for years with this violator and the county or city enforcement officials in which they are located; have they had other types of violations that you are aware of; what phone conversations or informal interactions have you had with the violator, has there been any prior complaints, WLs, or other enforcement? This information may not be in your most recent PEN, but it is extremely important to the case. Please make sure to review the facility file and describe or attach any information that would be helpful.
- Duration of each violation – Part of the penalty calculation formula requires an exact count of the number of days the violation continued. If you have proof that a violation occurred during a certain period of time, but believe it occurred longer, please provide a clear explanation. For example – on January 12th you find turbid waters discharging into a stream from a construction location; on January 19th you return and find the same thing. You don’t have specific proof that excess turbidity existed before Jan. 12<sup>th</sup> or on those intervening days. Surrounding facts like rainfall amounts on those days, or the condition of the silt fences might be used to show the violation lasted longer. This is not a guarantee that we will be able to prove to an administrative law judge that the violation did, in fact, occur every day during the period, and the ELS will strategize with you.
- What else do you know about this violator? – This question should be answered with factual information you have about the knowledge base of the employees or the company. What do you know about how long the company has been in business; what other licenses or experience does the violator have? This kind of information is useful with regard to determining whether the person was negligent, reckless, intentional, or flagrant in committing the violation. Any appropriate personal opinions should be placed on the Confidential Intra-office Advisory Information page, as described below.



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- Amount of pollutant, waste, and/or risks and impacts of the violation – This is used to determine the magnitude of the violation in the penalty calculation. In addition, it provides additional background information regarding why this particular instance of this violation is important.

### 6.4.3 Economic Benefit

Economic benefit is an estimate of the amount of money the violator gained through the violation by avoiding or delaying required expenditures. As part of a penalty, DEQ will assess economic benefit to (1) "level the playing field" by taking away any economic advantage the violator gained over its competitors through noncompliance, and (2) ensure that potential violators are deterred from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance.

The expenditures can be generally separated into two categories: (1) avoided costs are those which the violator should have paid but did not and (2) delayed costs are those which the violator eventually paid late. Some costs will always be delayed such as avoided annual compliance determination fees and costs of missed sampling events. Other costs may be delayed if they are later paid. In some cases, DEQ may recalculate the economic benefit as delayed for settlement purposes if the violator does take the required action after the penalty was issued.

DEQ calculates economic benefit using EPA's "BEN" computer model, which considers interest rates, tax consequences and other factors in determining an estimated present-day value of the benefit. In order to make these calculations, OCE needs to have the estimated information below:

- A description of the cost (*e.g.*, permit fee, new arc furnace).
- The date when the violator should have spent the money or when the violator began being out of compliance.
- The estimated annual cost of maintaining or fueling the equipment, if any.
- The date when the violator came into compliance, if applicable.

See the Internal Management Directive on Economic Benefit (Appendix E) for ideas on costs. Collecting this information then will be easier during the inspection, because of the nature of the relationship you have with the violator at that time. In addition, it is better to collect economic benefit information closer in time to the violation, because often the best economic benefit information may be unavailable or disappear prior to the case actually being drafted. For example, cost information may depend on counting staff hours or duties. A party may be willing to provide staff lists or duties at the time of the inspection, but unwilling to later.

### 6.4.4. Confidential Intra-Agency Advisory Information.

This section is intended to capture information that is deemed to be Intra-Agency Advisory during the development of the case. Generally, all DEQ's records are public record, not confidential, and must be disclosed and released to the public upon request. There are some exceptions to that, however, including confidential complaint information and advisory information preliminary to a final agency action. Documents of these sorts should be clearly marked and kept separate from other documents. Segregating this information on a sheet specially marked as "Confidential Intra-Agency Advisory – Exempt for Public

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Disclosure” will make it easier to identify the confidentiality of the information. While DEQ will work to keep all such information confidential and not publically available, if a member of the public seeks to review the documents or records, the Attorney General’s office will decide for itself whether the law requires the record must be released. As with all agency communications, make sure only to record information in ways that you are comfortable ultimately having released to the public. Some advice that an inspector might put in this section includes:

- Proposed items for the compliance order and realistic timeframes by which the entity should be able to complete the items. Be sure to note when something is contingent upon DEQ’s review or approval.
- Proposed requests, outside the legal order, that might be put in the cover letter.
- Recommendations about case strategy – If there is any other information you would like to provide that would give the reviewing managers and the ELS some indication of the strengths or weaknesses of the case or some other personal opinion about the case; please provide that information here. Remember that it is always possible that this document could be released, so use judgment about what types of personal opinions relevant to the case would be better conveyed by phone.

### 6.5. Formal enforcement: What to expect

#### 6.5.1 Document Preparation Process

As a result of the Enforcement Lean/Kaizen Effort in 2008, DEQ set out expected timelines for initiating the formal contested case process which is available at Appendix M. The process is designed to ensure that the case moves forward expeditiously will ensuring that the staff most familiar with the facts are involved in the review and that managers and administrators have an opportunity to review.

#### 6.5.2. Documents

The Environmental Law Specialist (ELS) assigned to the case will try to make a quick review of the referral and the evidence you provided, generally within three days of being assigned the case, to determine whether anything more is needed at the outset of the case development. The ELS will also let you know, given their current workload, when they are likely to begin drafting the case. Once the ELS begins to work on the case, he or she will evaluate whether: (1) the law and evidence exist to be reasonably sure we can prove the violations alleged, (2) there are other violations not addressed by the referral – especially secondary media issues, and (3) there is economic benefit, and whether the information provided can be used to calculate a reasonable estimate. The ELS will also double-check whether the violator should be a significant noncomplier or high priority violator which must be reported specially to EPA. (see IMD on Hazardous Waste Management, Criteria for Applying Factors to Determine Significant Non-Complier Status (Appendix B); Water Quality Significant Non-Complier (SNC) policy (Appendix C); and Air Quality High-Priority Violator Process (Appendix D).

The ELS will draft the formal enforcement documents after reviewing your referral, the evidence and WLs/PENs, background and related enforcement files, and after discussing any consistency issues with other enforcement staff. The formal documents will usually be of a cover letter, the Notice of Assessment of Civil Penalty and Department Order, and one or more exhibits.

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**Cover Letter** – Explains in layperson’s terms the general information we have showing that the violations occurred, why those violations are important to the environment, what needs to be done to correct the violations, the conditions of any attached order, a brief statement of the penalty and appeal process. Work with the ELS if there is special or particular information you want to see incorporated into the cover letter. The cover letter is the document most likely to be picked up by the media and so should explain well why we are taking an action.

**Notice & Order** – This is the legal instrument used to initiate the formal enforcement process and will state DEQ’s legal authority for the action, may give a list of findings, will state DEQ’s basic allegations supporting the conclusion that a violation occurred, and will provide notice about the respondent’s (violators’s) appeal rights. The Order will be a statement of the schedule DEQ expects the respondent to follow to reach compliance or to mitigate the effects of the violations. Compliance requirements for the order will normally be drafted by the region and reviewed for completeness and enforceability by the ELS.

**Exhibits** – Most cases referred for formal enforcement will receive a penalty for one or more of the violations. Penalties are XXX and alleged in the exhibit. The dollar value will depend on a variety of factors and cannot be easily estimated without careful consideration of the facts. For this reason, DEQ staff should not discuss the size of a possible or proposed penalty with a violator until the Director approves that penalty.

### 6.5.3. Penalties

Penalties are assessed based on various authorities. Below are the Division 12 citations describing when and how various penalties are applied.

**OAR 340-012-0045**. Most of the penalties that DEQ assesses for violations in most program areas are assessed under this formula. A number of factors go into the calculation of the penalty. The factors are specified in a formula in the rules at OAR 340-012-0045(1). When you receive a draft civil penalty assessment to review, examine the Exhibits where the ELS has detailed our evidence on the formula factors. That formula is:

$$\text{Penalty} = \text{BP} + [(\text{BP} \times 0.1) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$$

**BP** is the base penalty and is determined by the class and magnitude of the violation and the program in which the violation occurred. “Class” is a designation by rule of the potential importance of the rule or statute violated to the environment or to the regulatory system. “Magnitude” is a finding based on the extent and effects of a respondent’s deviation from statutory requirements, rules, standards, permits or orders in this specific case. Magnitude can be minor, moderate and major, depending on the evidence inspector collects and what DEQ can prove.

Once class and magnitude are determined, a base penalty is determined according to penalty matrices in OAR 340-012-0140. The base penalty for a Class I, major magnitude in the highest matrix is \$12,000. The base penalty for a Class I, major magnitude violation in the lowest matrix is \$1,000. Which matrix applies often depends on the nature of the violation and on who the violator is and is determined by the Division 12 rules. Individuals and small businesses tend to be in the lowest penalty matrix.

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- P** is an aggravating factor based on the person's past history of compliance or noncompliance as measured by the number of respondent's prior significant actions (PSAs) in formal enforcement actions (*e.g.*, in Notices of Violation or Department Orders). PSAs at all facilities owned or operated by the respondent in the same environmental media as the current violation are counted in the "P" factor. Older violations are given less weight. Violations that are more than ten years old are not counted.
- H** is a mitigating factor based on the person's past history of cooperation in correcting violations cited in past enforcement actions.
- O** is an aggravating factor concerning whether the violation was a one-time event or was repeated or ongoing for more than one day.
- M** is an aggravating factor based on the mental state of the alleged violator in committing the violation (*i.e.*, unknown mental state, negligent, reckless, intentional or flagrant).
- C** is the respondent's efforts to correct the violation and can be a mitigating or aggravating factor depending on the facts.
- EB** is the economic benefit in monetary terms that the violator gained by not complying with the law. *See* Appendix E for a discussion of economic benefit, including violation-specific criteria for determining EB.

**OAR 340-012-0155(1)(a)**. A violation which creates an imminent likelihood for extreme hazard to public health or causes extensive damage to the environment may be assessed a penalty of \$50,000 if done recklessly, \$75,000 if done intentionally, or \$100,000 if done flagrantly.

**OAR 340-012-0155(1)(b)**. Intentionally or negligently discharging of oil or hazardous materials into waters of the state (or intentionally or negligently failing to clean up) may receive a penalty of up to \$100,000. This penalty is determined by using the class, magnitude, and penalty factors similar to the penalty factors in the typical penalty formula outlined above. In addition, the penalty is multiplied by additional factors related to whether the spill was negligent or intentional, contains any hazardous substance, the volume of the spill, and whether it impacted any especially sensitive areas such as drinking water or cultural sites.

**OAR 340-012-0155(1)(c)**. Willfully or negligently discharging oil to state waters may additionally be assessed natural resource damages, which are determined by DEQ with the advice of the Department of Fish and Wildlife.

**OAR 340-012-0155(1)(d)**. Impacts of hazardous wastes or hazardous substances that kill wildlife may be assessed special penalties according to species value list kept by the Department of Fish and Wildlife at ORS 496.705.

**OAR 340-012-0155(1)(e) and -0155(2)**. A \$500 penalty may be assessed for owing or operating a confined animal feeding operation without a permit, failing to comply with toxic use reduction requirements, improperly disposing of batteries, or failing to provide an opportunity to recycle.

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**OAR 340-012-0155(2)(a).** A \$1,000 penalty may be assessed for any person who sells or supplies cleaning agents containing phosphorus.

**6.5.4 Multiple Penalties** – A single violator may receive, in one action, multiple penalties for different violations or may receive multiple penalties for repeated instances of the same violation. The factors that generally are taken into considered by OCE in drafting a notice of violation with multiple penalties are set forth in the Multiple Penalty Policy in Appendix F.

### 6.5.5. Contested Case Processes

#### 6.5.5.1. Service

OCE will generally serve the documents by certified mail to a natural person or to the registered agent of a corporation. Occasionally, we may hire a private investigator to serve documents, especially if the person has been difficult to reach. If there is an environmental manager or other person at the facility with whom you have been working you might want to have OCE copy that person as well so he or she is not surprised by the action. A party receiving a formal Notice or Department Order generally has 20 days to respond with a Request for Hearing, a Request for an Informal Discussion, and an Answer. The Answer should set out the respondent's admissions and denials of the facts as alleged by DEQ and any defenses and other objections.

Typically, DEQ encourages the person to appeal and to request an informal discussion. This allows DEQ to engage with the person to discuss the issues. If the person does not appeal the Order, it becomes final by operation of law.

#### 6.5.5.2 Informal discussion

After we receive a request for appeal, we will set up an informal discussion, which can be done in person or by conference call. Generally, the ELS handling the case will set up the meeting with the inspector and the respondent, but the regional manager, OCE manager, the respondent's attorney or others may also attend. The meeting serves several purposes. It gives respondents an opportunity to explain "their side of the story," to discuss different theories about the facts or law, to offer mitigating information, and to ask questions about the appeal. Sometimes all a respondent wants is to be heard and to vent. The ELS leading the meeting will try to focus the discussion on areas where we think the respondent might have a strong case so that we know where we stand if there is to be a hearing. At the informal, inspectors should be prepared to:

- Assist the ELS in discussing the evidence, the allegations made, and the application of the law;
- Discuss what still needs to be done to comply with the Order;
- Provide technical input and knowledge about the facility.

Following the informal discussion, the ELS and inspector will discuss any relevant points raised and determine whether to recommend that DEQ make an offer to settle. Generally, our goal is to issue the strongest case we can and to stick with the allegations we initially make. Nonetheless, respondents often can explain some mitigating information that DEQ had not known previously or point out weaknesses in our case. If we were wrong in any allegation or if there is a good chance we would lose at hearing, the ELS will make a recommendation to the OCE Manager that an offer of settlement be made. DEQ settles over 80% of

## Enforcement Guidance for Field Staff

the appealed penalties. Settlements are incorporated into a Mutual Agreement and Order (see below). Even if no settlement is reached, the informal discussion will give DEQ a chance to better understand why the respondent appealed and what defenses they might make if there is a hearing.

### 6.5.5.3 Mutual Agreement and Order to Settle a Contested Case

DEQ may offer to settle a formal enforcement action if there is new or mitigating information about the elements of the violation or the calculation of the penalty, or if there is a need to modify the compliance order. One common reason for settlement is that the respondent completed the actions requested, which may mitigate the penalty based on the efforts-to-correct factor.

DEQ may also settle for reasons of financial hardship if the violations are of a less egregious nature. On request and submission of the required tax statements and financial hardship forms, DEQ's business office will determine the extent to which a respondent is capable of paying a penalty. DEQ may also offer to allow a respondent to pay a penalty in monthly installments plus statutory 9% interest.

DEQ may also reduce a penalty in settlement if the respondent proposes an approvable Supplemental Environmental Project that benefits human health or the environment in Oregon. The cover letter to the FEA will mention this and it is possible that the respondent will want to discuss options with DEQ staff. For more information see the IMD on Supplemental Environmental Projects (Appendix G).

Settlements are always incorporated into a Mutual Agreement and Order (MAO) which is a formal consent order that contains a statement about what the agreement is based on and a final order that eliminates further appeal. The ELS will discuss with the inspector any reasons for settlement and may ask the inspector to assist in drafting revisions to the compliance order. In rare cases, DEQ may offer to settle an anticipated formal enforcement matter with an MAO before the formal enforcement order is issued. For more information on MAOs, see the IMD on Water Quality Program MAOs (Appendix A).

The MAO will specify how it will be enforced. Some MAOs may specify stipulated penalties for certain kinds of violations and if so, will also specify that DEQ will assess the penalty by issuing a "Penalty Demand Notice." Inspectors are expected to track compliance with the MAO and remind the party of upcoming deadlines if necessary, but in all events should refer any violations for enforcement. If the MAO does not specify stipulated penalties, then violations are assessed as Class I violations of a Final Order.

### 6.5.5.4 Contested Case Hearing

When a respondent makes a timely appeal to a DEQ action, and we are not able to resolve the issues through informal discussion or negotiated resolution, the respondent is entitled to a contested case hearing before an administrative law judge. A hearing is similar to a court trial, but less formal. You may be called as a witness to testify to your observations or to explain other evidence such as formal documents, letters, maps, diagrams or other written materials, or the results of experiments or analyses.

Organizing for a hearing – Work with your ELS to strategize, organize, review and plan. Typically, the ELS will create a hearing notebook that may include notes, copies of documents, and lists of questions designed to provide foundation (context) for evidence and to show that DEQ can prove the violations alleged. The ELS will work with you about how to present the information but will never tell you what to say.

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Preparing for the hearing – The hearing will likely occur months after your initial inspection. Refresh your memory by re-reading your inspection notes or reports. This will help you remember the facts more clearly. The ELS will likely review anticipated questions with you beforehand. It is perfectly ethical for you and the ELS to practice testimony, by the ELS cannot tell you what to say.

During the hearing – Hearings are generally held at a DEQ office in the city closest to the location of the respondent and the administrative law judge assigned, but may also be conducted by telephone or video-conference. The administrative law judge will sit at one end of the table with papers and a recorder. The ELS will sit on one side of table and the respondent and/or opposing attorney will sit on the other side. If witnesses are not excluded from the hearing, they'll sit with their ELS or attorney. All you will need to do is be prepared to be sworn in and to testify as requested. The ELS will initiate opening statements, manage exhibits, and orchestrate whatever discussions or motions must be considered.

A typical contested case hearing begins with opening statements from both sides and review of anticipated documents and exhibits that will be used. The ELS will present DEQ's case in support of the action, bringing in witnesses to testify and explain the violations. The respondent's presentation in opposition will follow. Both sides will be given opportunity to cross-examine witnesses. DEQ has the burden of proof on all elements of the violation at issue. Some elements may not be at issue if the respondent didn't appeal them in the Answer or if the element is admitted or stipulated by DEQ and the respondent. Here are some tips to keep in mind as you testify:

- Know the location of the hearing beforehand and be on time
- Dress appropriately in business attire.
- Listen to the question asked, answer directly and concisely, and then stop. Don't be lured into saying more than you need to say, which gives the opposing attorney new avenues of questioning.
- Avoid quick answers – wait for the whole question and take a moment to think of the answer before you give it.
- Address your answers to the judge.
- If an objection or motion is made, stop immediately, until you are asked to proceed.
- **Always** tell the truth regardless of whether you think it will hurt the case or be embarrassing to someone.
- Never guess. Either say "I don't know" or ask to refresh your memory with the exhibits or notes, if appropriate. If you make a mistake admit it as soon as you realize it.
- Avoid trying to outsmart the other side with "clever" answers – they often backfire.
- Speak so that you are heard and can be recorded. Avoid answering with only body language.
- Avoid slang, jargon and acronyms when possible or explain them if you use them.
- Be polite. Don't interrupt the judge or attorneys and don't use wisecracks or foul language.
- Never allow yourself to become angry, even if an attorney provokes you.

After the hearing – At the end of the hearing, both sides typically present closing arguments. These might be made orally at the hearing, or the judge might hold the record open for written closing arguments. When the record is closed, the judge will render a "Proposed Final Order." This may take from two weeks to six months depending on the complexity of the record and the administrative law judge's docket. The Proposed Order will become a Final Order by the Environmental Quality Commission unless appeal is made within 30 days of the mailing of the administrative law judge's Final Order.

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## 6.5.5.5 Higher Level Appeals

The Administrative Law Judge's "Proposed Final Order" is appealable to the Environmental Quality Commission (EQC). If either DEQ or the respondent appeal, there will be a period of filing "Exceptions," "Briefs," and "Reply Briefs." At the scheduled time, the five-member board will hear the appeal. First, DOJ counsel for the Commission will recite a brief history of the facts and case. Then DEQ and the party will each be given an opportunity to make a brief oral argument and to answer questions from the EQC. The appealing party goes first, but will be given a chance to speak to any issues raised by the other party. No new evidence may be presented and the inspector will not be called to testify. The EQC panel will then vote to adopt the administrative law judge's findings, to instruct that a new hearing order be prepared that reflects the EQC's decision, or to remand the case to the administrative law judge for further consideration on key points.

Final Orders may be appealed by the respondent to the Oregon Court of Appeals, though such appeals are rare. DEQ cannot appeal an adverse EQC decision because the Commission is acting on behalf of the Department. Pursuant to state law, appeals to the Court of Appeals are handled by the Department of Justice, which will work with the ELS.

## 6.5.5.6 Collections

Penalties are not collectable until DEQ obtains a Final Order from the EQC by default, by prevailing at hearing, or by agreement with the party through an MAO. In many cases, we allow the party to enter into a payment plan to pay in monthly payments plus 9% annual interest on the unpaid balance. Once we have a Final Order, and unless we have a payment agreement with the party, we will seek collection by placing a lien for the amount due plus interest on the property of the respondent and by referring the debts to the Department of Revenue or private collection agency for collection. In some cases DEQ may seek the aid of the Attorney General's office to pursue collection through judicial means.

## 6.6. Procedures for Amending the Guidance Tables

### 6.6.1. When to change the Enforcement Guidance program tables

- When there are new laws that will be enforced.
- When program staff repeatedly submit No Penalty Justifications or Penalty Justifications to request deviation from current guidance for the same reasons so that the circumstance is no longer "exceptional."
- When new situations do not fit well into the current guidance.
- When program priorities change and the program wants to re-direct enforcement resources (*e.g.*, program budget is reduced or increased; change in agency strategic priorities; program adopts a new expedited enforcement offer program).
- When existing language is less clear than needed such that staff have difficulty understanding it.

### 6.6.2. Procedures for amending the Enforcement Guidance program tables

To change a program guidance table, follow these steps:

- (1) The staff person discusses the need for new or revised enforcement guidance with their manager.



## Enforcement Guidance for Field Staff

- (2) The manager or staff person phones or emails the Environmental Law Specialist (ELS) who specializes in that program area to discuss the need for a change. The ELS will review the need for change with the OCE Policy Advisor. The ELS and the staff person draft proposed language.
- (3) Once the program staff person, manager, ELS and Policy Advisor agree upon a draft, the manager emails the proposed language to the Program Management Team and the OCE Manager. Program managers in other regions and offices are expected to solicit comments and suggestion from their staff on the proposed changes to the guidance.
- (4) The Policy Advisor and ELS will attend the PMT's meeting or participate in the email discussion to answer questions about the proposed new guidance.
- (5) If the PMT does not approve the proposed guidance, it will send the proposal back to originating staff and ELS with specific reasons for disapproval and, if desired, recommendations for changes to the proposal. If the PMT approves the proposal with changes, it should send the approved proposal out for staff comment prior to finalizing. Once PMT approves the proposed guidance, the Policy Advisor will forward it to the OCE Manager.
- (6) The OCE Manager reviews proposed guidance. If not approved, it is returned to the Policy Advisor for further discussion with the PMT and ELS. If the OCE Manager approves, it is conveyed to the Deputy Director for signature.
- (7) When signed, OCE announces the revision to all affected staff, amends the guidance on the web, and distributes to OCE staff.

## 7. List of Program-Specific Guidance Tables

Table 1.	Default Classifications for All Programs Guidance
Table 2.	Air Quality Guidance
Table 3.	Water Quality Guidance
Table 4.	Onsite Septic System Guidance
Table 5.	Solid Waste Guidance
Table 6.	Waste Tire Guidance
Table 7.	Underground Storage Tank Guidance
Table 8.	Hazardous Waste Guidance
Table 9.	Polychlorinated Biphenol (PCB) Guidance
Table 10.	Used Oil Guidance
Table 11.	Environmental Cleanup Guidance
Table 12.	Leaking Underground Storage Tank (LUST) Guidance
Table 13.	Heating Oil Tank (HOT) Guidance
Table 14.	Oil and Hazardous Materials Spills Guidance
Table 15.	Contingency Planning Guidance
Table 16.	Ballast Water Guidance
Table 17.	Dry Cleaner Guidance

## 8. Appendices

Appendix A	IMD on Water Quality Program MAOs
Appendix B	IMD on Hazardous Waste Management, Criteria for Applying Factors to Determine Significant Non-Complier Status

## **Enforcement Guidance for Field Staff**

- Appendix C Water Quality Significant Non-Complier (SNC)
- Appendix D Air Quality High-Priority Violator Process
- Appendix E IMD on the Penalty Factor for Economic Benefit
- Appendix F IMD on Assessment of Multiple Penalties
- Appendix G IMD on Evaluating and Approving Supplemental Environmental Projects
- Appendix H IMD on Self-Policing, Disclosure and Penalty Mitigation
- Appendix I IMD on Conducting the Criminal Enforcement Program
- Appendix J IMD on Expedited Enforcement Offer Considerations and Procedures
- Appendix L Enforcement Communication Protocol

## **9. Record of Revisions to IMD or Specific Program Tables**

<b>Revision</b>	<b>Date</b>	<b>Changes</b>	<b>Editor</b>
All new guidance and specific program tables incorporating the 1/6/14 Division 12 amendments	Xx/xx/xx	Various and many	Les Carlough

# Internal Management Directive Water Quality Mutual Agreement and Orders: Appendix A to Enforcement Guidance for Field Staff



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DEQ is a leader in restoring,  
maintaining and enhancing the  
quality of Oregon's air, land  
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DEQ can provide documents in an alternate format or in a language other than English upon request. Call DEQ at 800-452-4011 or email [deqinfo@deq.state.or.us](mailto:deqinfo@deq.state.or.us).

# Disclaimer

This directive is intended solely as guidance for DEQ employees. It does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create an enforceable right or benefit, substantive or procedural, enforceable at law or in equity, by any person. With written managerial approval, DEQ employees may deviate from this directive. DEQ anticipates revising this directive from time to time as conditions warrant.

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# 1. Definitions

Compliance order – A set of enforceable requirements designed to bring a facility into compliance, that is contained in an order.

Compliance schedule – As used in this document, “compliance schedule” means an enforceable schedule contained in a permit, usually in Schedule C.

Corrective actions – Actions required by DEQ to correct violations and intended to help the facility return to compliance. Corrective actions may be included in an informal enforcement (WLOC) or in a formal, enforceable compliance order such as an MAO or in a compliance schedule in a permit. Water quality MAOs often contain a series of corrective actions (together, an “MAO Schedule”). These corrective actions are entered into ACES by the ELS and entered into ICIS as “Schedule Events” by Water Quality data staff.

DMR Reviewer – The DEQ staff person listed in WQSIS as the person responsible for review of a particular facility’s Discharge Monitoring Reports (DMRs).

Enforcement Guidance – DEQ’s internal policy directing staff about what kind of response to take after identifying violations in DEQ program areas. Table 3 is the program-specific table for water quality violations. This Directive regarding Water Quality MAOs is also part of the Enforcement Guidance.

Entity – A person, partnership, organization, or business that has a legal and separately identifiable existence. This includes cities, counties, sanitary districts, and home owners associations. In most cases, DEQ issues WQ MAOs to Entities that are NPDES or WPCF Permittees.

Mutual Agreement and Order (MAO) – An agreement between DEQ and an outside party to the entry of a Final Order from the Environmental Quality Commission.

MAO Schedule – A series of corrective actions contained in the MAO.

Network Discharge Monitoring Report (NetDMR) – EPA’s online tool for NPDES permittees to submit Discharge Monitoring Reports (DMRs) to DEQ via a secure internet connection.

No Penalty Justification (NPJ) – A document prepared by regional compliance staff recommending that DEQ refrain from issuing a penalty related to a violation or violations that the Enforcement Guidance would otherwise direct be referred and penalized.

Notice of Civil Penalty Assessment and Order (NCPO or Notice) – A formal enforcement action issued to a person for a violation or violations which assesses a penalty and initiates a contested case process.



Penalty Demand Notice (PDN) – A demand for stipulated penalties pursuant to provisions of a Mutual Agreement and Order for violations of that Order.

Pre-Enforcement Notice (PEN) – A written notice of an alleged violation that is being referred for formal enforcement. A PEN generally will identify the alleged violations, what the recipient should do to comply, and will state that the violations are being referred for formal enforcement.

Stipulated penalty – A monetary penalty assessed for noncompliance with an MAO, the amount of which is set by explicit terms of such MAO.

Upfront penalty – A monetary penalty for past violations that is included in an MAO without having first been issued in a Notice of Civil Penalty Assessment and Order, and must be paid upon execution of the MAO.

WQ Compliance Staff – DEQ regional staff responsible for developing and monitoring compliance with the MAO. This may include the compliance inspector or the DMR Reviewer listed in WQIS, or both.

Water Quality Data Staff – DEQ headquarters staff responsible for reporting DEQ water quality compliance and enforcement data to EPA using EPA's Integrated Compliance Information System (ICIS).

Warning Letter (WL) – A written notice of an alleged violation for which formal enforcement is not anticipated. WLs may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement (see WLOC). A WL generally will identify the alleged violation(s) found, what needs to be done to comply, and the consequences of further noncompliance.

Warning Letter with Opportunity to Correct (WLOC) – A warning letter that contains an opportunity to correct noncompliance as a means of avoiding formal enforcement.

## 2. Acronyms used in this Directive

ACES – Agency-Wide Compliance and Enforcement System

DEQ – Oregon Department of Environmental Quality

DMR – Discharge Monitoring Report

ECHO – Enforcement and Compliance History Online (EPA database)

EDMS – DEQ Environmental Data Management System

ELS – DEQ Environmental Law Specialist

EPA – U.S. Environmental Protection Agency

EQC – Environmental Quality Commission

ICIS – EPA’s Integrated Compliance Information System

IMD – Internal Management Directive

MAO – Mutual Agreement and Order

NCPO – Notice of Civil Penalty Assessment and Order

NetDMR – Network Discharge Monitoring Report

NPDES – National Pollutant Discharge Elimination System

NPJ – No Penalty Justification

NPV – Notice of Permit Violation

OCE – DEQ Office of Compliance and Enforcement

PDN – Penalty Demand Notice

PEN – Pre-Enforcement Notice

WL – Warning Letter

WLOC – Warning Letter with Opportunity to Correct

WPCF – Water Pollution Control Facility

WQ – Water Quality

WQSYS – Water Quality Source Information System

## **3. Background**

### **A. Purpose of the Directive**

DEQ uses a document called a “Mutual Agreement and Order” (MAO) for several purposes in the water quality program. Because factual and legal circumstances differ from case to case, DEQ management wishes to provide direction to maintain consistency in the way that MAOs are used in the various offices and subprograms. This Internal Management Directive (IMD or Directive) directs staff about when to consider using an MAO and guides staff in how those documents are to be prepared.

This IMD also establishes procedures to track MAO corrective actions using DEQ’s Agency-Wide Compliance and Enforcement System (ACES) and the U.S. Environmental Protection Agency’s (EPA) Integrated Compliance Information System (ICIS). Consistent and accurate recording and tracking of compliance and enforcement data is essential to DEQ’s work regulating National Pollutant Discharge Elimination System (NPDES) permittees and protecting water quality. It also ensures the accuracy of data reported to the EPA through ICIS, and available to the public via EPA’s Enforcement and Compliance History Online (ECHO).

DEQ intends to transition, in the future, to a new Environmental Data Management System (EDMS). At that time, ACES data will likely be transferred to EDMS. Consistent and accurate tracking of compliance and enforcement data related to water quality MAOs in ACES and ICIS is critical in itself; it will also help ensure future data quality in the new EDMS.

### **B. Authorities**

MAOs used as negotiated final orders in contested case proceedings to settle past or possible future violations are authorized by Oregon Revised Statute 183.417(3) and 183.745(11) and Oregon Administrative Rule (OAR) 340-012-0170.

OAR 340-045-0062 authorizes DEQ to enter into certain MAOs when an Entity is required to obtain a permit but circumstances are such that DEQ cannot timely issue a permit.

## 4. Directive

### A. When should DEQ use an MAO?

#### i. Types of Water Quality MAOs

An MAO is a document that combines: (i) an agreement between an Entity and DEQ allowing for the creation of a final order from the Environmental Quality Commission (EQC), and (ii) a final order from the EQC. Table 1 below describes the four types of water quality MAOs used by DEQ and where they are addressed in this Directive.

**Table 1. Types of Water Quality MAOs**

MAO Type & Description	References in this Directive
<p><b>Settlement MAOs:</b> When DEQ issues a Notice of Civil Penalty Assessment and Order (Notice), the Entity to whom the Notice was issued is entitled to a contested case hearing. In cases where the Entity and DEQ can agree on changes to the Notice, a settlement MAO is used to resolve the matter. Settlement MAOs are developed by DEQ’s Office of Compliance and Enforcement (OCE).</p>	<p>Not addressed in this Directive, except stipulated penalties<sup>1</sup></p>
<p><b>Upfront MAOs:</b> These MAOs address past and anticipated future permit violations in exchange for a set of enforceable commitments by the Entity. Upfront MAOs are used when the Entity is unable to comply immediately and DEQ wants to set out a schedule as an enforceable order for the Entity to gain or regain the ability to comply with its permit or other requirements. These MAOs may include requirements for studies, plans, upgrades and interim requirements; they may also establish stipulated penalties for violating the terms of the MAO. Upfront MAOs do not alter permit conditions, including effluent limits.</p>	<p>Criteria for entering into Upfront MAOs and NPV MAOs (Section 4.A.ii)</p> <p>Process for developing and issuing Upfront MAOs and NPV MAOs (Section 4.B.i)</p>
<p><b>NPV MAOs:</b> ORS 468.126 requires DEQ to issue a pre-enforcement warning called a Notice of Permit Violation (NPV) for certain permit violations. Because of exceptions in the statutes and rules, NPVs are rare, and are only issued for certain violations of WPCF permit provisions that do not implement the Underground Injection Control program (for more information about when DEQ uses NPVs, see Table 3 of the <a href="#">Enforcement Guidance</a> regarding Water Quality violations). If the Entity responds to the NPV with a schedule for compliance that is longer than six months, the schedule must be incorporated into an NPV MAO. As with Upfront MAOs, NPV MAOs are sometimes also used to address anticipated future violations during the duration of the MAO.</p>	<p>Content of the MAO (Section 4.C)</p> <p>After the MAO is issued (Section 4.D)</p> <p>Tracking MAO corrective actions (Section 4.E)</p>

<sup>1</sup> This Directive does not address the process for developing and issuing Settlement MAOs, with one exception: stipulated penalties may be included in Settlement MAOs to address potential violations of the order; these stipulated penalties are calculated according to this Directive (see below, Section 4.C.iv).

<p><b>MAOs in lieu of permit:</b> DEQ issues MAOs in lieu of permit, authorized under OAR 340-045-0062<sup>2</sup>, in rare circumstances when a permit is required for the activity, but DEQ is unable to issue the permit in a timely manner because of the requirements of the permitting procedure or schedule. OAR 340-045-0062 includes the specific example of disposal of wastewater associated with a cleanup or spill, where the discharge cannot wait for the normal permitting process. Another example is when, largely because of regulatory uncertainty, DEQ becomes aware of the need for a permit for a necessary activity, but a permit cannot be issued in time for the need (e.g., after a court found that use of aquatic herbicides in irrigation canals required a NPDES permit, DEQ had insufficient time to process the permit in time for the irrigation season and then issued an MAO in lieu of a permit for that use). In these types of situations, an MAO may be issued while the NPDES or WPCF permit is being processed.</p>	<p>Process for developing and issuing MAOs in lieu of permit (Section 4.B.ii)</p> <p>Tracking MAO corrective actions (Section 4.E)</p>
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<sup>2</sup> OAR 340-045-0062 provides:

- (1) The Director may issue a mutual agreement and order (MAO) in lieu of or in addition to an NPDES permit or WPCF permit where the MAO is part of an enforcement action, for disposal of wastewater associated with the cleanup of a spill, or for an activity that does not lend itself to the normal permitting process or permit term.
- (2) An MAO may include, but not necessarily be limited to, compliance schedules, effluent limitations, monitoring and reporting requirements, and/or stipulated penalties.
- (3) The term of an MAO, when used in lieu of a permit, will not be longer than the term of the type of permit it is replacing.
- (4) The permitting procedures in OAR 340-045 are not required for MAOs, except for the following: An MAO issued in lieu of an NPDES permit is considered a Category II permitting action as described in OAR 340-045-0027. An exception to this requirement is allowed for environmental cleanups or other instances where a delay in issuing an MAO may magnify the problem. In these situations, public notice may be issued at the same time the MAO is issued.
- (5) When an MAO is used in lieu of a permit, the fee schedule for permits found in OAR 340-045-0075 applies.

## ii. Criteria for entering into Upfront MAOs and NPV MAOs

When considering an Upfront MAO or an NPV MAO, staff are directed to evaluate the three criteria below. If the situation meets all three criteria, staff should follow the process outlined in Section 4.B.i, below. If the situation does not meet the criteria, staff should follow the process outlined in Section 4.B.iii to address the compliance issue.

The criteria for entering into an Upfront MAO or an NPV MAO are as follows:

1. **Criterion #1:** The problem to be addressed will take more than six months to be corrected. The effort needed to negotiate and draft an MAO is not justified if the compliance order is less than six months. Therefore, DEQ should not enter into upfront MAOs or NPV MAOs with a duration of less than six months.
2. **Criterion #2:** The requirement to address the problem cannot be placed in the permit. For example, the permit is expired and cannot be modified until it is renewed. Corrective actions that can be put in the permit should be put in the permit rather than in an MAO. (See Water Quality Program IMD, "[Compliance Schedules in NPDES Permits](#)")
3. **Criterion #3:** For reasons of fairness and deterrence, the Entity agreeing to the MAO must be either:
  - a. The owner or operator of a public wastewater treatment facility where:
    - i. there is a strong likelihood of future violations, and
    - ii. the violations are because of aging, degraded or insufficient treatment facilities or because of capacity problems that leave the Entity unable to meet the terms of its permit.

OR

- b. The owner or operator of any facility where:
  - i. there is a strong likelihood of continuing future violations, and
  - ii. the violations have already been penalized through the normal formal enforcement process or DEQ approved a No Penalty Justification (NPJ) for violations that would have received a penalty, and
  - iii. the Entity has made a good faith effort to bring the facility into compliance.

In either case, the Entity must be willing to agree to enforceable, time-limited corrective actions to address the underlying issues causing the violations.

## **B. Developing and issuing MAOs**

### **i. Process for developing and issuing Upfront MAOs and NPV MAOs**

Upfront MAOs and NPV MAOs are developed and issued in situations that meet all three criteria listed in Section 4.A.ii above. The process for proposing, developing and issuing MAOs is described in Table 2, below. (The process is also described as a narrative example in Appendix A to this Directive).

The OCE ELS takes a lead role in negotiating the MAO with the Entity, in collaboration with WQ Compliance Staff, and the Regional Plan Review Engineer and Regional WQ Manager, as appropriate. DEQ's goal is to make an MAO offer to the Entity (Step 11 in Table 2, below) within 60 calendar days of receiving the referral from the WQ Compliance Staff. Following the offer, MAOs should be negotiated and finalized as expeditiously as possible.

OCE's files are the primary repository of information for the MAO, once the case is referred to OCE. Specifically, the ELS should store the following documents in both the hard copy case file and the electronic file associated with the case ("enfcases"):

- WL or PEN
- Email request to proceed with an MAO and OCE Manager approval
- Referral and associated documents including documentation necessary to prove each violation settled in the MAO
- Key correspondence with the Entity including the Entity's written request for an MAO;
- Copies of MAO offer(s) made to Entity
- Copies of the final MAO and any MAO Amendments
- Copies of the most recent Excel spreadsheet (if the MAO includes triggered corrective action deadlines)

In addition, the OCE Case Coordinator stores an electronic copy of all final MAOs and MAO Amendments in an MAO folder within the "OCE LIBRARY".

Regional files are the primary repository of technical information associated with the development of the MAO, including copies of relevant DMR and noncompliance reports. WQ Compliance Staff, and as appropriate, the Regional Plan Review Engineer, should ensure that documentation of completed corrective actions (e.g. facility plans), progress reports and DEQ approvals are included in the regional files.

The timeline listed in the "When" column of Table 2 below is a best practice standard for accountability and timeliness. It is understood that on occasion this timeline cannot be met, for example because a DEQ staff person is in the field or out of the office, in which case the task should be completed as soon as possible upon that staff person's return.

**Table 2. Process for Developing and Issuing Upfront MAOs and NPV MAOs**

Step	Who	When	What
1	WQ Compliance Staff	After receiving Regional Manager approval	<p><b>Send WL or PEN to Entity and request OCE approval for MAO</b></p> <ul style="list-style-type: none"> <li>In cases where there are <u>no referable violations</u>, send a Warning Letter (WL) to the Entity and discuss the situation with the Regional WQ Manager. If the Regional WQ Manager agrees that an MAO is appropriate, send an email to OCE WQ Lead ELS and OCE Manager explaining the situation and requesting approval to refer the matter to OCE. The email to OCE must cover the criteria in Section 4.A.ii, above. See Appendix A for example language.</li> <li>In cases where there are <u>referable violations</u>, send a PEN and discuss the situation with the Regional WQ Manager. If the Regional WQ Manager agrees that an MAO is appropriate, include a recommendation for an upfront MAO in the enforcement referral to OCE. The enforcement referral transmittal email to OCE should mention the region's request for OCE to begin drafting an MAO offer. The information in the referral must cover the criteria in Section 4.A.ii above. See Appendix A for example language.</li> </ul>
<p>Note: At this stage in the process it is appropriate for Regional staff to gather information from the Entity, discuss the cause of violations and potential solutions to return to compliance. DEQ should not commit the agency to any particular enforcement outcomes. Therefore, the WL or PEN should not include any information about MAOs.</p>			
2	OCE Manager	Within five business days of MAO request	<b>Approve / disapprove MAO request</b> from WQ Compliance Staff via email
3	WQ Compliance Staff	Within five business days of receiving OCE Manager's approval	<b>Send referral to OCE</b> (for WL cases; PEN cases would have already been referred to OCE under Step 1)
4	OCE Case Coordinator	Within three business days of receiving the referral	<b>Process referral</b>
5	OCE Manager	Within five business days of the referral being processed	<b>Assign Case to an ELS</b>



Step	Who	When	What
6	ELS WQ Compliance Staff	As soon as an initial phone call or meeting can reasonably be scheduled with the Entity	<p><b>Initial MAO discussion with Entity</b></p> <ul style="list-style-type: none"> <li>• The ELS assigned to the enforcement referral will discuss the situation with the WQ Compliance Staff including status of proposed corrective action schedule and appropriate interim limits. (See Note on noncompliance reports below).</li> <li>• ELS will discuss the invitation to consider an MAO with the Entity in person or on the phone. During the conversation, the ELS should make sure the Entity understands what an MAO is and its basic elements, including a reasonably brief schedule of corrective actions to bring the facility into compliance with the permit and agreed to penalties for violating interim limits, missing deadlines, or any other condition of the order. The WQ Compliance Staff should attend this discussion with the ELS and preside as technical expert.</li> <li>• The ELS should follow up the conversation with an email and be sure to provide a date by which the Entity must respond in writing with a request for an MAO and the information needed to prepare the MAO. See Appendix A for example language.</li> </ul>
<p>Note: Schedule F, Condition D.6 of most NPDES permits requires the permittee to submit noncompliance report that includes the steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. Accordingly, prior to requesting an MAO, the permittee should have thought about what needs to be done and how long it will take to complete the corrective actions. The Entity’s written request for an MAO must include a copy of the noncompliance report and include additional information about corrective actions and timelines</p>			
7	ELS	After the Entity requests MAO in writing	<p><b>Drafting and negotiation</b></p> <ul style="list-style-type: none"> <li>• The ELS begins drafting the MAO using the most recent <a href="#">MAO template</a>, and negotiates with the Entity about the details of the MAO schedule as needed. (See Section 4.C of this Directive, “Content of the MAO” for more information about drafting specific provisions of the MAO).</li> <li>• MAO negotiations should be led by the ELS and should include WQ Compliance Staff as a technical expert. The ELS and WQ Compliance Staff should also seek input from the Regional Plan Review Engineer regarding appropriate schedule and limits.</li> <li>• Once the draft MAO is complete, the ELS uploads the document into the OCE Sharepoint</li> </ul>

Step	Who	When	What
			site and requests review by WQ Compliance Staff. (Note: OCE's Sharepoint site should be accessible to all Regional staff and managers. If you have trouble accessing the site please contact the ELS or the DEQ Web Team.)
Note: The ELS and WQ Compliance Staff should be in contact with the Regional WQ Manager during this process and include the Regional WQ Manager in the negotiations and drafting discussions as needed.			
8	WQ Compliance Staff	Within three business days after receiving draft MAO from the ELS	<p><b>Staff level review</b></p> <p><b>Prepare Excel spreadsheet, if applicable</b></p> <ul style="list-style-type: none"> <li>Review and comment on MAO in Sharepoint</li> <li>If there are "triggered" corrective actions in the MAO schedule, prepare an Excel spreadsheet to track the MAO schedule and email it to the ELS (See Section 4.E of this Directive, "Tracking MAO Corrective Actions" for more information about creating and using the spreadsheet)</li> </ul>
9	ELS	Once ELS and WQ Compliance Staff agree on draft MAO	<p>Circulate the draft MAO for Manager / Administrator review</p> <ul style="list-style-type: none"> <li>Attach Excel spreadsheet, if needed</li> </ul>
10	OCE Manager, Regional WQ Manager, Deputy Director, Implementation Administrator, Regional Administrator	Within five business days after receiving the draft MAO	<p><b>Manager / Administrator review</b></p> <ul style="list-style-type: none"> <li>Review and comment on draft MAO (OCE Manager <i>must</i> review and approve; other Managers and Administrators <i>may</i> review and comment).</li> </ul>
11	ELS	Once the five day review period has passed and the OCE Manager has approved the MAO	<p><b>MAO Offer: Send the MAO to the Entity for signature</b></p> <ul style="list-style-type: none"> <li><i>As noted above, DEQ's goal is to issue this initial MAO offer within 60 days of receiving the referral from WQ Compliance Staff.</i></li> </ul>
12	ELS	If needed	<p><b>Additional negotiations</b></p> <ul style="list-style-type: none"> <li>If the Entity rejects the MAO, the ELS may schedule and facilitate an informal meeting to discuss the terms of the MAO. WQ Compliance Staff should attend the meeting as a technical expert and Regional WQ Manager and Regional Plan Review Engineer should be included, as appropriate.</li> </ul>

Step	Who	When	What
13	OCE Manager	After the Entity accepts the MAO	<b>OCE Manager Signature</b> <ul style="list-style-type: none"> <li>When the Entity’s signature is received, the OCE Manager signs the MAO, creating a final order.</li> </ul>
14	ELS	Within one business day after receiving the final MAO	<b>Send Final MAO to Entity</b> <ul style="list-style-type: none"> <li>Send a copy of the final MAO to the Entity and provide a copy to the OCE Case Coordinator.</li> </ul>
15	OCE Case Coordinator	Within one business day after receiving the final MAO	<b>Circulate Final MAO internally</b> <ul style="list-style-type: none"> <li>Circulate a copy of the final MAO via a group email to the ELS, WQ Compliance Staff, WQ Data Staff, OCE Manager, Regional WQ Manager, Regional Division Administrator, Regional Communications Staff and DEQ Business Office.</li> </ul>
16	WQ Compliance Staff	Within one business day after receiving the final MAO	<b>Circulate Excel spreadsheet, if needed</b> <ul style="list-style-type: none"> <li>If the MAO contains triggered corrective action due dates, check the Excel spreadsheet for accuracy against the final MAO deadlines and send a copy of the spreadsheet to the ELS and WQ Data Staff. The spreadsheet includes both hard calendar dates and the (calculated) estimated corrective action due dates. To ensure accurate data entry and tracking in ACES and ICIS, the Excel spreadsheet must include the exact language of the final MAO and the same number of corrective actions.</li> </ul>
17	ELS	Within five business days of OCE Manager Signature creating the final order (or within five business days of receiving the updated spreadsheet, if needed)	<b>ACES data entry</b> <ul style="list-style-type: none"> <li>Enter the MAO corrective actions in ACES, using the Excel spreadsheet, if necessary, to determine the estimated corrective action due dates</li> </ul>
	WQ Data Staff		<b>ICIS data entry</b> <ul style="list-style-type: none"> <li>Enter the MAO corrective actions as “Schedule Events” in ICIS, using the Excel spreadsheet, if necessary, to determine the estimated Schedule Event due dates</li> </ul>
<p>Note: Once the MAO is final, WQ Compliance Staff, the ELS and WQ Data Staff must work together and share information in a timely fashion to track compliance with MAO corrective actions, the completion of triggering events by DEQ, and any MAO amendments, in ACES and ICIS. (See Section 4.E, “Tracking MAO Corrective Actions” and Appendix B, “MAO Tracking Example” for more detailed information.)</p>			

## **ii. Process for developing and issuing MAOs in lieu of permit**

MAOs in lieu of permit are negotiated primarily by Regional WQ staff and management and are signed by Regional Division Administrator. The Region must consult with OCE (the lead Water Quality ELS and the OCE Manager) prior to entering into negotiations with an Entity regarding an MAO in lieu of permit. If, after this consultation, the Region decides to proceed with the MAO in lieu of permit, the OCE Case Coordinator will create a new case number for the MAO to allow for tracking in ACES. Depending on the situation, OCE may also provide support during the negotiation and drafting process.

When public notice is required by rule (see OAR 340-045-0062(4)) or requested by the region, WQ Compliance Staff send the draft MAO to the Entity for applicant review. After the applicant review period, the region makes the draft MAO available for public review. At the close of the public review period, WQ Compliance Staff work with the ELS to respond to any comments and finalize the MAO.

Once the MAO in lieu of permit is issued by the Region, WQ Compliance Staff email a copy to the lead Water Quality ELS and the OCE Case Coordinator. As with the process for Upfront MAOs, the OCE Case Coordinator circulates a pdf of the MAO to the ELS, WQ Compliance Staff, WQ Data Staff, OCE Manager, Regional WQ Manager, Regional Division Administrator, Regional Communications Staff, and DEQ Business Office. Within 5 business days of the final MAO, the ELS enters any MAO corrective actions in ACES and WQ Data Staff enter the MAO corrective actions as “Schedule Events” in ICIS. Compliance with any MAO corrective actions are tracked in ACES and ICIS the same way the Upfront MAO schedules are tracked. (See Section 4.E of this Directive, “Tracking MAO Corrective Actions” and Appendix B, “MAO Tracking Example”).

### **iii. Process for addressing compliance issues that do not meet the MAO criteria**

Staff are directed to follow the process outlined below to address compliance issues that do not meet one or more of the criteria described in Section 4.A.ii.

#### **Compliance issues the Entity can resolve in less than six months (does not meet criterion #1):**

- If the Entity can resolve the issue in less than six months and there are no violations that must be referred under the Enforcement Guidance (or an NPJ is approved), issue a Warning Letter with Opportunity to Correct (WLOC) with a specified informal compliance schedule of up to 6 months in duration. During the duration of the informal compliance schedule, do not refer unavoidable violations unless the violation caused significant environmental harm. If the Entity does not correct the issue within the timeframe established in the WLOC, refer for formal enforcement.
- If the entity can resolve the issue in less than six months and there are violations that must be referred under the Enforcement Guidance, issue a PEN and refer the violations to OCE for penalty assessment and possible compliance order.

#### **Compliance issues that can be addressed through a permit modification (does not meet criterion #2):**

If the underlying problem that is resulting in violations can be addressed with a compliance schedule included in the permit, develop a compliance schedule and add it to the permit. (See WQ Program IMD, "[Compliance Schedules in NPDES Permits](#)")

#### **Compliance issues that do not meet criterion #3:**

WQ Compliance Staff must apply DEQ's Enforcement Guidance and refer the violations to OCE if required.

- For non-public facilities that have referable violations for which they have not previously received a penalty, DEQ will negotiate an MAO to address future violations only after a Notice of Civil Penalty Assessment and Order has been issued.
- For non-public facilities that do not have referable violations, DEQ should deny all requests for MAOs. In these cases, staff should inform the permitted Entity that any violations are subject to possible enforcement and that the Entity has a responsibility to comply with its permit regardless of whether the only means to do so might be to reduce production (see NPDES Permit General Conditions, Schedule F, Section B, Condition 2. (Need to Halt or Reduce Activity Not a Defense)).

## **C. Content of the MAO**

As discussed in Section 4.B.i, above, upfront MAOs and NPV MAOs are drafted using a template that includes some standard “boilerplate” language for all MAOs. This Section provides an explanation of some of that “boilerplate” language and guidance for drafting other provisions of the MAO that must be tailored to specific situation at hand.

### **i. Specific violations settled**

The MAO should only address violations that arose, or may arise, from the problem the MAO corrective actions are designed to remedy. For example, if an Entity has violated its chlorine residual limit because it needs to install a new dechlorination system, the MAO should only settle the past violations of the chlorine limit and address any future violations of the chlorine limit resulting from the failure to have a new dechlorination system. If the chlorine limits are exceeded as a result of failure to operate the system properly, those exceedances fall outside the scope of the MAO because they were caused by the Entity’s negligence and should be treated the same as any other effluent limit exceedance. Consistent with Table 3 of the Enforcement Guidance, the MAO template states that violations caused “negligently, willfully or intentionally” are not addressed by the MAO.

### **ii. Setting interim limits and other interim requirements**

Interim effluent limitations and other requirements should be based on all available information regarding the treatment capabilities of the Entity’s system and processes. Using best professional judgment, DEQ staff are directed to set the interim effluent limits at levels the Entity can consistently meet when making best efforts to achieve the highest degree of treatment practicable. Interim limits may be seasonal or flow-based. DEQ may also require interim temporary treatment systems or equipment, for example, temporary dechlorination or backup generators or pumps.

### **iii. MAO corrective action schedules**

MAOs often contain a series of corrective actions to address the underlying issues causing the violations. Together, this series of corrective actions are referred to as the MAO schedule. When establishing timeframes for the completion of specific corrective actions in the MAO schedule, staff should rely on their best professional judgment about how long the various steps will take. The goal is an aggressive but reasonable schedule that will require the Entity to obtain compliance with the permit in all due haste, but not so aggressive that extensions would be predictably necessary. The ELS and WQ Compliance Staff should work with the Regional Plan Review Engineer to establish the MAO schedule.

In all cases, the first corrective action must be a hard calendar date to get the schedule started.

In addition, the termination date for the MAO (the final corrective action in the MAO schedule) must be a hard date (i.e. a specific calendar date and not a date that is defined when a triggering event occurs).

In drafting the MAO schedule, staff should establish interim corrective actions as appropriate so that the agency may follow progress of the order. Interim corrective actions may include requirements to submit evaluation reports, draft plans and specifications, or annual (or more regular) progress reports. Interim corrective action should be one year or less in duration. If a corrective action reasonably will take longer than one year to complete, a progress report should be required.

Interim corrective action due dates should be hard calendar dates, unless the schedule requires a DEQ action for the project to proceed. In these cases, “triggered” corrective action due dates may be used. The most common example is DEQ plan approval. OAR 340-052 prohibits construction, installation, or modification of wastewater treatment systems without prior DEQ approval. Accordingly, for projects that require DEQ plan approval, the corrective action may be “X days from DEQ plan approval”. Likewise, some projects may require a DEQ permitting action and it is acceptable to include a corrective action due date triggered by DEQ’s permit action.

Importantly, corrective action due dates must never be triggered by an action over which DEQ WQ permitting and compliance staff have little or no direct control. These include:

- Actions by the Entity itself (e.g., awarding a contract)
- Actions by other local, state, and/or federal agencies, and
- Actions by other DEQ sections (e.g. updating a WQ standard or issuing a TMDL)

See Appendix B for an example of an MAO compliance schedule with hard calendar dates for the first and last corrective actions and “triggered” interim deadlines.

#### **iv. Stipulated penalties**

Stipulated penalties are “agreed upon” penalties, described in the MAO, that DEQ may assess if the Entity does not comply with the terms of the MAO. These penalties are lower than the applicable penalties under OAR Chapter 340, Division 12, but DEQ expects to enforce the stipulated penalties as a higher priority and assess additional penalties for ongoing violations. When drafting an MAO, stipulated penalties should be calculated as follows:

- For violation of interim effluent limits, stipulated penalties should be set as 20 percent of the applicable base penalty in the applicable matrix using a magnitude of moderate.<sup>3</sup> Because interim effluent limit exceedances could be the equivalent of Class I, II or III

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<sup>3</sup> In determining stipulated penalties, interim effluent limits are treated as permitted limits. Refer to OAR 340-012-0055 to determine the classification of the violation. For example, an exceedance of a BOD limit by 50 percent or more is a Class I violation pursuant to OAR 340-012-0055(1)(k)(A). Then refer to OAR 340-012-0140 and, using the Entity’s daily permitted flow, determine what penalty matrix applies. For example, the “\$3,000 penalty matrix” in OAR 340-012-0140(4)(b) applies to all NPDES facilities with a permitted flow of 2 mgd or less (see OAR 340-012-0140(4)(a)(F)(i)). The stipulated penalty for an Entity with a permitted flow of less than 2 mgd (in the “\$3,000 penalty matrix”), who exceeds its interim BOD limit by more than 50 percent (a Class I violation) would therefore be \$300 or 20 percent of \$1,500, the base penalty for a Class I, moderate magnitude in the matrix in OAR 340-012-0140(4)(b).

permit limit exceedances, an MAO may contain multiple stipulated penalties for violation of interim limits.

- For violation of corrective action deadlines, stipulated penalties should be set at 40 percent of the applicable base penalty in the applicable matrix for a Class I moderated magnitude violation.<sup>4</sup>

The order should set out the penalty as dollars per day per violation for each type of violation potentially possible under the order. Alternative stipulated penalties may be used if unusual circumstances exist upon written approval by the OCE Manager and Regional Division Administrator and any such approvals should be stored by the ELS in the hard copy case file and the electronic file (“enfcases”).

#### **v. Extending MAO deadlines**

The MAO template includes a statement that DEQ will only agree to extend the order’s deadlines if the Entity has been making all reasonable efforts (duly diligent) to meet its deadlines. The Entity must take measures to prevent or minimize delays from any foreseeable causes. For example, failure to approve a rate increase necessary to fund work agreed to in the MAO is often a foreseeable outcome. DEQ would expect the Entity to have contingency plans for other available funding.

#### **vi. Acknowledgement of federal and citizen role**

While an MAO directs how future violations will be addressed by DEQ during its term, an MAO cannot limit federal enforcement or citizen suits. Therefore, the MAO template includes a paragraph which makes clear that the MAO does not eliminate the possibility of additional enforcement of permit requirements by the U.S. Environmental Protection Agency or citizens under the federal citizen suit provisions. This paragraph should be included in all MAOs that address anticipated future violations of a NPDES permit.

#### **vii. Termination clause**

The termination date for the MAO must be a hard calendar date when the last scheduled compliance task is to be completed. However, the Entity remains liable for stipulated penalties for any violations of the MAO that occurred during the term of the MAO.

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<sup>4</sup> According to OAR 340-012-0053(1)(a), all MAO schedule violations are Class I violations. To calculate the stipulated penalty for violating an MAO corrective action refer to OAR 340-012-0140 and determine the penalty matrix using the Entity’s permitted average daily flow. For example, entities with a permitted average daily flow of 2 mgd or below (see OAR 340-012-0140(4)(a)(F)(i)) are on the \$3,000 matrix in OAR 340-012-0140(4)(b). The stipulated penalty for such an Entity would be \$600 or 40% of \$1,500, the base penalty for a Class I, moderate magnitude penalty in the \$3,000 penalty matrix.



## D. After the MAO is issued

Once the MAO is issued according to the process described in Section 4.B.i, above, DEQ staff are expected to monitor compliance with the MAO's requirements. Specifically:

- The DMR Reviewer is expected to review the Entity's DMRs on at least a quarterly basis.
- WQ Compliance Staff are expected to use ACES to track upcoming corrective action deadlines, including reviewing those deadlines with a Manager or lead worker on at least a monthly basis.
- The ELS is expected to track past due corrective action deadlines including reviewing those deadlines with the OCE Manager on at least a monthly basis.

### i. MAO Interim Limits and Electronic Reporting

EPA requires all NPDES permit holders to submit discharge data electronically. DEQ has chosen to use EPA's NetDMR system. DEQ WQ Data Staff set up the permit limits (not the MAO interim limits) and monitoring requirements in NetDMR. When the Entity reports an effluent limit exceedance through the NetDMR system, a violation is flagged regardless of whether the MAO interim limit is met. NetDMR reports these effluent limit exceedances to EPA's Integrated Compliance Information System (ICIS).

For each MAO, the DMR Reviewer assigned to the Permit will review the effluent data on NetDMR on at least a quarterly basis. The DMR Reviewer is directed to take the following actions for any violations found during this review:

- For violations that exceed the MAO interim limits, follow the process outlined in Section 4.D.ii below to initiate a Penalty Demand Notice (PDN). Violations that exceed the MAO interim limits are resolved in ICIS when DEQ issues a PDN and the WQ Data Staff enter the PDN information into ICIS.
- Violations that exceed the permit limit but meet the interim limit are addressed by sending an email to the Entity using the [Notice of Permit Limit Violation](#) email template available on the [WQ Compliance and Enforcement SharePoint page](#). The email should copy the DMR Reviewer's manager, WQ Data Staff, and the ELS assigned to the case. When DEQ WQ Data Staff receive a copy of this email, they should resolve the violations in ICIS by entering "Resolution Code 7: Resolved Pending – In Compliance with Formal Enforcement Action Order Requirement" and linking the violation by reference to the MAO and the email correspondence.

### ii. MAO Enforcement: Penalty Demand Notices

DEQ assesses stipulated civil penalties for violations of the terms of an MAO through a Penalty Demand Notice (PDN) issued by OCE. Typically, DEQ will issue a PDN for the first occurrence of a violation of either an interim limit or a corrective action in the MAO, with increasing penalties for subsequent violations and PDNs according to DEQ's IMD on Assessment of Multiple Penalties (Appendix F to the [Enforcement Guidance](#)).

The process for issuing a PDN begins when the DMR Reviewer (in the case of interim effluent violations), or the ELS (in the case of past due MAO corrective actions) identifies a violation of the MAO. DEQ staff are expected to monitor compliance with MAO requirements closely and to initiate a PDN as soon as possible after any violation of the MAO.

- For violation of interim effluent limits, violations are identified by the DMR Reviewer through review of Discharge Monitoring Reports (DMRs) or when NetDMR data from the facility shows up as a violation in ICIS.
  - The DMR Reviewer should first notify the Regional WQ Manager and then send an enforcement referral to OCE using the [Penalty Demand Notice Referral](#) email template available on the [WQ Compliance and Enforcement SharePoint page](#).
  - The DMR Reviewer should record this action in ACES by creating a “reporting requirement”, attaching the violation, and creating a “program enforcement” type “Referral for Penalty Demand Notice”. WQ Compliance Staff should enter the PDN referral date in the Comments field in ACES.
  - If the DMR Reviewer is a different person than the WQ Compliance Staff, the DMR reviewer should copy WQ Compliance Staff on all PDN related correspondence.
- For a violation of MAO corrective action deadlines, violations are identified by the ELS tracking deadlines in ACES.
  - Upon discovery of a past due corrective action, the ELS should confirm the violation with the WQ Compliance Staff.
  - Once confirmed, the WQ Compliance Staff should first notify the Regional WQ Manager and then send an enforcement referral to OCE using the [Penalty Demand Notice Referral](#) email template available on the [WQ Compliance and Enforcement SharePoint page](#).
  - WQ Compliance Staff should enter the PDN referral date in the Comments field in ACES.

Once the referral email is received by OCE, the OCE Case Coordinator will create a new OCE enforcement in ACES with a new case number for the PDN, and the case will be assigned to an ELS (usually the same ELS assigned to the MAO).

The ELS will draft a PDN, post it on the OCE SharePoint page, and notify WQ Compliance Staff that the PDN is available for review and comment. WQ Compliance Staff are expected to respond in three working days. After WQ Compliance Staff review, the ELS will upload the draft PDN to the OCE Sharepoint page and notify the OCE Manager, Deputy Director, Implementation Administrator, Regional Administrator and Regional WQ Manager. The managers and administrators are expected to respond in five working days with any comments. Once the review period has passed, comments are addressed, and the OCE Manager approves the PDN, the OCE Manager signs the PDN and it is issued by OCE.

The OCE Manager provides a copy of the final, signed PDN to the OCE Case Coordinator, who circulates a pdf of the PDN to the ELS, WQ Compliance Staff, WQ Data Staff, OCE Manager, Regional WQ Manager, Regional Division Administrator, Regional Communications staff, and DEQ Business Office.

Within 5 business days of issuing the PDN, the ELS will enter the PDN information in ACES and the WQ Data Staff will enter the PDN information to “resolve” violations that appear in ICIS using RNC Resolution Code 6.

The OCE Case Coordinator stores a copy of the PDN in the hard copy file, the electronic file associated with the case (“enfcases”) and in the FEAs folder within the “OCE LIBRARY”.

### **iii. Amending MAOs**

At any time after an MAO is executed, it may be amended to modify requirements or deadlines. MAO amendments must be pre-approved and signed by the OCE Manager. Changes may be made without the Entity’s agreement through issuing a contestable unilateral order or may be made by agreement with the Entity. As discussed above in Section 4.C.v, the MAO should include specific provisions governing when an extension or other amendment may be granted by DEQ. Generally a decision about whether to grant an amendment should be based on whether the Entity is diligently pursuing compliance and whether the reasons for the delay were within the Entity’s reasonable control.

If the Entity makes a written request for an extension of time for good cause and is granted an extension before a deadline arrives, there is no violation of the MAO. If the Entity has not completed a corrective action in the MAO schedule and is not granted an extension, the Entity has violated the MAO and should be referred for a Penalty Demand Notice (see Section 4.D.ii, “Penalty Demand Notices”, above).

The process for issuing an amendment is the same as for issuing the MAO (see Section 4.B.i, above). In cases where the MAO has been amended multiple times or the amendment involves significant changes to the corrective actions, the ELS assigned to the case will redraft the entire MAO to ensure clarity on the updated requirements of the MAO.

The ELS assigned to the case should store a copy of the MAO amendment in both the hard copy case file and the electronic file associated with the case (“enfcases”). In addition, the OCE Case Coordinator stores an electronic copy of all MAO amendments in an MAO folder within the “OCE LIBRARY”.

Within five business days of the amendment, the ELS is expected to update ACES and WQ Data Staff are expected to update ICIS. (See Section 4.E.iv, “Entering MAO Amendments in ACES and ICIS”).

## **E. Tracking MAO Corrective Actions**

### **i. Adding New MAO Corrective Actions in ACES and ICIS**

DEQ tracks MAOs corrective actions using ACES. Within five business days after the OCE Manager signs the MAO, the ELS must enter each corrective action in the MAO schedule as a separate corrective action in ACES, including the “Corrective Action Text” and the “Scheduled Compliance Date”. Similarly, WQ Data Staff must enter each corrective action in the MAO schedule in ICIS, including the Schedule Event and Due Date.

For MAOs with triggered corrective action due dates, the “Scheduled Compliance Date” that is entered into ACES and ICIS will be an estimated date; the actual calendar compliance date for the Entity will not be known until the triggering event occurs. When WQ Compliance Staff reviews the draft MAO prepared by the ELS (See Step 8 in the MAO Process Table, Section 4.B.i of this Directive), WQ Compliance Staff will prepare an Excel spreadsheet that includes both the hard dates and the calculated estimated dates. When the OCE Manager signs the MAO, creating a final order, within one business day of receiving a copy of the final MAO, WQ Compliance Staff checks the Excel spreadsheet for accuracy against the final MAO deadlines and sends the spreadsheet to the ELS and WQ Data Staff (See Step 16 of the MAO Process Table, Section 4.B.i of this Directive). To ensure accurate data entry and tracking in ACES and ICIS, the Excel spreadsheet must include the exact language of the final MAO and the same number of corrective actions. Within five business days of receiving the Excel spreadsheet, the ELS will enter the corrective action text and “Scheduled Compliance Dates” in ACES and WQ Data Staff will enter Schedule Events and Due Dates into ICIS. See Appendix B for an example of tracking an MAO with triggered corrective action due dates.

### **ii. Updating Corrective Actions With Triggering Events in ACES and ICIS**

When DEQ completes a triggering event, such as plan approval, WQ Compliance Staff notify the Entity in writing of the triggering event and that the next corrective action in the MAO schedule is a hard date. The following is an example from a DEQ plan approval letter:

“This submittal adequately addresses DEQ’s comments on the draft plans and specifications, which were received on August 2, 2015 and satisfied Paragraph 8.A.9 of Mutual Agreement and Order (MAO) number WQ/M-WR-04-215, as amended. Per Paragraph 8.A.11 of the MAO, the city must award construction contracts as necessary for completion of the improvements by no later than July 21, 2016. Also, per Paragraph 8.A.12 of the MAO, the city must complete the upgrades/expansion to the facilities and collection system as specified in the final engineering plans and specifications by no later than April 21, 2017.”

Within five business days of the triggering event, WQ Compliance Staff email a copy of this letter and an updated Excel spreadsheet with the new hard date and any remaining revised estimated due dates to the ELS and WQ Data Staff (See Appendix B of this Directive, “MAO Tracking Example” for more information about updating the Excel spreadsheet). The ELS will save a copy of the most up-to-date Excel spreadsheet in both the hard copy case file and the electronic file associated with the case (“enfcases”) where it can be viewed by other staff. A

copy of the plans submitted by the Entity and the plan approval letter should be retained in the Regional files.

Within five business days of receiving the Excel spreadsheet, the ELS and WQ Data Staff will use the Excel spreadsheet to update all of the “Scheduled Compliance Dates” in ACES and Schedule Event due dates in ICIS, respectively (one or more of the updated due dates will now be hard date(s), but there may be other remaining estimated due dates).

### **iii. Entering Actual Compliance Dates in ACES and ICIS**

OCE Enforcement Corrective Actions appear on the ACES dashboard of both the ELS and the WQ Compliance Staff assigned to that Entity. However, most of the documents required by the MAO will be submitted to the Regional Plan Review Engineer. To coordinate communication, the Regional Plan Review Engineer is responsible for sending an email to the WQ Compliance Staff, ELS, and WQ Data Staff that the corrective action (Schedule Event) was completed. If WQ Compliance Staff receive compliance documentation, then WQ Compliance Staff are responsible for sending the email to the ELS and WQ Data Staff to notify them that the corrective action (Schedule Event) was completed. The ELS and WQ Data Staff will enter the completion date in ACES and ICIS, respectively. Compliance documentation is retained in the regional files.

WQ Compliance Staff are expected to regularly check their ACES dashboard. When a corrective action due date approaches (within 30 days before the deadline) and the corrective action has not yet been completed, WQ Compliance Staff are expected to contact the Entity (via phone or email) to inquire about the status. If a corrective action due date passes uncompleted, WQ Compliance Staff will send a PDN referral to OCE per Section 4.D.ii above or send OCE a NPJ.

### **iv. Entering MAO Amendments in ACES and ICIS**

As discussed in Section 4.D.iii above, there are two basic types of amendments: 1) extension of existing corrective action due dates, and 2) replacing or revising MAO corrective actions. MAO Amendments are drafted by the ELS and issued by OCE, using the same process that DEQ uses for developing and issuing MAOs (see Section 4.B.i, above).

Once the MAO Amendment is final, the OCE Case Coordinator circulates the MAO Amendment to the ELS, WQ Compliance Staff, WQ Data Staff, OCE Manager, Regional WQ Manager, Regional Administrator, and DEQ Business Office. If the MAO includes triggered compliance due dates, within one business days of the final MAO Amendment, WQ Compliance Staff must also send an updated Excel spreadsheet to the ELS and the WQ Data Staff.

When the MAO amendment extends the due dates only:

- Within five business days of the amendment, the ELS may simply change each of the affected “Scheduled Compliance Dates” in ACES and add a note in the comments field “Due date extended per MAO amendment X.”
- Within five business days of the amendment, the WQ Data Staff will update the Schedule Event Due Dates in ICIS.

When the MAO amendment replaces or revises the corrective actions:

- Within five business days of the amendment, the ELS must first “override” the corrective actions that are being replaced in ACES. This is done by entering “MAO Amendment X” in the “Override Reason” field and the date of the MAO amendment in the “Override Date” field. Then the ELS enters the new corrective actions as separate new corrective actions.
- The ELS also emails WQ Data Staff of the updates needed in ICIS to ensure that the Corrective Actions in ACES and Schedule Events in ICIS match.

#### **v. Coordination of ICIS and ACES**

As discussed above, DEQ uses ACES to track enforcement actions but must also report compliance information to EPA through ICIS. Accordingly, it is important that the ACES OCE Corrective Actions and the ICIS Schedule Events are the same to ensure that each corrective action can be tracked via ACES, and that MAO data is reported accurately to EPA. WQ Data Staff should contact the ELS with any questions about ACES Corrective Actions. If errors are found in the ACES corrective action set ups, the ELS will first correct the ACES data and notify the WQ Data Staff. Then the WQ Data Staff will copy that information into ICIS.

# Appendix A – MAO Development Narrative Example

WQ Compliance Staff person Jill is reviewing Pleasantville’s wastewater treatment plant DMRs and finds that Pleasantville has exceeded the effluent limits in its permit. Pleasantville has included the following non-compliance report:

- Description and Cause: The wastewater treatment plant exceeded the BOD and TSS effluent limits. The plant clarifier arm continues to break down and we are having trouble repairing because the plant is over 30 years old.
- Period of noncompliance: Monthly average and weekly average (second week).
- Estimated time noncompliance is expected to continue: Until plant is replaced.
- Steps taken or planning to reduce, eliminate, and prevent reoccurrence: We have hired a consultant to develop a wastewater facilities plan.

Jill reviews the Enforcement Guidance and sends Pleasantville a WL. She then discusses situation with her manager. Her manager agrees that an MAO is appropriate and meets the criteria for an Upfront MAO. Jill drafts the following email to Jack, OCE WQ Lead ELS and Oscar, the OCE Manager:

“Hi Jack and Oscar, Pleasantville’s wastewater treatment plant is not capable of meeting the BOD and TSS permit limits. Based on the information that we have gathered from the City, we believe that an MAO is appropriate due to the following:

- The facility upgrades will take longer than 6 months to complete
- The permit can’t be modified to include a compliance schedule because BOD and TSS are technology-based effluent limits.
- Because of the age and degraded condition of the treatment plant, there is a high likelihood of future violations.

Western Region requests approval to refer the Pleasantille matter to OCE for an upfront MAO.”

The ELS and OCE Manager discuss the request and the OCE Manager responds in an email:

“Hi Jill, This seems consistent with our guidance and like a good candidate for an MAO for the reasons you outlined below. I support this approach. Thanks for all your work on this! Oscar”

Jill refers the case to OCE and Oscar assigns the case to an ELS, Jack. Jack familiarizes himself with the case and discusses it with Jill, and then Jack and Jill meet with the Pleasantville City Manager and Public Works Director. At the meeting, Jack outlines for the City what an MAO is and its basic elements, including a reasonably brief schedule of corrective actions to bring the facility into compliance with the permit and agreed to penalties for violating interim limits,

missing deadlines, or any other condition of the order. After the meeting, Jack sends Pleasantville the following email:

“Thank you for meeting with me to discuss the possibility of entering into a Mutual Agreement and Order (MAO) to address the ongoing effluent limit violations at the City’s wastewater treatment plant. An MAO would:

- Establish interim effluent limits that are achievable when making best efforts to achieve the highest degree of treatment practicable until the necessary upgrades are completed;
- Set a schedule of required corrective actions for the proposed upgrades. (For example, prepare an options analysis, repair the collection system, prepare design documents, and upgrade the treatment plant); and
- Include specified stipulated penalties for failure to comply with the agreed-to schedule and any exceedances of the interim limits. Without an MAO, any ongoing violations would result in higher penalties.

If you would like to enter into an MAO with DEQ, please send me a written request with a schedule of proposed actions by July 12.”

On July 1, Jack receives the following letter from the City Manager:

“Through this letter, the City of Pleasantville ("City") is requesting to enter into a Mutual Agreement and Order ("MAO") with the Oregon Department of Environmental Quality ("DEQ"). The City is seeking to enter into the MAO because of the City's inability to currently meet the biochemical oxygen demand (BOD) and total suspended solids (TSS) limits set forth in the City's NPDES Permit. The attached enclosures provide supporting data related to these concerns, including a spreadsheet of our last 2 years of discharge monitoring reports. The City believes it is unable to meet the limits because it doesn't have an adequate treatment process due to the age of the facility.

It is our intent to immediately pursue the details of an MAO, with a goal of accomplishing a formal approval of the document by the City Council at its regularly scheduled meeting on December 17.

To that end we offer the following suggested milestones and timelines for your consideration. We understand that DEQ’s expected review time is 30 days and that there may be other requirements, especially at the outset, to evaluate and implement intermediate operational enhancements.

- Wastewater Facilities Plan - Award engineering contract by February 2019, with completion and submit to DEQ by August 2019.
- Funding - Begin funding application process in October 2019, with funding commitments achieved by February 2020.
- Design – Predesign report one year after DEQ approval of wastewater facilities plan (est. February 2021). Final plans one year after DEQ approval of the predesign report (est. August 2022).



- Bidding and Award – Award construction contract six months after DEQ approval of final plans (est. March 2023).
- Construction – Notice proceed in March 2023 and complete by March 2025.
- Performance Evaluation Period – Fifteen months after completion of project - June 2026.

Thank you for considering this letter requesting to enter into an MAO between the City of Pleasantville and DEQ. Please let us know if you need anything else from us.”

Jack consults with Jill and the Regional Plan Review Engineer. They determine that the City’s proposed schedule is acceptable to DEQ. Jack then drafts an MAO. When the draft MAO is complete, Jack uploads it to the OCE Sharepoint page and emails Jill. Jill provides a few comments and Jack accepts them. Jill also prepares an Excel spreadsheet with the proposed MAO schedule and emails it to Jack.

Once Jack and Jill agree on the draft MAO, Jack notifies the OCE Manager, Deputy Director, Implementation Administrator, Regional Administrator and Regional WQ Manager that the MAO is posted on the OCE Sharepoint page and requests their comments. Jack attaches the Excel spreadsheet which provides a visual depiction of the MAO schedule for Managers and Administrators to view.

Once the review period has run and the OCE Manager has approved the MAO in writing, Jack sends the MAO to the City for signature, with a deadline to return the signed MAO.

When Jack receives a signed copy from the City, he asks the OCE Manager to sign the MAO. Jack then provides a copy of the final, signed MAO to the OCE Case Coordinator, Carissa, who circulates a pdf of the MAO to the ELS, WQ Compliance Staff, WQ Data Staff, OCE Manager, Regional WQ Manager, Regional Division Administrator, Regional Communications staff, and DEQ Business Office. Carissa stores an electronic copy of the final MAO in the “enfcases” file and the MAO folder in the “OCE Library”; she also provides a copy to Jack for the hard copy file.

Based on the dates in the final, fully executed MAO, Jill checks the Excel spreadsheet for accuracy against the final MAO deadlines and sends it to Jack and WQ Data Staff, Diane.

Jack enters the corrective actions in ACES and Diane enters the corrective actions as “Schedule Events” in ICIS.

# Appendix B – MAO Tracking Example

Pleasantville’s MAO has the following schedule:

1. By no later than August 1, 2019, Permittee must submit to DEQ a draft wastewater facilities planning document which conforms to the document “Guidelines for the Preparation of Facilities Plans and Environmental Reports for Community Wastewater Projects.” The document must include evaluation of an alternative to connect into the Regional Wastewater Treatment Facility.
2. By no later than three (3) months after DEQ provides written comments on the draft wastewater facilities planning document, Permittee must submit a final document, revised to conform to DEQ’s comments, for DEQ review and approval.
3. By no later than one (1) year after receiving approval of the wastewater facilities planning document, Permittee must submit to DEQ a pre-design report for the recommended improvements to the collection system and treatment plant.
4. By no later than three (3) months after DEQ provides written comments on the draft pre-design report, Permittee must submit a final document, revised to conform to DEQ’s comments, for DEQ review and approval.
5. By no later than (1) year after DEQ approval of the predesign report, Permittee must submit to DEQ Final Engineering Plans and Specifications for the recommended improvements to the collection system and treatment plant.
6. By no later than six (6) months after DEQ approval of Final Plans and Specifications, Permittee must advertise and award the construction contract for the recommended improvements to the collection system and treatment plant, revised to conform with any DEQ approval conditions.
7. By no later than one (1) year after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ a construction progress report.
8. By no later than two (2) years after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ documentation that the recommended improvements to the collection system and treatment plant are substantially complete and operational.
9. By no later than June 15, 2026, Permittee must submit to DEQ a report summarizing the performance testing conducted during the first twelve (12) months of operation and an evaluation of whether the actual performance meets expectations. If needed, the report must also include a list of recommended performance improvements.

Concurrent with the development of the MAO (See Step 8 in the MAO Process Table, Section 4.B.i of this Directive), WQ Compliance Staff prepares an Excel spreadsheet with the estimated schedule and Gantt chart for the Pleasantville MAO (see example, next page). Note: To avoid data tracking errors, it is very important that the text of the corrective actions and the number of corrective actions in the spreadsheet match the final MAO exactly.

MAO Corrective Action Tracker

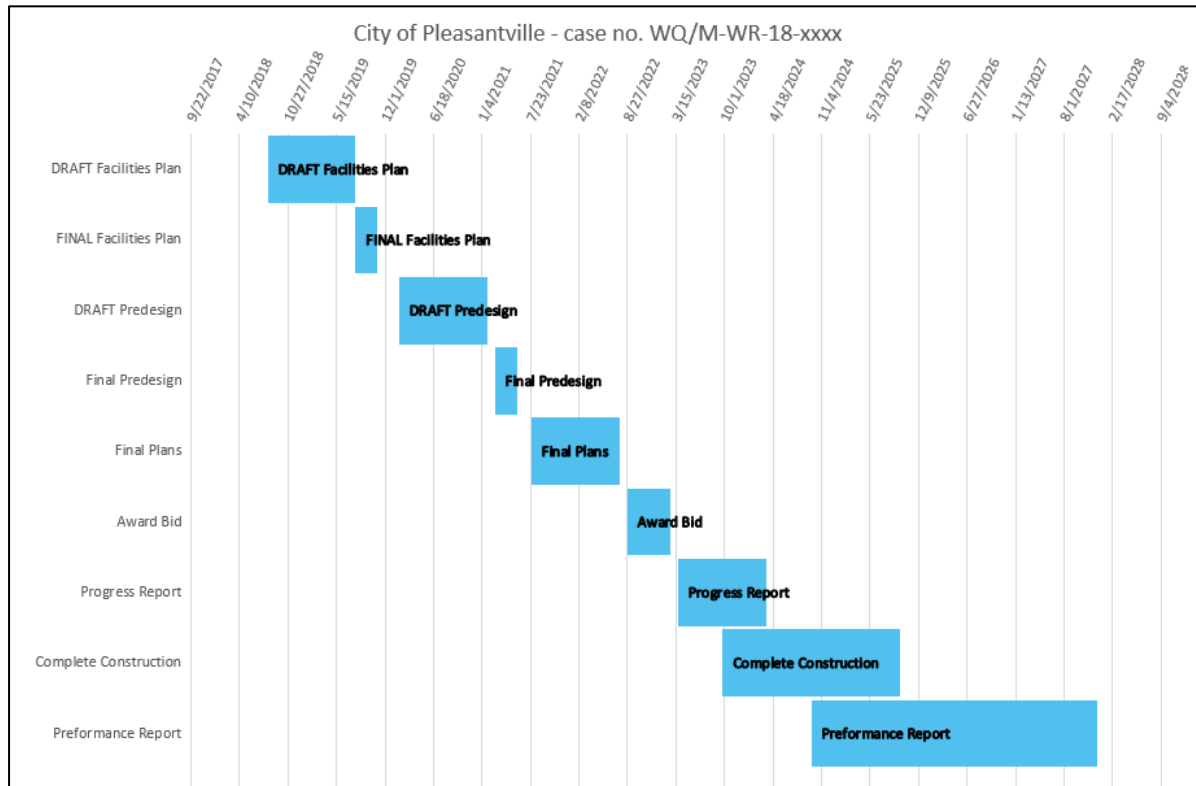
City of Pleasantville - case no. WQ/M-WR-18-xxxx

Spreadsheet Last Updated: 8/5/2018  
 Start (Signature) Date: 8/5/2018  
 Calculated Final Date: 12/17/2025  
 Hard Final Date: 6/15/2026

On Target

NOTES: Estimated (calculated) due dates are in red. Hard dates are in black.  
 INSPECTOR: Enter corrective action language exactly as it appears in the final MAO. Add actual trigger dates (when DEQ actions are completed) and actual compliance dates (for Entity actions) as they occur. Red will automatically turn black.  
 ELS: Enter due dates from Column D in ACES, except for final date. Enter final hard date from cell D7.  
 WQ DATA TEAM: Enter due dates from Column D in ICIS except for final date. Enter final hard date from cell D7.  
 Enter Estimated Permittee Completion Days (column C) for last task to calculate estimated final completion date.

Amendment Number	Enter Actual Trigger Dates Here	Permittee Completion Days	Due Date (est. in red; hard in black)	Corrective Action Language	DEQ Review Days	Estimated Trigger Date for next task
Original	NA	NA	8/1/2019	By no later than August 1, 2019, Permittee must submit to DEQ a draft wastewater facilities planning document which conforms to the document "Guidelines for the Preparation of Facilities Plans and Environmental Reports for Community Wastewater Projects." The document must include evaluation of an alternative to connect into the Regional Wastewater Treatment Facility.	90	10/30/2019
Original		90	1/28/2020	By no later than three (3) months after DEQ provides written comments on the draft wastewater facilities planning document, Permittee must submit a final document, revised to conform to DEQ's comments, for DEQ review and approval.	30	2/27/2020
Original		365	2/26/2021	By no later than one (1) year after receiving approval of the wastewater facilities planning document, Permittee must submit to DEQ a pre-design report for the recommended improvements to the collection system and treatment plant.	60	4/27/2021
Original		90	7/26/2021	By no later than three (3) months after DEQ provides written comments on the draft pre-design report, Permittee must submit a final document, revised to conform to DEQ's comments, for DEQ review and approval.	30	8/25/2021
Original		365	8/25/2022	By no later than (1) year after DEQ approval of the pre-design report, Permittee must submit to DEQ Final Engineering Plans and Specifications for the recommended improvements to the collection system and treatment plant.	30	9/24/2022
Original		180	3/23/2023	By no later than six (6) months after DEQ approval of Final Plans and Specifications, Permittee must advertise and award the construction contract for the recommended improvements to the collection system and treatment plant, revised to conform with any DEQ approval conditions.		9/24/2022
Original		365	9/24/2023	By no later than one (1) year after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ a construction progress report.		9/24/2022
Original		730	9/23/2024	By no later than two (2) years after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ documentation that the recommended improvements to the collection system and treatment plant are substantially complete and operational.		9/24/2022
Original		1180	6/15/2026	By no later than <b>June 15, 2026</b> , Permittee must submit to DEQ a report summarizing the performance testing conducted during the first twelve (12) months of operation and an evaluation of whether the actual performance meets expectations. If needed, the report must also include a list of recommended performance improvements.		12/17/2025



Once the MAO has been finalized, WQ Compliance Staff checks the spreadsheet for accuracy, and then emails the spreadsheet to the ELS and the WQ Data Staff. The ELS enters the text and the “Scheduled Compliance Date” for each corrective action in the MAO schedule into the OCE Enforcement Corrective Actions part of ACES (see example below).

### OCE Enforcement Corrective Action Maintenance

OCE Enforcement	Violation	Violations List (1)	<b>Corrective Actions (9)</b>	Link Actions
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Case Number

Case Search Key

[View Corrective Action](#)

	Vio ID	SV/RR/OCE ID	Corrective Action	Staff Assigned	Sched Comp	Actual Comp	ID
<a href="#">Select</a>	7479	OCEID 938	By no later than August 1, 2019, Permittee must submit to DEQ a draft wastewater facilities planning document which conforms to the document "Guidelines for the Preparation of Facilities Plans and Environmental Reports for Community Wastewater Projects." The document must include evaluation of an alternative to connect into the Medford Regional Wastewater Treatment Facility.	Jon Gasik	08/01/2019		3332
<a href="#">Select</a>	7479	OCEID 938	By no later than three (3) months after DEQ provides written comments on the draft wastewater facilities planning document, Permittee must submit a final document, revised to conform to DEQ's comments, for DEQ review and approval.	Jon Gasik	01/28/2020		3333
<a href="#">Select</a>	7479	OCEID 938	By no later than one (1) year after receiving approval of the wastewater facilities planning document, Permittee must submit to DEQ a pre-design report for the recommended improvements to the collection system and treatment plant.	Jon Gasik	02/26/2021		3334
<a href="#">Select</a>	7479	OCEID 938	By no later than three (3) months after DEQ provides written comments on the draft pre-design report, Permittee must submit a final document, revised to conform to DEQ's comments, for DEQ review and approval.	Jon Gasik	07/26/2021		3335
<a href="#">Select</a>	7479	OCEID 938	By no later than (1) year after DEQ approval of the predesign report, Permittee must submit to DEQ Final Engineering Plans and Specifications for the recommended improvements to the collection system and treatment plant.	Jon Gasik	08/25/2022		3336
<a href="#">Select</a>	7479	OCEID 938	By no later than six (6) months after DEQ approval of Final Plans and Specifications, Permittee must advertise and award the construction contract for the recommended improvements to the collection system and treatment plant, revised to conform with any DEQ approval conditions.	Jon Gasik	03/23/2023		3337
<a href="#">Select</a>	7479	OCEID 938	By no later than one (1) year after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ a construction progress report.	Jon Gasik	09/23/2024		3338
<a href="#">Select</a>	7479	OCEID 938	By no later than two (2) years after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ documentation that the recommended improvements to the collection system and treatment plant are substantially complete and operational.	Jon Gasik	03/22/2025		3339
<a href="#">Select</a>	7479	OCEID 938	By no later than June 15, 2026, Permittee must submit to DEQ a report summarizing the performance testing conducted during the first twelve (12) months of operation and an evaluation of whether the actual performance meets expectations. If needed, the report must also include a list of recommended performance improvements.	Jon Gasik	06/15/2026		3340

Records Found = 9

At the same time, the WQ Data Staff enters the Schedule Event text and the Due Date for each corrective action in the MAO schedule, ensuring a one-to-one match between OCE Corrective Actions in ACES and schedule events in ICIS (see example, next page). WQ Data Staff should contact the ELS with any questions about ACES Corrective Actions. If errors are found in the ACES corrective action set ups, the ELS will first correct the ACES data and notify the WQ Data Staff. Then the WQ Data Staff will copy that information into ICIS.

[Home](#) | [Search Enforcement Actions](#) | [Search Results](#) | [Edit Enforcement Action OR-WQ/M-ER-16-058-MA](#) | [Final Orders](#) | [Edit Final Order 1](#)

[Facilities](#) | [NPDES Permits](#) | [Compliance Monitoring](#) | [Case Files](#) | [NPDES Violations](#) | [Enforcement Actions](#)

[Basic Info](#) | [Milestones](#) | [Sub Activities](#) | [Final Order](#)

[Basic Info](#) | [Penalty](#) | [SEP](#) | [Complying Action/Inj. Relief](#) | [Compliance Schedule](#) | [Enf. Act. Limits](#) | [NPDES Violations](#)

Enforcement Action Identifier: OR-WQ/M-ER-16-058-MA    Final Order ID: 1    [ADD EVENT](#)  
 Enforcement Action Name: PLEASANTVILLE, CITY OF    Final Order Name: PLEASANTVILLE, CITY OF    State    Facility: NPDES ORTEST024  
 ORTEST024    State Administrative Order of Consent    Administrative Order of Consent    Comp Sched Number: 1  
 Issued By: State    Final Order Type: Proposed Administrative Settlement  
 Forum: Administrative - Formal

**Schedule**  
 Schedule Descriptor:   
 Order Paragraph Number:   
 Related Component:   
 Comments:

**Linked Facilities**

Facility Site Name	FRS ID	Programmatic ID	Address
PLEASANTVILLE, CITY OF	110006618197	NPDES ORTEST024	123 NW PLEASANTVILLERD, PLEASANTVILLE OR

**Schedule Events List**

Event	Schedule Date	Projected Date	Actual Date	Report Received Date	Amount	Violation
<a href="#">Draft Wastewater Facilities Plan</a>	08/01/2019					No
<a href="#">Final Wastewater Facilities Plan</a>	01/28/2020					No
<a href="#">Draft Pre-design Report</a>	02/26/2021					No
<a href="#">Final Pre-design Report</a>	07/26/2021					No
<a href="#">Final Engineering Plans and Specifications</a>	08/25/2022					No
<a href="#">Contract award</a>	03/23/2023					No
<a href="#">Construction Progress Report</a>	09/24/2023					No
<a href="#">Other (see comments)</a>	09/23/2024					No
<a href="#">Performance Testing Report</a>	06/15/2026					No

A few months after the Pleasantville MAO is finalized and issued, on 7/15/2019, the Regional Plan Review Engineer receives the draft wastewater facilities plan (Scheduled Compliance Date 8/1/2019). She emails the WQ Compliance Staff, ELS, and WQ Data Staff to notify them that the corrective action (Schedule Event) was completed. The ELS enters the “Actual Compliance Date” in ACES and WQ Data Staff enters the Schedule Event completion date in ICIS.

On 10/20/2019, the Regional Plan Review Engineer provides comments on the draft wastewater facilities plan (i.e. completing a “triggering event” for the next corrective action). She sends a copy to the WQ Compliance Staff, the ELS, and WQ Data Staff that the corrective action (Schedule Event) was completed. The ELS and WQ Data Staff will enter the completion date in ACES and ICIS, respectively. The WQ Compliance Staff updates the Excel spreadsheet by entering the actual trigger date (10/20/2019) in column B. This changes the due date from an estimated date (red) to a hard date (black) and updates all the estimated dates. WQ Compliance Staff emails the updated spreadsheet to the ELS and WQ Data Staff (see example, next page).

(Note the changes to the relational dates below. Also note that the Calculated Final Date has changed. Since the Calculated Final Date is before the Hard Final Date, Pleasantville is “On Target”. If the Calculated Final Date is later than the Hard Final Date, a warning “Behind Schedule” is shown”).

MAO Corrective Action Tracker

City of Pleasantville - case no. WQ/M-WR-18-xxxx

Spreadsheet Last Updated: 8/5/2018  
 Start (Signature) Date: 8/5/2018  
 Calculated Final Date: 12/7/2025  
 Hard Final Date: 6/15/2026  
 On Target

NOTES: Estimated (calculated) due dates are in red. Hard dates are in black.  
 INSPECTOR: Enter corrective action language exactly as it appears in the final MAO. Add actual trigger dates (when DEQ actions are completed) and actual compliance dates (for Entity actions) as they occur. Red will automatically turn black.  
 ELS: Enter due dates from Column D in ACES, except for final date. Enter final hard date from cell D7.  
 WQ DATA TEAM: Enter due dates from Column D in ICIS except for final date. Enter final hard date from cell D7.  
 Enter Estimated Permittee Completion Days (column C) for last task to calculate estimated final completion date.

Amendment Number	Enter Actual Trigger Dates Here	Permittee Completion Days	Due Date (est. in red; hard in black)	Corrective Action Language	DEQ Review Days	Estimated Trigger Date for next task
Original	NA	NA	8/1/2019	By no later than August 1, 2019, Permittee must submit to DEQ a draft wastewater facilities planning document which conforms to the document "Guidelines for the Preparation of Facilities Plans and Environmental Reports for Community Wastewater Projects." The document must include evaluation of an alternative to connect into the Regional Wastewater Treatment Facility.	90	10/30/2019
Original	10/20/2019	90	1/18/2020	By no later than three (3) months after DEQ provides written comments on the draft wastewater facilities planning document, Permittee must submit a final document, revised to conform to DEQ's comments, for DEQ review and approval.	30	2/17/2020
Original		365	2/16/2021	By no later than one (1) year after receiving approval of the wastewater facilities planning document, Permittee must submit to DEQ a pre-design report for the recommended improvements to the collection system and treatment plant.	60	4/17/2021
Original		90	7/16/2021	By no later than three (3) months after DEQ provides written comments on the draft pre-design report, Permittee must submit a final document, revised to conform to DEQ's comments, for DEQ review and approval.	30	8/15/2021
Original		365	8/15/2022	By no later than (1) year after DEQ approval of the pre-design report, Permittee must submit to DEQ Final Engineering Plans and Specifications for the recommended improvements to the collection system and treatment plant.	30	9/14/2022
Original		180	3/13/2023	By no later than six (6) months after DEQ approval of Final Plans and Specifications, Permittee must advertise and award the construction contract for the recommended improvements to the collection system and treatment plant, revised to conform with any DEQ approval conditions.		9/14/2022
Original		365	9/14/2023	By no later than one (1) year after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ a construction progress report.		9/14/2022
Original		730	9/13/2024	By no later than two (2) years after DEQ approval of Final Plans and Specifications, Permittee must submit to DEQ documentation that the recommended improvements to the collection system and treatment plant are substantially complete and operational.		9/14/2022
Original		1180	6/15/2026	By no later than <u>June 15, 2026</u> , Permittee must submit to DEQ a report summarizing the performance testing conducted during the first twelve (12) months of operation and an evaluation of whether the actual performance meets expectations. If needed, the report must also include a list of recommended performance improvements.		12/7/2025

The ELS updates all of the affected "Scheduled Compliance Dates" in ACES and the WQ Data Staff makes the same changes to Schedule Event Due Dates in ICIS.

This procedure continues until all the corrective actions are completed, the MAO is modified, or the MAO is terminated early.

## Record of Revisions to the Directive

Revision	Date	Changes	Editors
Original	11/30/2011	NA	Les Carlough
Update	June 2019	Updates to: describe current DEQ process for developing and issuing WQ MAOs; respond to Round 3 EPA State Review Framework recommendations; and add ACES/ICIS tracking information.	Jon Gasik, Jeff Bachman, Martina Frey, Becka Puskas

# Internal Management Directive



State of Oregon  
Department of  
Environmental  
Quality

Subject: Hazardous Waste Management, Criteria for Applying Factors to Determine Significant Non-Complier Status	
Effective Date: December 1, 2011	IMD Number:: 140.001.2012
Approval: Wendy Wiles, LQ Administrator <i>Wendy Wiles</i>	Pages: 3

**Disclaimer** This internal management directive represents the Department of Environmental Quality's current directions to Hazardous Waste staff on how to apply guidance, rules and regulations regarding Significant Non-Compliers. This IMD is not final agency action and does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This directive should not be construed as rule, although some of it describes existing state and federal laws. The recommendations contained in this directive should not be construed as a requirement of rule or statute. DEQ anticipates revising this document from time to time as conditions warrant.

**Intent/Purpose/  
Statement of Need** The purpose of this policy is to define the actions Hazardous Waste (HW) and Enforcement personnel will take for facilities identified as Significant Non-Compliers (SNCs) with the goal of focusing resources on those companies and facilities who pose the greatest threat to human health and the environment. The Department of Environmental Quality (the Department or DEQ) will use the SNC designation to prioritize inspections and enforcement resources.

**Authority** This policy provides guidance for Hazardous Waste and Enforcement personnel in determining whether a person meets the definition of a SNC and the actions the Department will take as a result of a SNC designation. "Person" includes, but is not limited to, individuals, corporations, associations, firms, partnerships, trusts, joint stock companies, public and municipal corporations, political subdivisions, states, and their agencies, and the federal government and its agencies. A person may not appeal DEQ's determination that it is a SNC. DEQ uses the SNC designation as internal enforcement guidance for DEQ employees.

**Applicability** DEQ Hazardous waste inspectors, Hazardous Waste Managers, Office of Compliance and Enforcement staff

## POLICY

**DESIGNATING A SNC:** Throughout the inspection and enforcement process, HW and Enforcement personnel will evaluate a person's compliance status in order to designate those persons that meet the criteria to be a SNC.

**SNCs** are those persons which:

- Cause actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents to humans or the environment; or
- Violate the law through flagrant or willful action; or
- Are chronic or recalcitrant violators; or
- Have violation(s) which deviate substantially from the terms of a permit, order, agreement or hazardous waste statutory or regulatory requirement.

DEQ staff may use any one of these criteria to warrant designation as a SNC at any time during the enforcement process. DEQ may evaluate persons on a multi-media basis for SNC designation; however, a person may be found to be a SNC based solely on previous RCRA violations or behavior.



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**Actual or substantial likelihood of human or environmental exposure to hazardous waste or hazardous waste constituents:**

To apply this criteria, DEQ staff should use facility-specific environmental and exposure information whenever possible. This may include evaluating potential exposure pathways and the mobility and toxicity of the hazardous waste being managed. In most cases, HW staff will make qualitative assessments of whether exposure has, or is likely to occur, which does not require a risk assessment. Environmental impact alone is sufficient cause for designating a person as a SNC, particularly when the environmental media affected require special protection (e.g., wetlands or sources of underground drinking water). Violations that involve releases of hazardous waste to the environment such as spills, illegal treatment, and illegal disposal do not automatically make a person a SNC. However, DEQ staff will qualitatively assess persons with these types of violations to evaluate whether actual or substantial likelihood of exposure occurs because of these violations.

**Flagrant or willful action:**

To apply this criteria, DEQ staff should review the cause of the violation that led to the current investigation. When determining whether a person acted **flagrantly**, the Department will consider the current violations and whether the person had actual knowledge that its conduct was unlawful and whether the company consciously set out to commit the violation. When determining whether the person acted **willfully**, the Department will consider whether the person had a conscious objective to cause the result of the conduct and whether the company knew or had reason to know that its actions were not lawful.

**Chronic or Recalcitrant Violator:**

When determining whether a person has been a **chronic** violator, the Department may consider violations from prior enforcement actions, as well as violations that were observed but not included as the basis for penalty assessment of a prior enforcement action. The Department may also consider the compliance history at other facilities of the person, or in other media programs when designating a chronic violator.

In general, a violator demonstrates **recalcitrance** through behavior or actions that constitute an unwillingness or stubborn refusal to adhere to the law. For example, a person may be identified as recalcitrant due to failure to implement required compliance actions within the timeframe specified by the Department; in such a case the person becomes a SNC once the timeframe specified has been exceeded.

**Violations that deviate from permit, order, agreement or hazardous waste laws or rules:**

Violations that constitute **substantial deviation** of a permit, order or regulatory requirement, are those violations of requirements that are important to the protection of the environment or human health or the integrity of the regulatory system. For example, violations that allow a person to remain outside the scope of the regulatory program, or violations of requirements that provide information essential to the integrity of the RCRA program would constitute substantial deviation.

**SNC PROCESS:** HW field staff will designate a person as a SNC pursuant to the above criteria and with manager concurrence, when referring alleged hazardous waste management violations for formal enforcement. The SNC designation will be reflected on the referral form with the HW staff checking the appropriate criteria box and making any necessary comments to support the SNC designation. In addition, HW staff will ensure that OHWIME is updated with the designation information.

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Enforcement staff will designate a person as a SNC with HW staff and manager concurrence if during formal enforcement proceedings, the person meets one of the criteria above by failing to meet an applicable compliance date, or comply with all or part of a Pre-Enforcement Notice, Department Order, Mutual Agreement and Order, or any other order or schedule related to the person and compliance with the violations. Enforcement staff will work with HW staff to add the SNC designation to the file and HW staff will update OHWIME to reflect the SNC designation information.

**RETURN TO COMPLIANCE:** Once a person has returned to Compliance, it is no longer a SNC. This occurs when the person submits the required documentation to show that it is in full compliance with regulatory and/or statutory requirements or is in full compliance with a compliance schedule established in a formal enforcement action (in either an order or an agreement). If the documentation submitted does not adequately demonstrate compliance, HW field staff should re-inspect to verify compliance. When compliance is verified by field staff with manager concurrence on the issue of whether the facility is in compliance, field staff will update OHWIME to reflect the change in SNC status, regardless of any outstanding enforcement actions in other media or whether the civil penalty is paid,. At this point, the person and the facility at issue will no longer be considered a SNC.

**ACTIONS AS A RESULT OF SNC DESIGNATION:** Persons that receive a SNC designation are subject to the following actions:

- SNCs will receive enforcement priority over non-SNCs; and
- They will be placed on the list of facilities to be inspected. A new inspection will be conducted as soon as possible after the conclusion of the enforcement action.

**History**

This internal management directive updates and supersedes Hazardous Waste Policy 2001-PO-005.

## **Appendix C**

### **Water Quality Significant Non-Complier (SNC)**

#### 1. Effluent Violations of Monthly Average Limits

##### a. TRC Violations

A 40% exceedance of specific pollutant limits listed in the A List or a 20% exceedance of a specific pollutant limit from the B List at a given discharge point for any two or more months during the two consecutive quarter review period is SNC

##### b. Chronic Violations

Violation of any monthly effluent limit at a given pipe by any amount for any four or more months during the two consecutive quarter review period is SNC.

#### 2. Effluent Violations of Non-Monthly Average Limits\*

TRC and chronic SNC criteria are the same as for monthly average violations as described in section 1.a. and b. above. However, the following caveat also applies:

When a parameter has both a monthly average and a non-monthly average limit, a facility would only be considered in SNC for the non-monthly limits if the monthly average is also violated to some degree (but less than SNC).

#### 3. Other Effluent Violations

Any effluent violation that causes or has the potential to cause a water quality or human health problem is SNC.

#### 4. Non-Effluent Violations

Any unauthorized bypass, unpermitted discharge, or pass through of pollutants which causes or has the potential to cause a water quality problem (e.g., beach closings, fishing bans, or other restrictions of beneficial uses) is SNC. In the case of POTWs implementing Approved Pretreatment Programs, failure to implement or enforce those programs is SNC.

\*NOTE: Non-monthly average SNC applies to all maximum and all average (other than monthly average) statistical base codes.

#### 5. Permit Schedule Violations

Any failure to start construction, end construction, or attain final compliance within 90 days of the scheduled date is SNC. Also, all pretreatment schedule milestones missed by 90 days or more are SNC.

## 6. Permit Reporting Violations

Discharge Monitoring Reports, POTW Pretreatment Performance Reports, and the Compliance Schedule Final Report of Progress (i.e., whether final compliance has been attained) that are not submitted at all or are submitted 30 or more days late are SNC.

## 7. Enforcement Orders

### a. Judicial Order

Any violation of a Judicial Order is SNC.

### b. Administrative Order (AO)

Any violation of an effluent limit (or other water quality/health impact) established in an AO is SNC. However, when an AO limit is as stringent as an applicable permit limit, the facility is SNC only if the permit effluent SNC criteria, set out in number 1-3 above, are met.

Any unauthorized bypass, unpermitted discharge or pass-through of pollutants which cause or has the potential to cause a water quality problem or human health problem is SNC.

Any schedule or reporting violations listed above in sections 5 and 6 respectively are SNC.

Any violations of narrative requirements or any other violation of concern to the Director is SNC.

Exhibit A  
SNC Conventional Pollutants  
(40% exceedance of limit)

#### Group I Pollutants-TRC+1.4

##### *Oxygen Demand*

Biochemical Oxygen Demand

Chemical Oxygen Demand

Total Oxygen Demands

Total Organic Carbon

Other

##### *Solids*

Total Suspended Solids

(Residues)

Total Dissolved Solids

(Residues)

##### *Minerals*

Calcium

Chloride

Fluoride

Magnesium

Sodium

Potassium

Sulfur

Sulfate

Total Alkalinity

Total Hardness

Other Minerals

##### *Metals*

##### *Detergents and Oils*

MBAS

NTA

Oil and Grease

Other detergents or algicides

Other

Aluminum

Cobalt

Iron

Vanadium

*Nutrients*

Inorganic Phosphorus Compounds

Inorganic Nitrogen Compounds

Other

SNC Toxic Pollutants  
(20% exceedance of limit)

Group II Pollutants-TRC=1.2

Metals (all forms)

Other metals not specifically listed under Group I

*Inorganic*

Cyanide

Total Residual Chlorine

*Organics*

All organics are Group II except those specifically listed under Group I.3

## Appendix D



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

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

August 25, 2014

### MEMORANDUM

**SUBJECT:** Revision of U.S. Environmental Protection Agency's Enforcement Response Policy for High Priority Violations of the Clean Air Act: *Timely and Appropriate Enforcement Response to High Priority Violations- 2014.*

**FROM:** Phillip A. Brooks *PAB*  
Director, Air Enforcement Division  
Office of Civil Enforcement

**TO:** Regional Air Enforcement Division Directors, Regions 1-10  
Regional Air Enforcement Branch Chiefs, Regions 1-10  
Regional Counsels, Regions 1-10

**CC:** Environmental Council of States  
National Association of Clean Air Agencies  
Association of Air Pollution Control Agencies

Attached is the revision to the U.S. Environmental Protection Agency's (EPA) enforcement response policy for High Priority Violations of the Clean Air Act (CAA) - *Timely and Appropriate Enforcement Response to High Priority Violations- Revised 2014*. This revision supersedes *The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)* issued in 1998. This revision reflects what the EPA has learned and how enforcement decisions have changed over the past 15 years.

The EPA considers all violations important. HPVs, however, are a subset of violations of regulations authorized by the CAA that warrant additional scrutiny to ensure that state, local, territorial and tribal agencies (referred to collectively as enforcement agencies) respond to such violations in an appropriate manner and, if needed, have access to federal assistance.

This policy revision reflects two substantial changes from the 1998 policy that the EPA determined is appropriate after consultation and input from our enforcement partners. First and

foremost, we have refined the criteria of what constitutes an HPV to sharpen our focus on CAA violations that experience shows are the most likely to be significant for human health and the environment or for maintenance of strong CAA programs. The EPA has reduced the general categories of violations that are designated as HPVs from ten to six, and has eliminated the matrix criteria for emission limitation violations.

Second, this revision recognizes the simple fact that even though a violation falls within a category of HPVs, not every such violation warrants additional tracking and attention at a national level. Identification of potential violations as HPVs should not be restrained by concerns that every such identification imposes an inalterable duty to bring a formal enforcement action. If it is later determined that such a violation does not warrant additional tracking and attention, enforcement agencies should be able to re-prioritize their efforts. Thus, this policy revision provides explicit mechanisms to remove those qualifying matters from HPV oversight.

These two major changes are intended to align the EPA's expectations for enforcement agencies with the reality of enforcement decisions to construct an approach that (1) enhances the EPA's ability to meaningfully monitor progress in an important group of enforcement matters, and (2) fosters a cooperative approach to case management with a focus on protection of public health.

Successful implementation of this policy depends on the ongoing communication and cooperation between the enforcement agencies and the EPA Regions. This revision continues to require regular regional consultation, which should now occur on a quarterly basis, with our enforcement partners to discuss HPVs and the appropriate response. Regions are expected to keep specific records regarding these consultations. Enforcement agencies are also responsible for keeping records on HPVs they identify and for reporting specific information about the HPV as required by the current Information Collection Request (ICR) and any subsequent revisions.<sup>1</sup> The ICR contains the minimum requirements that enforcement agencies must report into the EPA's national compliance database. Enforcement agencies should regularly consult the *Clarification Regarding Federally-Reportable Violations for Clean Air Act Stationary Sources*, March 22, 2010, and any subsequent revisions,<sup>2</sup> regarding reporting requirements for violations at CAA stationary sources. Because HPVs are a subset of federally enforceable violations, enforcement agencies should be familiar with both policies to ensure that the policies are consistently implemented and that information shared with the public about pollution and violations that affect their communities is as accurate as possible.

In order to ease the transition to this revised policy and the revised Air Module in the EPA's Integrated Compliance Information System or ICIS- Air, EPA expects enforcement agencies to implement this revision beginning October 1, 2014, the beginning of EPA's fiscal year. ICIS-Air is expected to be available for data entry by the end of October. The EPA Regional offices are asked to ensure that this policy is promptly transmitted to all affected enforcement agencies in their regions.

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<sup>1</sup> Source Compliance and State Action Reporting (Renewal), EPA ICR Number 0107.10, OMB Control Number 2060-0096, EPA-HQ-OECA-2010-0777. EPA has begun the process for renewing the ICR and expects the first Federal Register notice to be published in August 2014.

<sup>2</sup> EPA anticipates a revision to the policy regarding federally reportable violations in 2014.

# Timely and Appropriate Enforcement Response to High Priority Violations- Revised 2014

## I. INTRODUCTION

This policy is a significant revision of *The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)* issued in 1998 (1998 Policy). The 1998 Policy anticipated the need for revisions based upon experience implementing the policy. This revision reflects what the EPA has learned and how enforcement decisions have changed over the past 15 years. This policy supersedes the previous version issued in 1998. Nothing in this policy is intended to change the underlying applicable requirements or to imply that compliance must be achieved on a less than continuous basis. Furthermore, this policy cannot be used to establish new standards or limits, is not binding on any party and cannot be relied on to create any rights enforceable by any party. The EPA reserves the right to change this policy at any time without public notice.

The EPA designed this policy as a management tool for conducting oversight of the response to six specific categories of violations of certain federally enforceable regulations authorized by the Clean Air Act (CAA).<sup>1</sup> These specific six categories of violations are called High Priority Violations (HPVs). This policy applies only if an HPV occurs at either a major source<sup>2</sup> as defined in CAA § 501(2) or a minor stationary source (*i.e.*, a source that is not a major source) that is subject to a Compliance Monitoring Strategy<sup>3</sup> plan for a specific enforcement agency. State, local, territorial and tribal agencies (referred to collectively as enforcement agencies) are responsible for reporting data about these violations into Air module of EPA's national database, Integrated Compliance Information System (ICIS-Air), in compliance with the current Information Collection Request (ICR) and any subsequent revisions.<sup>4</sup>

The EPA considers all CAA violations important. HPVs, however, warrant additional scrutiny to ensure that enforcement agencies respond to such violations in an appropriate manner and have access to federal assistance if need be.

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<sup>1</sup> These include not only the regulations implementing the CAA (e.g., 40 C.F.R., Parts 52, 60, 61 and 63), but also state, local, tribal or territorial regulations approved by EPA to implement the requirements of the Clean Air Act. "CAA" is used in this policy to represent collectively the CAA and these federally enforceable regulations.

<sup>2</sup> A synthetic minor source, *i.e.*, a source that has taken a permit limit to remain a minor source of emissions, is subject to this policy as a major source if the source's violation results in the actual emissions exceeding the major source thresholds.

<sup>3</sup> See <http://www.epa.gov/compliance/resources/policies/monitoring/caa/cmospolicy.pdf>

<sup>4</sup> The ICR contains the minimum data requirements for (1) determining CAA stationary source compliance and (2) the data required to be reported to the national data system, including specifics about HPVs. Source Compliance and State Action Reporting (Renewal), EPA ICR Number 0107.10, OMB Control Number 2060-0096, EPA-HQ-OECA-2010-0777.



This revision reflects several substantial changes that the EPA determined are appropriate after consultation and input from enforcement agencies and in light of our experience under the 1998 Policy. First and foremost, this revision contains refined criteria of what constitutes an HPV to sharpen our focus on CAA violations that experience shows are the most likely to be significant for human health and the environment or for maintenance of important programs. The EPA considers an HPV a violation of a federally enforceable CAA requirement that is (1) likely to result in impacts that pose a significant risk to human health and/or the environment from direct or indirect release of air pollutants or (2) may harm the ability to implement CAA programs.

Second, this revision recognizes the simple fact that even though a violation falls within a category of HPVs, not every such violation warrants additional tracking and attention at a national level. Identification of potential violations should not be restrained by concerns that every such identification imposes an inalterable duty to bring a formal enforcement action. This policy seeks to encourage enforcement agencies to (1) quickly identify which violations are likely HPVs, (2) report them into ICIS-Air as soon as possible after the HPV designation is made, and (3) promptly engage sources thought to be in violation. The EPA considers prompt identification and communication to the source as key elements in resolving a violation. If it is later determined that a violation previously designated as an HPV does not warrant the additional tracking and attention outlined in this policy, enforcement agencies should be able to re-prioritize their efforts. Thus, this policy revision provides explicit mechanisms to remove those qualifying matters from HPV oversight.

These two major changes are intended to align the EPA's expectations for enforcement staff with the reality of enforcement decisions. The essence of enforcement decisions is the element of judgement applied to a particular set of laws and facts, in light of competing demands for enforcement resources. This policy recognizes this basic truth and seeks to construct an approach to oversight that (1) enhances the EPA's ability to meaningfully monitor progress in an important group of enforcement matters and (2) fosters a cooperative approach to case management decisions that focuses more energy on protection of public health.

The EPA expects enforcement agencies responsible for enforcing the CAA to address all violations of air pollution requirements regardless of whether they are designated as an HPV. The EPA further expects enforcement agencies to address HPVs consistent with this policy in order to resolve the violations and collect the appropriate penalties. This revision outlines expected responses to HPVs and, where appropriate, timelines for such responses. Enforcement agencies should design their activities with these expectations in mind. Although this policy outlines how agencies should respond to HPVs, the EPA recognizes that some agencies may need assistance from time to time. The HPV policy provides a process to identify those violations that may require assistance from the EPA so that HPVs can be promptly and properly identified and addressed as expeditiously as possible.

As a final matter, the EPA recognizes that the rapid pace of development of real-time monitoring capabilities and a growing use of electronic reporting of compliance-related data by facilities is likely to have a significant impact on enforcement practices in the coming years. This data flow holds the potential for improvement of enforcement targeting practices, public transparency and assessment of compliance trends and issues. The EPA expects that this policy may likely be revised in future years to reflect experiences and evolution of CAA enforcement, including accounting for new real-time monitoring capacities.

## II. HIGH PRIORITY VIOLATION CRITERIA

When an enforcement agency detects a violation of the CAA, it should compare the violation's characteristics with the following criteria to determine if the violation is an HPV.<sup>5</sup> The criteria below apply only to a violation that occurs at (1) a major source as defined in CAA Sec. 501(2) (Title V Major Source) or (2) a non-Title V Major Source, otherwise known as a minor or area source, with a CMS plan. It is not appropriate to apply the criteria to violations that the EPA is not authorized to enforce, *i.e.*, violations of requirements that are not federally enforceable.

**Criterion 1** – Failure to obtain a New Source Review (NSR) permit (for either attainment or non-attainment areas) and/or install Best Available Control Technology (BACT) or Lowest Available Emission Reductions (LAER) (and/or obtain offsets) for any new major stationary source or major modification at a major stationary source. This criterion includes a violation by a synthetic minor stationary source of an emission limit or permit condition such that the source's actual annual emissions exceed (or are expected to exceed) the major stationary source threshold as defined in the applicable NSR regulations.

**Criterion 2** – A violation of any federally enforceable emission limitation, emission standard or operating parameter, which is a surrogate for emissions, that was issued pursuant to Title I, Part C or D, of the CAA and the implementing regulations, or the equivalent provision(s) in an EPA-approved implementation plan (state, local, territorial or tribal) where such violation continued (or is expected to continue) for at least seven days. This criterion includes violations that, while not necessarily continuous for 168 hours, recur (or recurred) regularly or intermittently for at least seven days. EPA presumes that the violation is continuing unless the enforcement agency can document sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.

**Criterion 3** – A violation of any emission limitation, emission standard or operating parameter, which is a surrogate for emissions, in an applicable Standards of Performance for New Sources (NSPS) (Part 60) or in an analogous regulation adopted by state, local, tribal or territorial

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<sup>5</sup> If, after additional investigation or analysis, the enforcement agency determines that the set of facts that presented a violation, which had previously been designated an HPV, does not meet any of the HPV criteria – the enforcement agency should correct the classification in the national database, ICIS-Air, thereby removing the violation from its list of HPVs, and notify the Region.

authorities and the EPA has granted delegation to enforce such regulations in lieu of the NSPS where such violation continued (or is expected to continue) for at least seven days. This criterion includes violations that, while not necessarily continuous for 168 hours, recur (or recurred) regularly or intermittently for at least seven days. The EPA presumes that the violation is continuing unless the enforcement agency can document sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.

**Criterion 4** – A violation of any emission limitation, standard or surrogate parameter (emission or operating) of an applicable National Emission Standards for Hazardous Air Pollutants (NESHAP) (Parts 61 and 63) or in an analogous regulation adopted by state, local, tribal or territorial authorities and EPA has granted delegation to enforce such regulations in lieu of the NESHAP where such violation continued (or is expected to continue) for at least seven days. This criterion includes violations that, while not necessarily continuous for 168 hours, recur (or recurred) regularly or intermittently for at least seven days. The EPA presumes that the violation is continuing unless the enforcement agency can document sufficient evidence to conclude that the violation is no longer ongoing and is unlikely to recur.

**Criterion 5** – A violation that involves federally enforceable work practices, testing requirements, monitoring requirements, recordkeeping or reporting that substantially interferes with enforcement of a requirement or a determination of the source's compliance. The determination of what is substantial shall be part of a case-by-case analysis/discussion between the EPA Region and the enforcement agency.

**Criterion 6** – Any other violations specifically identified and communicated to enforcement agencies from time to time by the Director, Air Enforcement Division (AED), U.S. EPA (general applicability) or as mutually agreed upon between the enforcement agency and corresponding EPA Region (case-by-case). For example, an enforcement agency believes an emission violation warrants designation as an HPV even though the violation lasted (or will last) for less than seven days.

### **III. INITIAL HPV IDENTIFICATION- DAY ZERO**

Once an enforcement agency identifies a potential violation of a federal requirement, prompt determination whether the violation meets the HPV criteria is critical to achieving the goals of this policy. When an enforcement agency first receives information that indicates a potential violation (*e.g.*, through a compliance evaluation, stack test results, continuous emission monitoring system report, etc.), the agency is to determine whether the potential violation meets any of the HPV criteria. The enforcement agency should take prompt steps to gather any additional information needed to determine whether the violation is an HPV.

HPV identification should occur as soon as possible after the enforcement agency receives information sufficient to determine whether a potential violation meets the HPV criteria. The date of the initial identification of a violation as an HPV is called Day Zero for purposes of

evaluating timeliness of actions in accordance with this policy. Day Zero will be deemed to have occurred on the earlier of either (1) the date the agency has sufficient information to determine that a violation occurred that appears to meet at least one HPV criterion or (2) 90 days after the compliance monitoring activity that first provides information reasonably indicating a violation of a federally enforceable requirement. Stated differently, the EPA expects that the enforcement agency will act expeditiously to determine whether information in its possession indicates a violation is an HPV as defined in this policy. Timeliness of the enforcement response is measured from the Day Zero.

In accordance with the ICR, the enforcement agency must record all HPVs for a source into ICIS-Air, including which of the six criterion each violation meets. In addition to designating the HPV criterion in the database, the enforcement agency must also record the Day Zero, the pollutant, where appropriate, and the applicable CAA program for each HPV. The enforcement agency must also indicate in ICIS-Air which compliance monitoring activity (or activities) relate to the HPV, which is referred to as the Discovery Action.

The enforcement agency should discuss newly identified HPVs with the Region in regular consultations and resolve any issues concerning the HPV designation during the consultation. Such questions may include whether the violation meets the HPV criterion, which agency will lead the enforcement efforts, or if there are any viable defenses to the violation such that pursuing the violation is not warranted (*e.g.*, exceedance of an NSPS limit that resulted from a malfunction).

The EPA recognizes that after additional investigation, the enforcement agency may determine that even though a violation meets an HPV criterion, it may not warrant the additional oversight envisioned for HPVs. If the enforcement agency makes such a determination, even after reporting the HPV into ICIS-Air, it may confer with the Region about removing the violation from its list of HPVs. Reasons for removing an HPV from an enforcement agency's list are:

- A. Further development of the evidence leads to a conclusion that even with additional efforts, it is unlikely that enough evidence can be developed to support or prevail on the claim that would constitute an HPV; or
- B. The HPV does not involve (1) on-going violations or an identifiable threat to the public and (2) expenditure of resources on oversight of the enforcement agency's handling of the violation is not in the public interest.

A case-specific consultation must occur between the enforcement agency and the EPA, and both agencies (*e.g.*, the State and the Region) must agree that it is appropriate to no longer pursue the violation in accordance with this policy. The Region must record this decision in a document that is preserved as an agency record. At a minimum, this record must (1) identify the source, (2) list the violation that had been identified as an HPV, (3) contain a statement that identifies one of the above reasons for changing the designation, and (4) identify the persons that concurred in the

decision. A violation may be removed from an enforcement agency’s list of HPVs at any time (e.g., even after the violation has been addressed) so long as the consultation and concurrence process described above has occurred. The enforcement agency records the removal of violation from its list of HPVs by entering the HPV Designation Removal Basis and the Removal Basis Date under the Air Violations link in the ICIS-Air Case File module.

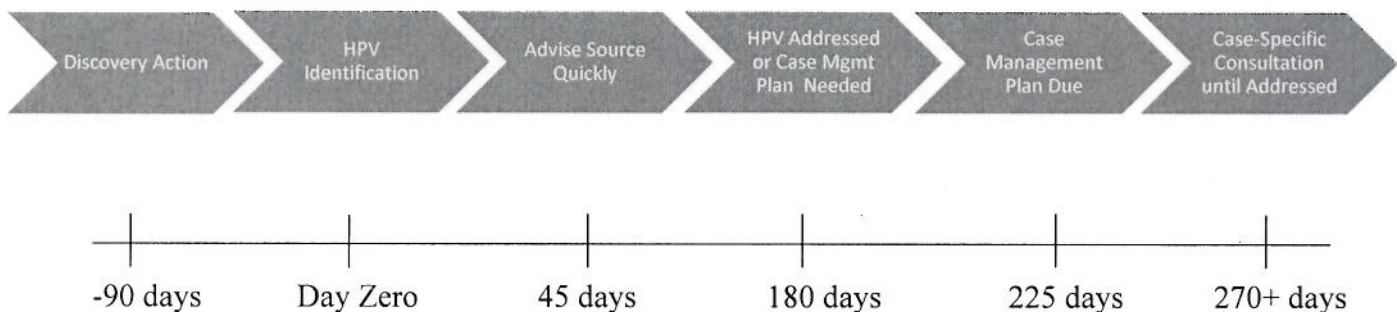
Removing a violation from an agency’s list of HPVs only means that federal and non-federal enforcement agencies have concluded that the matter should no longer be subject to additional oversight under this policy. The EPA still expects the violation to be addressed, as appropriate.

#### IV. INTER-AGENCY COMMUNICATION REGARDING HPVS

Unless specifically agreed to by the Director, AED, Regions are expected to have regular consultations with the enforcement agencies to discuss HPVs. These consultations are to occur at least quarterly.<sup>6</sup> EPA Regions are also expected to maintain records of dates of the regular consultations for at least five years. These regular consultations are intended to facilitate:

- Maintenance of a common, agreed upon list of HPVs for each enforcement agency;
- Monitoring of actions designed to address HPVs consistent with Section V. *Appropriate Enforcement Response for HPVs*; and
- Accuracy of records indicating compliance with the policy (e.g., identifying, addressing and resolving HPVs).

#### V. APPROPRIATE ENFORCEMENT RESPONSE FOR HPVS



1. Not more than 45 days after Day Zero, the enforcement agency must advise<sup>7</sup> the source that the violation has been identified. The enforcement agency must document the form and date of this initial communication in its enforcement records. This initial communication includes issuance of any notice of violation required under Section 113 of the CAA or corresponding state

<sup>6</sup> EPA is aware that some of the Regions may need a different schedule due to large numbers of state, local, territorial, or tribal enforcement agencies. Regions desiring an alternative schedule should request a written concurrence from the Director, AED.

<sup>7</sup> This notification is not intended to address what is required by statute for jurisdictional purposes. Agencies should make their own determinations as to what is sufficient to meet the statutory jurisdictional requirements.

or tribal implementation plan as well as other written notices, meetings, teleconferences and electronic correspondence. This requirement is intended to ensure that the enforcement agency informs the source as soon as possible of the agency's findings so that the source is on notice of the need to promptly correct conditions giving rise to the violation(s) or potential violation(s). A source's return to compliance does not relieve a source from liability for violations, or automatically remove the need for further enforcement response. Prompt action, however, is necessary for public protection.

2. The enforcement agency should attempt to address an HPV within 180 days of Day Zero. The enforcement agency can "address" an HPV using one of the following actions: (1) issuing a legally enforceable order that requires immediate action to come into compliance with the requirement violated; (2) issuing a legally enforceable order that imposes penalties, where the source has demonstrated that it is currently complying with the requirement violated; (3) issuing a legally enforceable order that imposes a schedule on the source to comply with the requirement violated and penalties for the violation; or (4) transferring the matter to an organization with authority to initiate a civil or criminal judicial action (also known as a referral). Examples of appropriate addressing actions are:<sup>8</sup>

- Filing a complaint and/or lodging a judicial consent decree;
- Consent Agreement and/or Final Order approved by a judicial officer;
- Referral to the Attorney General (or equivalent) for a state, territorial or tribal enforcement action;
- Order issued pursuant to state, local, territorial or tribal legal authority;
- Proposed SIP or FIP provision;<sup>9</sup>
- EPA referral for civil action to the Department of Justice (DOJ);
- EPA referral for criminal action to DOJ;
- CAA Sec. 113(a) order;
- CAA Sec. 167 order; or
- CAA Sec. 113(d) order.

3. If an HPV is not addressed within 180 days from Day Zero, the enforcement response to the violation will be deemed untimely unless the enforcement agency demonstrates during the next quarterly consultation with the Region that it has a case-specific development and resolution timeline. The purpose of the timeline is to allow the enforcement agency to develop significant milestones towards addressing the violation. The EPA recognizes that this timeline is an initial plan and may need revision as new information comes to light. Never-the-less, the very idea of "timely and appropriate enforcement" requires some benchmarks for evaluation. In this policy,

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<sup>8</sup> For the purpose of this policy, Addressing Action no longer includes "Source Returned to Compliance by EPA or the State." The enforcement agency should choose another action, if appropriate, or use the mechanism for removing the HPV designation in the national database as discussed in this policy.

<sup>9</sup> A proposed SIP or FIP also resolves a violation.

the EPA acknowledges the legitimate observation that a single target of 180 days from Day Zero is not the only way to evaluate an enforcement agency's response to a violation. This policy, therefore, includes the option for enforcement agencies to provide their own assessment of appropriate benchmarks for addressing and resolving individual HPVs that are not addressed within 180 days so long as the plan is shared with the Regions.<sup>10</sup> The EPA would expect that under normal circumstances, a case development and resolution timeline should be in place within 225 days from Day Zero (an additional 45 days from the 180 day period discussed above).

Case development and resolution timelines need to include: (1) the pollutant(s) at issue; (2) an estimate of the type and amount of any on-going or recurring emissions in excess of the applicable standard; and (3) specific milestones for case resolution. Specific milestones for an enforcement agency's timeline should include, but are not limited to:

- A proposed date for the start of settlement negotiations and a proposed timeline for such negotiations;
- A proposed date for commencing an enforcement action (administrative or judicial); and
- Other steps the enforcement agency chooses that are important for case resolution.

Also, where applicable, the plan should also identify activities where the EPA can assist in the development or prosecution of the case, or otherwise help address the violation. The enforcement agency should have this plan finalized before the initial case-specific consultation with the Region occurs (see next step); however, the enforcement agency is not required to submit a written plan to the EPA.

4. For an HPV that is not or will not be addressed within 180 days of Day Zero, the Region is expected to have an initial case-specific consultation with the enforcement agency no later than the next quarterly consultation (*i.e.*, within 270 days of Day Zero). The Region and the enforcement agency should discuss the case development and resolution timeline in the case-specific consultations. The case-specific consultation can occur during the regular consultations required in Section IV or in a separate meeting, so long as the first one occurs within the 270 days of Day Zero. The Region should record the Consultation Date of the case-specific consultation under the Air Violations link in the Case File.

5. Case-specific consultations should occur at least every three months after the initial case-specific consultation until the HPV is addressed. Subsequent case-specific consultations can

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<sup>10</sup> While the EPA understands and appreciates that the complexity of specific multimedia enforcement actions can make it difficult to address violations in a timely manner, going several years without an addressing action is not acceptable. In these cases, the EPA may suggest that the enforcement agency address the CAA violations of these cases separately. This would be especially true when dealing with larger facilities and municipalities, and where overall compliance has not yet been achieved.

occur during the regular quarterly consultations or in a separate meeting. Regions should document the dates of subsequent case-specific consultations. At these consultations, the enforcement agency is expected to discuss (1) case status and development expectations for at least the upcoming three months and (2) whether additional actions are necessary to address the HPV and the additional time required to do so. The enforcement agency will continue to be the lead agency for the enforcement efforts, with the EPA providing assistance as necessary, so long as it is appropriate to do so, taking into consideration the protection of public health and the environment. In limited cases it may be appropriate for the EPA to take the lead for enforcing certain violations.

6. All efforts should be made to resolve the enforcement action addressing the violations as soon as possible; however, there are no timelines for resolving a matter. “Enforcement Action Resolved” means that: (A) in a filed judicial action (state or federal), a court of competent jurisdiction has entered an order adjudicating the case and the order is final (such order may include a compliance schedule or other injunctive relief to be performed after the order becomes final); (B) for violations addressed administratively or through any non-judicial process, all penalties have been collected, all SEPs are completed, and the source is confirmed to be in compliance with respect to all HPVs included in the administrative order or non-judicial agreement<sup>11</sup>; or (C) an enforcement agency has proposed revision to its implementation plan (e.g., state implementation plan or tribal implementation plan) regarding the violation. In some cases, violations can be addressed and resolved with the same action or at the same time.

7. If an HPV has not been addressed within 24 months from Day Zero, the Region shall notify the Director, AED, of the source and the violation, and provide an assessment of whether direct federal action is warranted. AED will review any HPV identified under this paragraph with the respective Region on no less than a semi-annual basis until it is addressed.

## VI. PENALTIES

All civil penalties for HPVs should be sufficient to achieve effective deterrence for the source subject to enforcement and for the regulated community as a whole. The EPA expects all enforcement agencies resolving an HPV to assess penalties that recover economic benefit and contain a component reflecting the gravity (seriousness) of the violation.<sup>12</sup>

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<sup>11</sup> “Non-judicial process” and “non-judicial agreements” include consensual agreements between the enforcement agency and the source that are not authorized by any legal authority. While these agreements are not addressing actions as defined in this policy, completion of the agreements (*i.e.*, all penalties have been collected, all SEPs are completed, and the source is confirmed to be in compliance with respect to all HPVs included in the agreement), address and resolve the HPVs simultaneously.

<sup>12</sup> For additional discussion of calculating appropriate penalties for CAA violations, see *The Clean Air Act Stationary Source Penalty Policy*.



All penalty calculations must be documented in the enforcement agency's file.<sup>13</sup> In matters where no penalty is assessed or where a difference exists between the assessed and collected penalty, the enforcement agency should provide an explanation in its file.

## **VII. REPORTING HPVs INTO ICIS-AIR**

Enforcement agencies are required to report all HPVs and the resulting enforcement response into the EPA's national database, ICIS-Air. The EPA considers timely and accurate reporting into ICIS-Air critical to the EPA's oversight role regarding CAA violations. The following discusses how enforcement agencies should report information about HPVs into ICIS-Air.<sup>14</sup>

### **1. Initial HPV Identification**

Enforcement agencies will report the initial HPV identification into the Case File module in ICIS-Air. The EPA designed the Case File module to capture data that an enforcement agency normally reports regarding violations of the CAA at a specific source. An enforcement agency will need to add and save a Case File in ICIS-Air when it suspects or knows of a violation or violations at a specific source. A Case File can contain information about more than one violation at a source. The enforcement agency must report the following information concerning each HPV into an ICIS-Air Case File:

- Violation Type - When a violation meets one of the six HPV criterion, the enforcement agency should designate the violation as an HPV by reporting one of the six criterion from the Violation Type dropdown menu or reference table;
- Pollutant - A pollutant must be reported on Criteria 1-5. A pollutant is optional for Criterion 6;
- Program - The enforcement agency must designate the applicable CAA program violated (e.g., NSPS, SIP, NESHAP); and
- HPV Day Zero Date - Each HPV must have a Day Zero. This date is the earliest date that the enforcement agency makes the initial identification of a violation as an HPV (*see* Section III for additional discussion).

### **2. Discovery Action(s)**

After the Case File is added and saved, the enforcement agency must link the Case File to the corresponding Discovery Action or Actions. Generally, the enforcement agency has already entered the Discovery Action into ICIS-Air as a Compliance Monitoring Activity. If not, the

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<sup>13</sup> States that are required by statute to maintain the detailed information on the calculations, assessment and negotiation of final penalties in a different form or file have the discretion to do so. However, such calculations should be made available to EPA on request.

<sup>14</sup> Additional information regarding reporting into ICIS-Air can be found in the ICIS-Air Help Files and Compendium of Business Rules.

enforcement agency will need to enter the compliance monitoring activity into ICIS-Air and then link it to the Case File as the Discovery Action.

### **3. Date that the Enforcement Agency Advised the Source of HPV Identification**

The enforcement agency must record that it advised the source of the violation by entering the Method of Advisement and Date the communication took place in the Air Violations link on the Case File module. If an enforcement agency uses a formal notice of violation, as defined in the policy on federally-reportable CAA violations,<sup>15</sup> the agency should enter the informal enforcement action in the Enforcement Action module.

### **4. Formal Enforcement Responses to HPVs**

Enforcement agencies must report subsequent formal enforcement action(s) taken to address and resolve an HPV in the Enforcement Action module of ICIS-Air. There are two options for reporting enforcement actions into the module: Administrative Formal or Judicial. The enforcement agency will need to choose one of these options depending on the forum for its enforcement action and add an Enforcement Action into ICIS-Air. In order to add an Enforcement Action, the enforcement agency must report the following information in the Enforcement Action module under Basic Info:

- Linked Facility – The enforcement Agency must link the Enforcement Action, either Administrative Formal or Judicial, to a Case File;
- Enforcement Action Type – The specific enforcement tool must be identified (*e.g.*, Administrative Order for an Administrative Formal Enforcement Action); and
- Program Violated (*e.g.*, MACT, NSR).

In ICIS-Air, some information about enforcement responses is recorded under the Milestones link under the Administrative Formal or Judicial Enforcement Action. The enforcement agency must report the following Milestones in an Enforcement Action for an HPV:

- Administrative Formal – Actual Date of the Complaint Filed/Proposed Order; or
- Judicial – Actual Date Referred to a State Attorney General.

The enforcement agency must also report the following information under the Final Order link in an Enforcement Action for an HPV:

- Administrative Formal – The Final Order Issued Date and the date the enforcement response is resolved, *i.e.*, Air Resolved date; or

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<sup>15</sup> EPA anticipates a revision to the *Clarification Regarding Federally-Reportable Violations for Clean Air Act Stationary Sources*, March 2010.

- Judicial – The Final Order is Entered Date.

## **5. Removing a Violation from an Agency's list of HPVs**

Enforcement agencies may need to remove a violation from its list of HPVs because it does not intend to or cannot address and/or resolve the violation through an enforcement response, *i.e.*, an action that is not authorized by any statute or regulation. *See supra* Section III. Once it is agreed that the violation should no longer be tracked as an HPV, the enforcement agency should enter the HPV Removal Designation Basis and Removal Basis Date for the Air Violation in the Case File Module.

## **6. Penalty Assessed**

The enforcement agency must report the Penalty Assessed to be Paid in the Penalty section under the Final Order link in an Enforcement Action for an HPV. If multiple agencies are involved in the enforcement action, the enforcement agency must report the penalty amount that each agency is to receive.

## **7. Lead Change**

A lead change may apply to a Case File or to an individual HPV. If the lead change applies to the Case File, the originating agency shall report the lead change on the Case File Pathway Activity under resolving action. The agency taking lead of all the violations in a Case File will need to open a new Case File and add the violations. If an agency takes lead of an individual HPV, the originating agency will indicate a Lead Change as the Addressing Action in the Other field on the Case File's Add/Edit Air Violations page and select Mark for Deletion on the row corresponding to the HPV for which the lead was assumed by another agency. The agency taking lead of an individual HPV will need to either open a new Case File and add the HPV or add the HPV to an existing Case File.

# **Appendix E**

## **THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S INTERNAL MANAGEMENT DIRECTIVE ON THE PENALTY FACTOR FOR ECONOMIC BENEFIT**

### **A. PURPOSE**

This internal management directive (Directive) is designed to enhance human health and the environment by supporting Department of Environmental Quality (Department) strategies to stimulate compliance with environmental laws. The penalty formula in the Department's rules includes a component of economic benefit. This component is important to "level the playing field" by taking away economic advantage the entity gained from the violation. Economic benefit is "no fault" in nature. An entity need not have deliberately chosen to avoid or delay compliance or in fact have been aware of noncompliance to have accrued the economic benefit. However, economic benefit also deters potential violators from deciding it is cheaper to violate and pay the penalty than invest in compliance. This Directive outlines the kinds of information Department inspectors must consider when referring violations to the Office of Compliance and Enforcement, and economic benefit factors Environmental Law Specialists in OCE must consider in drafting of civil penalty calculations.

### **B. AUTHORITY**

Oregon Revised Statute 468.130(2)(c,h) directs the Environmental Quality Commission to consider economic conditions of the entity in assessing a penalty as well as other factors that the Commission makes relevant by rule. Oregon Administrative Rules (OARs) 340-012-0045 (renumbered to OAR 340-012-0150) specifies that the penalty contain an estimate of the economic benefit. OAR 340-012-0150 also specifies that the Department may use the U.S. Environmental Protection Agency's BEN computer model and must use it upon request of a respondent.

### **C. GENERAL APPLICABILITY**

- 1) This Directive applies to assessment of penalties for violations of all of the environmental statutes, rules, permits and Orders administered by the Department.
- 2) This Directive sets forth the types of information Department staff should gather during an investigation. The Department may take action which varies from this Directive.
- 3) The Directive does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It is not intended for use in pleading, at hearing or at trial.

## D. DISCUSSION AND DIRECTIVE

Economic benefit is a necessary part of the penalty and it is important that Department inspectors and enforcement staff include economic benefit when feasible. This information is easiest to collect and most credible when collected early in the investigation and should be gathered during inspections to the extent possible.

Below is a summary of the general kinds of economic benefits that inspectors must include in referrals and environmental law specialists must consider in drafting penalty actions. Economic benefit can be difficult to obtain. Inspectors are directed to include in the referral any economic benefit information that is reasonably available or any estimate reasonably based on knowledge and experience. If it appears that the total benefits will be less than \$10, the inspector must briefly explain in the referral the benefits or lack of benefits but need not develop specific dollar information. If it appears to the environmental law specialist that the economic benefit would be less than \$10, no evaluation with the BEN computer model is necessary. Environmental law specialists will include, in the draft formal enforcement actions, economic benefit estimates over \$10 after evaluation with the BEN model, but may omit as “de minimis” any economic benefit below \$10. Further direction for some specific violations is given in Attachment A (Air Quality), Attachment B (Land Quality) and Attachment C (Water Quality).

1) Costs of Compliance – Compliance with environmental regulations may require an entity to expend financial resources. These expenditures support the public goal of better environmental quality, but may not yield direct financial return to the entity. “Economic benefit” represents the financial gain that a violating entity accrues by delaying and/or avoiding investment in compliance. The gain may be described in money or in the value of non-money resource. For example, if an entity did not conduct required sampling, it may have avoided the monetary costs of chemicals and laboratory equipment and it also may have benefited by diverting staff to other work. Resources generally fall into two categories:

- *Avoided costs* are those costs of compliance which the entity did not pay.
- *Delayed costs* are those costs which the entity paid later than the law allows or requires. Note that when an entity spends money late, it’s likely that economic benefit was obtained because of interest and inflation.

Identifying *exact* costs avoided or delayed is difficult because entities often have more than one alternative to comply. For this reason, OAR 340-012-0150(1) specifies that the Department should calculate “the *approximate* dollar value of the benefit” (emphasis added). Staff should consider compliance options available to the entity related to the violation, make reasonable assumptions about what steps the entity should have taken to comply, and collect information on an option that meets the following criteria:

- The option must be consistent with the approach taken by the entity. “Going out of business,” which would have eliminated the economic benefit, is not consistent with the continued operations approach taken by the entity. Similarly, an option of inexpensive

storage of a waste for an indefinite time is not consistent with a disposal approach taken by the entity. If an entity implements a compliance option before the penalty is issued, then the value of that option should be used as the economic benefit.

- The option must be conservative. Staff should assume the entity would choose a less expensive option unless the entity actually did choose a more expensive alternative.
- The option must be reasonable. Staff should assume that the entity would choose an option that is generally favored in the industry.

After choosing a consistent, conservative and reasonable option, staff should use their expertise and common sense to identify the costs related to the violation. Be aware that there are some possible benefits that the Department will probably not pursue because of difficulties of proof, including illegal profits from selling illegal goods or services.<sup>1</sup> For suggestions on what information should be collected for some common violations, see Appendices A (Air Quality), B (Land Quality) and C (Water Quality).

2) Other information related to the costs – The actual cost of an item may not be a good estimate of the economic benefit received because of the effects of taxes, interest and inflation. The BEN model calculates and inputs standard values for the rates for these factors based on certain data. The data the model requires and which should be collected when collecting cost information includes:

- *Is the entity engaged in a for-profit activity or is this a personal venture like a residential activity?* If the cost was a business expense it would be tax deductible, lessening the value of the benefit. For example, if an entity was required to spend \$1,000 on pollution-control equipment, it could have deducted the \$1,000 from taxable income resulting in an economic benefit of about \$600.
- *Is the violating entity a natural person, a corporation, or some other legal entity?* Different types of entities are taxed differently. Take, for example, an entity that avoided paying \$1,000 one year ago. If the entity was an individual operating under an assumed business name it would save about \$50 more in taxes than if it were a corporation. The type of entity can be found by either calling the Secretary of State Corporations Division at 503-986-2200 or querying the “Business Name Search” on the Secretary of State Corporation Division website at <http://www.filinginoregon.com/>.

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<sup>1</sup> Other benefits the Department will generally not attempt to include are:

- *Advantage-of-risk* – the value of (1) the risk of never getting caught and (2) keeping future options open by delaying a decision to institute a process or purchase capital.
- *Competitive advantage* – (1) beginning production earlier than would be possible if in compliance; (2) attracting clients by avoiding compliance costs, having a higher profit margin and therefore being able to offer goods or services at a lower cost than competitors; (3) keeping those clients attracted by lower prices because of brand loyalty or high switching costs; or (4) using the time or money saved to increase production.

- *When did the violator need to spend the money to avoid the violation?* This is not necessarily the date the violation occurred. For example, a facility operating without the required permit on June 1 would have needed to pay for the permit application at an earlier date.
- *Did the entity eventually pay the amount; and if so when?* Even if an entity eventually pays the costs, it still gained a benefit through using the money it should have paid. We address this through an interest calculation. For example, if a company should have spent \$1,000 a year ago but did not spend it until today, the entity would have netted about \$60 in interest.
- *When did you determine the costs?* Over time, inflation lessens the value of money. If an entity would have had to pay \$1,000 for pollution control equipment a year ago, because of inflation, it would have to pay an estimated \$1,025 today. Conversely, if the company had to pay for pollution control equipment a year ago and that equipment would cost \$1,000 now, it would only have cost about \$975 a year ago. For this reason, it is important to know the date when the cost was determined to be \$1,000.

3) Mitigating information – Often timely compliance would have been less expensive than the follow-up cost, which may include more expensive studies and cleanups. The Department, on a case-by-case basis, may mitigate economic benefit with reasonable and related response costs paid by the entity.

4) Documentation – Inspectors and ELSs are expected to document information, estimates, and decisions in the file so that outside readers (*e.g.*, public, Court of Appeals, EPA auditors) understand why there was insufficient information or why the estimate is *de minimis* if no economic benefit were included in the penalty, or the basis of the calculations if one is included in the penalty.

## **E. INTERPRETATION**

The terms and provisions of this directive are subject to reasonable interpretations of the Department.

## **F. EFFECTIVE DATE**

This Directive is effective on

July 28, 2009

/S/

\_\_\_\_\_  
Date

\_\_\_\_\_  
Joni Hammond, Deputy Director  
Pursuant to OAR 340-012-0150

## ATTACHMENT A

### EXAMPLES OF ECONOMIC BENEFIT FOR COMMON AIR QUALITY VIOLATIONS

Below are some common examples of economic benefit in the Air Quality program. In calculating economic benefit, DEQ generally used the US EPA BEN model, which considers interest on unpaid amounts, inflation over time, tax deductibility and other factors that change the value of a benefit. **When collecting information on any avoided or delayed costs, also record:**

- **Approximate date the amount should have been spent.**
- **Date on which the estimate was determined.**
- **Whether the cost is avoided or, if only delayed, the date the entity spent it.**

#### Asbestos

*Failing to hire a licensed abatement contractor, or open accumulation of asbestos-containing waste material:*

- Costs of hiring a licensed contractor
- Costs of proper containerizing and disposal
- Cost of air clearance test, if applicable

*Conducting an abatement without certification or license if entity reasonably should have obtained one, for example the entity is a roofing contractor who typically handles asbestos waste or any other entity that knew it was handling asbestos waste:*

- Cost of training courses
- Certification or licensing fees

Costs of cleaning up asbestos, if paid for by the respondent, may be deducted from the respondent's EB related to improper management that led to the contamination.

#### Open burning

*Open burning of any type of debris:*

- Tipping fees – There are a couple ways to do this: (1) If the person mostly likely would have used a dumpster pickup service to avoid the violation, estimate the cost of the dumpster rental and pickup. (2) Otherwise, estimate the length, width and height of the pile. Use the worksheet available entitled “Calculating the Avoided Costs of an Illegal Burn” (available from OCE) which employs the formula  $\frac{1}{6} \times \pi \times \text{Length} \times \text{Width} \times \text{Height}$  to calculate volume. For EB purposes, use the size of the whole pile regardless of whether some of the materials could have been legally burned because the entity did not expend the time or money to separate the materials. Contact the local landfill or transfer station to determine the cost of tipping that volume of waste. If the station charges by the



ton, convert the volume to weight using the standard density in the worksheet or substitute a more specific density if known.

- Transportation – Consider including costs of hiring an excavator and trucker; renting a truck; the number of hours that would be spent by employees in loading, driving and unloading the truck; and fuel. Alternatively the distance from the open burn site to the landfill may be converted to a very conservative transportation cost using government standard mileage.

### **Air Permit Programs**

#### *Operating without a permit:*

- The amounts of the filing fees, application fees, initial permitting fees, and annual compliance determination fees and the dates they should have been paid
- Monitoring costs avoided while not operating under a permit
- For NSR/PSD ACD permits, include:
  - i) consultant and other application preparation costs,
  - ii) modeling and related costs, and
  - iii) costs of obtaining or upgrading pollution control equipment, or modifying the facility that will be required as part of the permitting process
- For Title V permits, include:
  - i) Base and annual emission tonnage fees and the dates they should have been paid (Note that the actual fees will be collected by the program.)
  - ii) Consultant and other application preparation costs

#### *Exceeding an emission limitation or performance standard:*

- Costs of evaluation, planning, purchase of the equipment and installation costs
- Costs of repairing, operating and maintaining the equipment during the period it was not installed

#### *Failure to conduct monitoring, source testing and/or record keeping:*

- Costs associated with monitoring or reporting including consultant charges, labor, equipment, and other related costs

## ATTACHMENT B

### EXAMPLES OF ECONOMIC BENEFIT FOR COMMON LAND QUALITY VIOLATIONS

#### Clean up

*Failing to sample and report as required by rules or agreements:*

- Cost of workplan preparation
- Costs of soil or groundwater sampling
- Costs of report preparation including consultant costs

*Failing to conduct quarterly groundwater monitoring:*

- Costs of installation of monitoring wells
- Operating costs (generally annual)
- Cost of sample analysis

*Failing to operate groundwater treatment/vapor extraction/free product removal system:*

- Design and installation costs (including permit fees and contractor costs)
- Annual operating costs

*Failing to complete corrective action plan:*

- Costs of sampling and analyses
- Costs of preparing the plan

#### Hazardous Waste

*Failing to make waste determination unless knowledge of process:*

- Cost of sampling and analyses
- Often failure to make a hazardous waste determination leads to avoided costs of lawful treatment or proper disposal

*Illegal disposal:*

- Costs of lawful disposal for any waste illegally disposed. For a routine waste stream find out how long the entity has been generating the waste and its approximate rate of generation. Find out from a hauler or TSD the cost of disposal
- Transportation

*Storing hazardous waste on-site longer than the rules allow:*

- Cost of on-time off-site shipment

*Violations that lead to a failure to report generation of hazardous waste:*

- Cost of the hazardous waste generator fees

*Failing to have hazardous waste training:*

- Cost of sending a person to training including tuition and time at the training
- Cost of having that person train the other necessary staff including everyone's time

*Operating a TSD without a permit if the facility needs a permit because it is not following generator requirements:*

- Costs of disposing of the stored hazardous wastes
- See other violations in this section and in clean up

*Failure to make required inspection:*

- Estimate the time it would take to make the required inspection, the frequency of the inspections, and the length of the period during which the inspections were not made

*Failure to have a tank or secondary containment properly certified:*

- Costs of installation if lacking needed tank or containment
- Consultant costs

### **Solid Waste**

*Operating a disposal site without a permit if a permit were a reasonable option:*

- Costs of obtaining a permit, including fees
- Costs of operating and maintaining the site which will depend on what kind of site it is
- Revenue for illegal operation if the could not have been permitted

*Operating a disposal site without a permit if a permit is not a reasonable option:*

- Costs of removing the waste from the site including labor costs, transportation costs and tipping fees (*see Attachment A – open burning for more detail*)

*Violating conditions of the permit:*

- Costs of site maintenance
- Groundwater monitoring well and sampling and analysis costs
- Cost of designing, installing, operating and maintaining liners or other structural pollution control technologies

### **Spills**

*Failing to clean up a spill:*

- Avoided cost of proper disposal
- Avoided costs of cleanup. Note however that a delay in cleanup often increases the cost of the eventual cleanup which normally the Department will consider as mitigation of the economic benefit.

### **Tanks**

*Violating permit requirements for operation and maintenance:*

- Cost of testing (*e.g.*, tightness testing) and other routine or annual costs
- Decommissioning costs including disposal of petroleum contaminated soil and soil sampling
- Unpaid permit fees
- Costs of installing and operating equipment, *e.g.*, automatic tank gauge or overflow protection

*Failing to investigate and clean up a release:*

- Costs of soil and groundwater sampling and analysis
- Cost of consultants or other costs of preparing required reports
- Costs of quarterly groundwater monitoring including costs of installing the monitoring wells, annual operating costs, and costs of sample analysis
- Costs of groundwater treatment, vapor extraction, and free product removal system including costs of design and installation (permit fees, contractor costs, etc.) and annual operating costs
- Cost of preparing the corrective action plan
- Costs of disposal of petroleum-contaminated soil or contaminated groundwater

## ATTACHMENT C

### EXAMPLES OF ECONOMIC BENEFIT FOR COMMON WATER QUALITY VIOLATIONS

#### WPCF and NPDES Permits

*Discharge without a permit if a permit was a reasonable option:*

- Permitting fees
- Routine sampling and analysis costs avoided during the period including chemical reagents, laboratory equipment, and staff time needed to collect and run samples

*Violating effluent limitations because the facility is not properly constructed, upgraded, repaired, or maintained:*

- Costs of evaluation, planning, purchase of the facility studies, upgrades and construction costs
- Costs of constructing, upgrading, repairing, maintaining, and/or operating

*Violating monitoring and reporting conditions of the permit:*

- Routine sampling and analysis costs avoided during the period including chemical reagents, laboratory equipment, and staff time needed to collect and run samples

*Violating general stormwater requirements:*

- For construction stormwater include as applicable silt fencing, erosion matting, hydroseed, and hay or straw bales; and the time it would have taken to install these controls

#### On-Site Violations

*Performing sewage disposal services without first obtaining a license from the Department:*

- Cost of the license (either new license or renewal license fee)
- Cost of surety bond during the period of the violation
- Cost of obtaining pumper truck inspections (for each truck)

*Discharge of sewage to the ground surface (by the owner of the property):*

- Cost of obtaining installation or repair permit for septic tank/system (minor or major)
- Cost of installing replacement septic tank/system
- Cost of proper disposal of sewage (from a holding tank, for example, in the event that the discharge is large enough that the sewage should have been pumped and taken away)

*Operating an unapprovable on-site system:*

- Cost of decommissioning the system

# ASSESSMENT OF MULTIPLE PENALTIES



State of Oregon  
Department of  
Environmental  
Quality

**Office of Compliance  
and Enforcement**

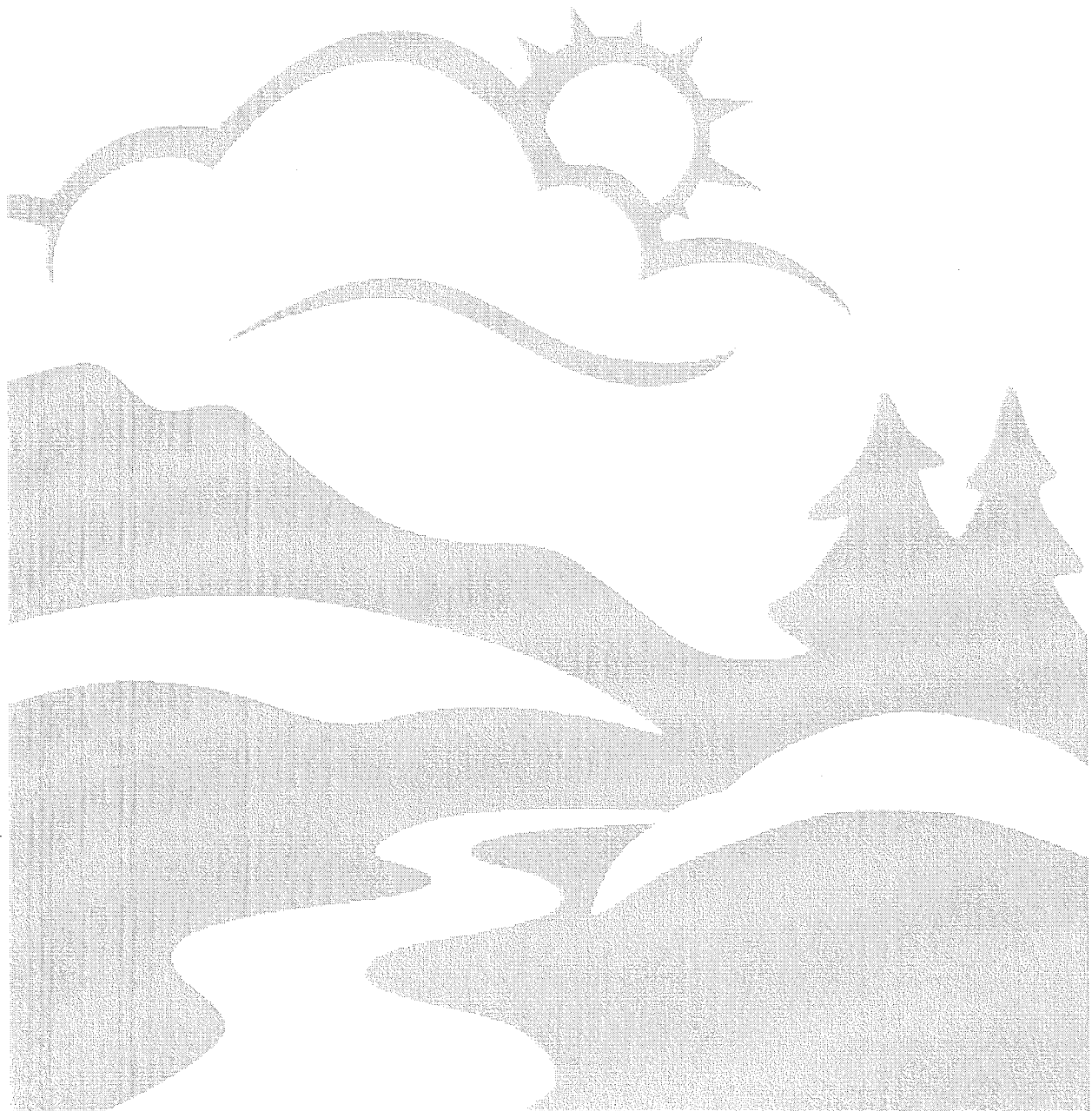
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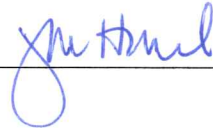
# Disclaimer

This directive is intended solely as guidance for DEQ employees. It does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create an enforceable right or benefit, substantive or procedural, enforceable at law or in equity, by any person. With written managerial approval, DEQ employees may deviate from this directive. DEQ anticipates revising this directive from time to time as conditions warrant.

# Document Development

Prepared By: Steven Siegel

Reviewed By: 

Approved By: 

Date: 11-28-14



# **Table of Contents**

1. Intent/Purpose/Statement of Need
2. Applicability
3. Background & Summary
4. Directive
5. Record of Revisions to IMD

# 1. Intent/Purpose/Statement of Need

DEQ works to promote and maintain consistency between enforcement cases in different geographic areas and in different programs. DEQ has discretion in whether to issue a penalty for identified violations, whether to issue separate penalties for multiple occurrences or days of violation, and when to use the “occurrences” factor in the penalty rules. An Internal Management Directive (IMD) is needed to outline the Director’s expectations when assessing penalties for multiple violations and multiple days of violation.

# 2. Applicability

- 1) This IMD applies to assessment of penalties for violations of all of the environmental statutes, rules, permits and Orders administered by DEQ.
- 2) This IMD is intended solely as guidance for DEQ staff in issuing formal enforcement actions.
- 3) This IMD does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It is not intended for use in pleading, at hearing or at trial.
- 4) This IMD does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create a right or benefit, substantive or procedural, enforceable by law or in equity, by any person. DEQ may take action which varies from this directive.

# 3. Background & Summary

Oregon Revised Statute (ORS) 468.140 makes a person liable for separate penalties for each violation of the various statutes, rules, permits, and orders issued and enforced by DEQ, and for each day of violation. However, DEQ is not required to issue a penalty for every violation or for every day of violation. This IMD creates consistency between enforcement cases in different geographic areas and in different programs by outlining the Director’s expectations regarding assessment of penalties for multiple violations and multiple days of violation.

# 4. Directive

Program-specific enforcement guidance identifies which violations will be referred to the Office of Compliance and Enforcement for determining whether it is appropriate to formally cite a regulated entity with a violation and to assess a penalty. Staff will consider the following in deciding whether and how to assess penalties for multiple days and occurrences of a violation.

## Assessment of Multiple Penalties

- a. Each violation that is independently referable under program-specific guidance should generally be assessed a civil penalty consisting of a base penalty as adjusted by the application of aggravating and mitigating factors and the appropriate economic benefit.\*
- b. Each violation that is cited in an unpaid Field Citation or Expedited Enforcement Offer, whether corrected or not, will be assessed a penalty.
- c. Generally, violations which are on-going or which occur on multiple occasions will be assessed a single civil penalty consisting of a base penalty as adjusted by the application of aggravating and mitigating factors and the appropriate economic benefit. In those instances, the “O” (repeated or continuing) factor in the civil penalty formula is used in place of assessing multiple penalties. Reliance on the “O” factor instead of separate civil penalties results in significantly lower total penalties.

In some instances, separate penalties for an ongoing violation or multiple occurrences of the same violation may be appropriate. Staff should consider recommending that DEQ exercise its discretion to assess separate penalties for on-going violations or multiple occurrences of the same violation when:

- 1) Violations have the potential to cause significant adverse impacts to the environment or significant threats to public health;
- 2) Violations result from flagrant action; or
- 3) Violations are chronic and prior formal or informal action by DEQ has not resulted in compliance, or the violator has demonstrated recalcitrance in correcting the violations.

If DEQ assesses separate penalties, the “O” factor for each violation will be set according to the number of occurrences represented by the separate penalty. *See* OAR 340-012-0145(4)(e). Additionally, if DEQ assesses separate penalties for violations occurring over a long time, DEQ may use its discretion to determine how many penalties to assess, based on the number of weeks, months, or years of the violation.

- d. Regardless of whether or not DEQ assesses other portions of the civil penalty formula for a violation, DEQ may still assess a penalty for the economic benefit associated with the violation.
- e. In calculating prior significant actions (PSAs) for subsequent enforcement actions, staff should count:
  - 1) Every violation cited in the earlier enforcement action, regardless of whether a penalty was assessed, is counted as an individual PSA.

---

\* NOTE: When a violation could be cited under multiple citations, do not penalize under the duplicative citations. When one violation necessarily leads to another, discretion may be used in determining whether to penalize the secondary violations or to cite without penalty.

## Assessment of Multiple Penalties

- 2) Any on-going violation is counted as one PSA regardless of the “O” factor value. An on-going violation is a violation which is continuing but was begun from one act or omission. Examples include: (i) a report submitted after the deadline would be one PSA; (ii) a discharge violation may be one or more PSAs, depending on whether the discharge was ongoing or repeated and how the previous violation “O” factor was alleged. Generally if the exhibit specifies the violation is on-going, allege one PSA.\*\*
- 3) Every occurrence of a non-ongoing violation which was alleged in the “O” factor is counted as a separate PSA. For example, if a person fails to submit multiple monthly reports, each month is a separate PSA.\*\*
- 4) Any violation which is separately cited for individual penalty in the earlier enforcement action, regardless of whether it was on-going, is counted as a separate PSA.\*\*

---

\*\* For monitoring violations count as separate PSAs, each separate outfall and each separate date of missing monitoring, but not each individual parameter. For effluent and emissions violations count as separate PSAs, each separate outfall, and each separate parameter, but only count each day of violation if the root cause of the exceedance is *not* ongoing.

## 5. Record of Revisions to IMD

<b>Revision</b>	<b>Date</b>	<b>Changes</b>	<b>Editor</b>
Changes to make the IMD consistent with the revised enforcement guidance	11/28/14	Total rewrite and reformatting	Steve Siegel

# Evaluating and Approving Supplemental Environmental Projects



State of Oregon  
Department of  
Environmental  
Quality

**Office of Compliance  
and Enforcement  
Office of the Director**

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## Disclaimer

This internal management directive represents the Department of Environmental Quality's current directions to staff on the criteria that must be considered when evaluating a supplemental environmental project (SEP) and the process used to approve a SEP. This IMD is not final agency action and does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This directive should not be construed as rule, although some of it describes existing state and federal laws. The recommendations contained in this directive should not be construed as a requirement of rule or statute. DEQ anticipates revising this document from time to time as conditions warrant.

## Document Development

Prepared By:     /s/ Les Carlough    

Reviewed By     /s/ Jenny Root /s/ Leah Koss    

Approved By:     /s/ Joni Hammond     Date:     1-11-13



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# 1. Intent/Purpose/Statement of Need

This internal management directive (Directive) is designed to enhance human health and the environment by encouraging respondents to complete or provide for the completion of “Supplemental Environmental Projects” (SEPs) in settlement of civil penalty actions. SEPs reduce the risk of further pollution, benefit public health, restore and protect the environment, and/or promote environmental compliance. SEPs result in benefits that would not otherwise occur, either because the actions are not required by law or would not be seen by the respondent as economically viable, were it not for the impending penalty action. This Directive outlines the conditions under which the Oregon Department of Environmental Quality (Department) will consider mitigating a penalty with a SEP.

## 1.1 Authority

The Department may consider SEPs in settlement pursuant to Oregon Revised Statute 468.130(3) and (4) and Oregon Administrative Rule (OAR) 340-012-0170, which allow the Director to mitigate penalties when the respondent is willing to employ extraordinary means to maintain compliance and when the settlement is consistent with protecting public health and the environment.

## 1.2 Applicability

- 1) This Directive applies to assessment of penalties for violations of all of environmental statutes, rules, permits and orders administered by the Department.
- 2) This Directive sets forth factors for the Department to consider in exercising its prosecutorial and settlement discretion. The Directive is not final agency action and is intended as guidance for staff. The Department may take action at variance with this Directive.
- 3) The Directive does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It is not intended for use in pleading, at hearing or at trial.

## 1.3 Internal Contact

Jenny Root, Environmental Law Specialist  
Office of Compliance and Enforcement  
Oregon Department of Environmental Quality  
811 SW 6<sup>th</sup> Ave.  
Portland OR, 97204-1390  
ph 503-229-5874  
fx 503-229-5100

# 2. Directive

The Department wishes to create a means through which respondents may reduce penalties by agreeing to fund projects that benefits public health and the environment in Oregon. The objective is to ensure deterrence through payment of the appropriate penalty, but to allow a respondent to supply a portion of the penalty in the form of the benefits of a SEP rather than cash. In order to ensure that performance of a SEP benefits the environment and deters violations of environmental laws, Department staff are directed to approve a SEP proposal only if it meets all

of the Required Criteria listed in Section 2.1 below and to give preference to those SEPs meeting the Preference Criteria listed in Section 2.2 below.

## 2.1 Required Criteria

To be approvable, a SEP must meet the following Required Criteria:

- 1) The SEP primarily benefits human health or the environment in Oregon;
- 2) The respondent's contribution to the SEP is worth at least as much as the penalty reduction;
- 3) The work and/or the environmental result under the SEP is not otherwise required by statute, rule, permit, or order; and is not set to become a future enforceable requirement as identified by a law, regulation or government register, except this requirement does not apply to a SEP directed to a small community<sup>1</sup> wastewater collection or treatment facility if (i) the SEP addresses existing effluent violations, and (ii) the SEP improves the ability of the wastewater facility to comply in the long term, and (iii) it is likely that the community would not otherwise be financially capable of meeting the requirement that is being violated;
- 4) The portion of the SEP attributable to the penalty reduction will not be funded by state or federal government loans, contracts or grants;
- 5) The responsibilities of the respondent under the SEP are commensurate with the respondent's expertise and capabilities, if respondent is doing the work rather than conferring the funds on a third party to do the work;
- 6) The SEP must not call for the Department to manage or control funds; or to manage or administer the SEP (though it may involve the Department in an oversight role);
- 7) The SEP will not necessitate significant DEQ staff time to plan, review, implement, monitor, or follow up (*e.g.*, a project where the respondent arranges to have the project carried out by an organization that regularly performs the kind of work proposed would be preferable to having a respondent work outside its area of knowledge);
- 8) The SEP will not be used to satisfy any statutory obligation or circumvent any statutory prohibition applicable to the Department;
- 9) The SEP does not create a significant market or economic advantage for the respondent; however, an otherwise acceptable project that has incidental advantage to the respondent may be accepted by appropriately valuing the SEP (see Section 2.3, below); and
- 10) The SEP must provide for a Final SEP Report to be submitted to the Department.

## 2.2 Preference Criteria

In deciding between alternative SEPs and whether to recommend approval of a penalty reduction for any particular SEP, staff should consider the extent to which the proposed SEP meets the following Preference Criteria:

---

<sup>1</sup> "Small community" means: (a) A city, including areas within a city's urban growth boundary, or an urban unincorporated community, that has a population of 5,000 or less; or (b) A community within the reservation of a federally recognized Indian tribe that is provided with services related to water pollution control by a public agency.

- 1) Projects should have a higher monetary value than the penalty reduction, either because the respondent donates additional resources or money or because the respondent or recipient leverages the money to gain additional resources or money for the project;
- 2) SEPs done to mitigate penalties for violations done willfully, flagrantly, or with criminal intent or violations done by chronic or recalcitrant violators generally should be performed by third parties rather than the respondent;
- 3) The violation was self-disclosed;
- 4) The violation was corrected expeditiously;
- 5) The SEP proposal contains all the information described below in Section 2.4. (Incomplete proposals may be rejected without further action);
- 6) The respondent submits a complete SEP proposal within 60 days of service of the Notice of Civil Penalty Assessment;
- 7) The penalty to be mitigated exceeds \$2,000 if the project is to be handled by the respondent rather than a third party;
- 8) The SEP relates to the same environmental program as the violation and will be implemented in the same geographic area as the violation;<sup>2</sup>
- 9) The SEP has measurable, or tangible, environmental outcome; and
- 10) The project fits into at least one of the following categories:<sup>3</sup>
  - a) Pollution Prevention – preventing waste or pollution at the source, by conserving energy or natural resources, or by making process changes (such as chemical substitutions) or by making a process more efficient so that less waste is created for a given amount of product;
  - b) Pollution Reduction – reducing the amount and/or danger presented by some form of pollution, often by providing better treatment and disposal of the pollutant;
  - c) Public Health Protection – for example, medical examinations of residents in a community to determine if anyone has experienced any health problems because of the violations;
  - d) Environmental Restoration and Protection – improving the condition of the land, air or water in the area damaged by the violation. For example, by planting native riparian vegetation, a respondent could improve aquatic habitat by reducing water temperatures;
  - e) Planning and Preparedness for Environmental Emergencies – providing assistance to a responsible state or local emergency response or planning entity. Such assistance may include the purchase of computers and/or software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training.
  - f) Assessments and Audits to determine if the respondent is causing any other pollution problems or can run its operations better to avoid violations in the future.
  - g) Environmental education, training and outreach – providing assistance, either through direct contracting or through funding to prepare, publish, produce, and/or distribute outreach, training, or educational materials on environmental issues significant to Oregon. Examples might include direct training or assistance to an operator of a small

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<sup>2</sup> While DEQ prefers that SEPs have a “nexus” to the violation, this is not a state legal requirement as it is under EPA’s final Supplemental Environmental Projects Policy, (April 10, 1998) which can be found at [www.epa.gov/Compliance/resources/policies/civil/seps/sepfinal2.pdf](http://www.epa.gov/Compliance/resources/policies/civil/seps/sepfinal2.pdf).

<sup>3</sup> Additional information about these categories can be found in the EPA final SEP policy at the above website.

- community wastewater treatment plant or contribution to environmental inspection training programs conducted by nonprofits such as the Western States Project;
- h) Environmental Compliance Promotion – providing training or technical support to other members of the regulated community to achieve, or go beyond, compliance with applicable environmental requirements.
  - i) Other projects that have environmental merit but do not fit within the categories listed above. These types of projects must be fully consistent with all other provisions of the SEP Policy and be approved by the Department.

## 2.3 Determining the Amount of Penalty Mitigation

SEPs are valued by the following method:

- 1) Add all the qualifying costs of the SEP proposed by the respondent. Qualifying costs are all the reasonable costs of executing the SEP, which may include:
  - (i) reasonable costs of preparing an approved SEP proposal;
  - (ii) costs of materials and services;
  - (iii) wages (appropriate to the work) paid to a respondent's employees for time spent on the SEP so long as the time is only spent on the SEP and the respondent documents the days and hours during which the employee worked on the SEP and includes that accounting in its final close-out report;
  - (iv) wages (appropriate to the work) and proportional overhead paid to employees of a third party executing the SEP; and
  - (v) any other reasonable and proper costs of preparing, organizing, and executing the SEP.
  - (vi) Under no circumstances may SEP monies be used for entertainment or refreshment costs.
- 2) In cases where the respondent will likely gain an economic benefit from the SEP, DEQ may reduce the value of the SEP accordingly. In making this determination, the Department may use the US EPA PROJECT computer model.<sup>4</sup>
- 3) When a SEP calls for payments to be made in the future, the value of the SEP may be adjusted to reflect the difference in value of present vs. future payments.
- 4) Department staff may consider a SEP that might not otherwise meet preference criteria if the value of the SEP exceeds the value of the penalty reduction, or if the SEP has components that benefit the public or environment at large, are innovative, address environmental justice concerns, incorporate community input, or have multimedia benefits.
- 5) Determine the final penalty as follows: Determine the settleable penalty which is the dollar value of the penalty after taking into consideration all information and agreements other than the value of the SEP. Subtract the amount respondent will contribute to the SEP from the settleable penalty. Generally, a settleable penalty may not be reduced by more than 80%.<sup>5</sup>

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<sup>4</sup> The PROJECT model and user's manual can be found at [www.eap.gov/oeca/models/](http://www.eap.gov/oeca/models/).

<sup>5</sup> Example: Respondent receives a Notice of Civil Penalty Assessment for \$10,000. During informal discussions, DEQ learns information leading it to believe the penalty should be reduced to \$8,000. The maximum penalty mitigation would be 80% of the

## 2.4 SEP Proposal Procedures

- 1) Proposals for SEPs are solely the responsibility of the respondent and must include the following:
  - a) A description of expected benefits and results and how benefits and results will be measured or assessed;
  - b) A summary of the estimated value of the SEP, listing the costs that will be paid by the respondent and crediting any leveraged amounts that will cover other related costs; and
  - c) A proposed schedule including milestones for completion, culminating in the submission of a Final Close-out Report to DEQ.  
Department staff may assist a respondent in identifying possible SEPs. However, staff should not advocate for a particular project or particular recipient of the funds without first obtaining the approval of the Administrator of the Office of Compliance and Enforcement. The Administrator of the Office of Compliance and Enforcement has sole authority to reduce a penalty with a SEP and to commit DEQ to agreeing to a particular SEP.
- 2) A respondent may wish to submit a pre-proposal outlining a proposed project before doing the work necessary to create a final SEP proposal. A pre-proposal should contain sufficient information to show that the project is likely to meet the requirements set forth in this guidance. Once a pre-proposal is submitted to the Environmental Law Specialist (ELS) handling the case, the ELS will consult with the relevant regional and headquarters staff, manager and administrator, and make a recommendation to the Administrator of the Office of Compliance and Enforcement. Approval of a pre-proposal by the OCE Administrator indicates that the Department agrees that the concept appears to meet the SEP criteria and will likely approve that particular SEP. However, approval and acceptance is only made final upon full agreement with the respondent on the costs, benefits, schedules and other terms of the final SEP as incorporated into a Mutual Agreement and Order (MAO) described below.
- 3) A final SEP proposal must be submitted to the ELS handling the case. An address and phone number for that person will be listed on the cover letter of the Notice of Violation and Civil Penalty Assessment.
- 4) In determining whether any given SEP proposal fits within this Directive, the ELS will consult with the relevant regional staff, management and others as needed. Once the ELS has completed an evaluation, the ELS will make a recommendation to the Administrator of the Office of Compliance and Enforcement.

## 2.5 SEP Settlement Procedure

- 1) A SEP must be accurately and completely described in a MAO which may incorporate the SEP proposal if the proposal itself provides sufficient detail.

- 2) The MAO must include the following:
  - a) Respondent must not use the value of a SEP as a tax deduction or as part of a tax credit application.
  - b) Respondent must agree that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an Oregon DEQ enforcement action.
  - c) A requirement for a Final SEP Report to be submitted to the Department according to a schedule defined in the MAO. The Final SEP Report must include a detailed description of the expenses, copies of relevant receipts, explanation of measurable results, and a certification that the SEP is complete as described in the report.
  - d) If respondent fails to complete the SEP as required, the penalty will become due (including the portion of the penalty that would have been mitigated because of the SEP, plus statutory interest (currently 9% annual) on the whole amount). At its discretion, DEQ may give credit for a partially completed project.
  - e) If respondent is conveying the money to a third party for execution of the SEP, the Department may agree to have the payment of the penalty be the respondent's only deliverable under the MAO, as long as the third party is required to carry out the work and provide the Final Close-out Report.
- 3) The Department's Office of Compliance and Enforcement will give information to the appropriate Communications and Outreach staff to generate a news release on every MAO that includes a SEP.

## 2.6 Effective Date

This Directive is effective on January 10, 2013.

# Appendix A

Revision	Date	Changes	Editor
	1/10/13	Add small communities and educational SEPs	Les Carlough



# Appendix H

## THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S INTERNAL MANAGEMENT DIRECTIVE ON SELF-POLICING, DISCLOSURE, AND PENALTY MITIGATION

### I. PURPOSE

This Internal Management Directive (Directive) is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily prevent, discover, disclose, and correct violations of Federal, state and local environmental requirements. It also encourages facilities to create and maintain environmental management systems and to take other steps to review compliance within their operations. Benefits available to entities that make disclosures under this Directive include reduction or possible elimination of civil penalties and a determination not to recommend criminal investigation of the disclosing entities. The penalty provisions of this Directive apply only to violations for which the Department of Environmental Quality (Department) would have assessed a penalty had it discovered the violations.

### II. AUTHORITY

Oregon Administrative Rule (OAR) 340-012-0160(2) provides that “the director may reduce any penalty by any amount the director deems appropriate if the respondent has voluntarily disclosed the violation to the department. In deciding whether a violation has been voluntarily disclosed, the director may take into account any considerations the director deems appropriate, including whether the violation was (a) Discovered through an environmental auditing program or a systematic compliance program; (b) Voluntarily discovered; (c) Promptly disclosed; (d) Discovered and disclosed independent of the government or a third party; (e) Corrected and remedied; (f) Prevented from recurring; (g) Not repeated; (h) Not the cause of significant harm to human health or the environment; and (i) Disclosed and corrected in a cooperative manner..

### III. APPLICABILITY

- 1) This Directive applies to assessment of penalties for violations of all of the environmental statutes and rules administered by the Department.
- 2) The Directive is not final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.
- 3) This Directive applies to assessing civil penalties for both administrative and civil judicial enforcement actions, and for determining when criminal referral is appropriate. It is not intended for use in pleading, at hearing, or at trial.
- 4) This Directive applies only to violations disclosed after the effective date of this guidance.

#### IV. DEFINITIONS

“*Environmental audit*” means a voluntary, internal and comprehensive evaluation of one or more facilities or an activity at one or more facilities regulated under Oregon Revised Statute (ORS) 824.050 to 824.114 or ORS chapters 465, 466, 468, 468A, 468B or 825, or the Federal, regional or local counterpart or extension of such statutes, or of management systems related to such facility or activity, that is designed to identify and prevent noncompliance and to improve compliance with such statutes. An environmental audit may be conducted by the owner or operator, by the owner’s or operator’s employees, or by independent contractors.

“*Environmental audit report*” means a set of documents each labeled “Environmental Audit Report: Privileged Document,” and prepared as a result of an environmental audit. An environmental audit report may include field notes and records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs and surveys, provided such supporting information is collected or developed for the primary purpose and in the course of an environmental audit. An environmental audit report, when completed, may have three components:

- a) An audit report prepared by the auditor, which may include the scope of the audit, the information gained in the audit, conclusions and recommendations, together with exhibits and appendices;
- b) Memoranda and documents analyzing portions or all of the audit report, perhaps discussing implementation issues; and
- c) An implementation plan that addresses correcting past noncompliance, improving current compliance and preventing future noncompliance.

“*Gravity-based penalties*” means that portion of a civil penalty (determined pursuant to OAR 340-12-0045), but excluding the economic benefit portion of the civil penalty determination.

“*Knowingly*”:

- a) Has the meaning given that term in ORS 161.085; or
- b) Means that a person acts with a conscious purpose to avoid knowledge of a conduct or a circumstance in violation of ORS 824.050 to 824.110 or ORS chapters 465, 466, 468, 468A, 468B or 825.

“*Regulated entity*” means any person, facility, or entity, including a Federal, state, or municipal agency, regulated under Federal, state, or local environmental laws.

“*Substantial harm to human health or the environment*” means:

- a) Physical injury, as defined in ORS 161.015, to a human being or demonstrable substantial risk of serious physical injury, as defined in ORS 161.015, to a human being; or
- b) Substantial damage to wildlife, flora, aquatic or marine life, to habitat or to livestock or agricultural crops.

“*Violation*” means a transgression of any statute, rule, order, license, permit, or any part thereof under the jurisdiction of the Department, and includes both acts and omissions.

## V. DISCUSSION AND DIRECTIVE

**In determining what, if any, action the Department should take regarding self-disclosed violations, the Director expects DEQ staff to apply the “Department Responses” below.**

### A. Department Responses

This section identifies the major incentives provided to encourage self-policing, self-disclosure, and prompt self-correction. These incentives include, when appropriate, reducing gravity based penalties, declining to refer for criminal prosecution regulated entities that self-report violations, and refraining from routine requests for audits reports.

1. Reduction of Gravity-Based Penalties by 100%: The Department will reduce the gravity-based penalty assessment by 100% for violations of environmental statutes, rules, and permits if the regulated entity establishes that it satisfies all of the conditions of Section B of this Directive. That is, this incentive only applies to regulated entities that have performed environmental audits, or have initiated “systematic compliance” to assess ongoing environmental compliance.
2. Reduction of Gravity-Based Penalties by 50%: The Department will reduce the gravity-based penalty assessment by 50% for violations of environmental statutes, rules, and permits if the regulated entity establishes that it satisfies the conditions in Section B other than Paragraph B.1. That is, this incentive applies to regulated entities that self-report violations and meet the other conditions of this Directive but do not discover the violation(s) pursuant to an environmental audit or systematic compliance.
3. Additional Gravity-Based Penalty Reduction: The Department will consider reducing the gravity-based penalties assessed under paragraph 2 of this section up to 100% if the regulated entity demonstrates that it took, or is willing to take, exceptional measures to reduce or prevent pollution beyond a level otherwise required by law.
4. No Criminal Recommendations:
  - a) The Department will not recommend to any prosecuting authority that criminal charges be brought against a regulated entity if the Department determines that Paragraphs B.2 through B.9 are satisfied, so long as the violation does not demonstrate or involve:
    - i) A prevalent management philosophy or practice that concealed or condoned environmental violations; or
    - ii) Knowing involvement in or deliberate ignorance of the violations by responsible corporate officials or managers; or
    - iii) Substantial harm to human health or the environment.
  - b) Whether or not the Department refers the regulated entity for criminal prosecution under this section, the Department may recommend prosecution of the criminal acts of individual managers, employees, or agents.

5. No Routine Request for Audits: The Department does not routinely request environmental audit reports to initiate administrative, civil, or criminal investigations of regulated entities. Any request by the Department for environmental audit reports is subject to applicable statutes, rules, and Department Directives.

## **B. Conditions for penalty mitigation and abstention from criminal recommendation**

This section identifies the conditions that regulated entities must meet to qualify for the incentives, pursuant to the terms and conditions of this Directive. The Department retains sole authority and discretion in determining whether a regulated entity has met the relevant conditions. The Department's determination will be based on information readily available to the Department, including information provided by the regulated entity. For incentives to be applied, the following must occur:

1. **Discovery**: The violation is discovered through:
  - a) An "environmental audit;" or
  - b) "Systematic compliance" which means the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, disclose, and correct violations through all of the following:
    - i) Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of statutes, regulations, permits, and other sources of authority for environmental requirements;
    - ii) Assignment of overall responsibility to a person with authority to make decisions regarding environmental compliance for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
    - iii) Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
    - iv) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents whose duties involve environmental compliance;
    - v) Appropriate incentives to managers and employees to perform in accordance with compliance policies, standards, and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
    - vi) Procedures for the prompt and appropriate disclosure to the Department or the appropriate entity (e.g., the Oregon Emergency Response System), for the prompt and appropriate correction of any violations, and for any modification necessary to the regulated entity's program to prevent future violations.
2. **Voluntary Discovery**: The violation is identified voluntarily by the regulated entity and not through a mandated monitoring, sampling or auditing requirement prescribed by statute, regulation, permit, variance, judicial or administrative order, mutual agreement and order, or

consent agreement. This condition does not, however, exclude violations discovered through a routine environmental audit or systematic compliance established pursuant to a consent agreement, provided such an agreement is part of a voluntary program entered into between the regulated entity and the Department, or any Federal, state, or local unit of government.

"Voluntary Discovery" does not include:

- a) Emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required by statute, rule, or permit; or
- b) Violations of waste discharge requirements or National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;
- c) Spills of oil or hazardous materials that enter waters of the state; or
- d) Violations discovered through a specific or one-time compliance audit required to be performed by the terms of a consent order, variance, or settlement agreement.

The voluntary requirement applies to discovery only, not reporting. That is, any violation that is voluntarily discovered is generally "voluntary discovery" regardless of whether reporting of the violation is required after it is found.

3. **Prompt Disclosure** Except as provided in this section, the regulated entity fully discloses in writing to the Department the specific violation within 21 days (or within such shorter time as may be required by law) after it discovered that the violation occurred, or may have occurred.
  - a) Full disclosure requires detailed documentation of the facts surrounding the violation, including, at a minimum, written information on the type of violation, location where the violation occurred, duration of the violation, and any underlying discharge, monitoring, sampling, operation, or permit data upon which the regulated entity relied to determine that a violation occurred. For suspected violations, the regulated entity must provide to the Department the rationale and relevant data for such suspected violation(s). If more than 21 days would be needed to prepare the detailed documentation of the facts surrounding the violation, the regulated entity may disclose the specific violation within 21 days in writing to the Department, and as part of the same disclosure propose a longer period of time to provide to the Department the detailed documentation of the facts.
  - b) The Department will accept disclosures later than 21 days as "prompt" when the regulated entity demonstrates, to the satisfaction of the Department, that the additional time is reasonably needed to determine compliance status and did not cause significant harm, or pose significant risk of harm, to human health or the environment.
  - c) Disclosures made pursuant to this Directive and any compliance agreements reached under this Directive, are subject to the Oregon Public Records Law.
4. **Discovery and Disclosure Independent of Government or Third Party:** The violation is identified and disclosed by the regulated entity prior to discovery or disclosure of the violation through:
  - a) The commencement of a Federal, state, or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

- b) Notice or commencement of a citizen suit;
- c) Commencement of litigation by a third party;
- d) The reporting of the violation to the Department (or other government agency) by a "whistle blower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
- e) Discovery of the violation by a regulatory agency.

For entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Department from exercising its discretion to make this Directive available for violations self-discovered at other facilities owned or operated by the same regulated entity.

5. **Correction and Remediation:** To the extent that a violation can be corrected, the regulated entity satisfactorily corrects the violation as promptly as practicable, certifies in writing that violations have been corrected, and takes appropriate measures to remedy any significant harm, or significant risk of harm to human health or the environment. The Department may require that, to satisfy conditions 5, 6, and 8, a regulated entity enter into a publicly-available written agreement, administrative consent order, variance, or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required. In meeting this condition, the regulated entity does not need Department approval before correcting the violation; however, the Department retains sole discretion to determine whether the regulated entity has satisfactorily corrected the violation.
6. **Prevent Recurrence:** At the request of the Department, the regulated entity agrees, in writing, to take steps to prevent a recurrence of the violation. Such steps may include improvements to its environmental auditing or systematic compliance efforts.
7. **No Repeat Violations:**
  - a) The regulated entity must not have received notice from the Department (i.e., through a warning letter or formal Department enforcement action) that indicates that the regulated entity committed the same violation at the same location or distinct facility within the past three years from the date the warning letter or formal enforcement action was issued
  - b) The violation must not be a part of a series or pattern of similar Federal, state, or local violations by the regulated entity, which occurred within the past three years, and which reflect a prevalent management philosophy or practice that concealed or condoned environmental violations or knowing or negligent involvement in or deliberate ignorance of the violations by high-level corporate officials or managers. The Department will consider all the facts and circumstances relating to any prior violation in determining whether it is a repeat violation.
8. **Other Violations Excluded:** The violation is not one that: i) resulted in significant harm, or posed significant risk of harm, to human health or the environment, or ii) violated the specific terms of any judicial or administrative order, variance, mutual agreement and order, or consent agreement.



# Appendix I

## THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S INTERNAL MANAGEMENT DIRECTIVE ON CONDUCTING THE CRIMINAL ENFORCEMENT PROGRAM

### I. Purpose

This Internal Management Directive (Directive) is established to direct staff in deciding which environmental violations should be referred to criminal investigators; to identify the appropriate roles, responsibilities and channels of communication for DEQ staff; and to define key decision-making points and responsibilities.

### II. Authority

Oregon Revised Statutes (ORS) 468.035(1) authorizes DEQ to “seek enforcement” of Oregon environmental laws and to take “any acts as may be necessary, proper or desirable to carry out effectively [it’s] duties, powers and responsibilities.” ORS Chapters 161, 448, 454, 459, 466, and 468 (especially 468.920 through 468.963) establish criminal penalties for certain violations of environmental laws administered by DEQ. Pursuant to ORS 468.035(1)(c), DEQ consults with and provides advice to other agencies who are empowered to investigate and prosecute environmental crimes.

### III. Applicability

- This Directive applies to all DEQ program areas where Oregon statutes establish environmental crimes provisions, including but not limited to solid waste, underground storage tanks, spills of oil or hazardous material, hazardous waste, asbestos, air pollution, and water pollution.
- This Directive directs staff about their roles and responsibilities with regard to environmental crimes.
- This Directive sets forth factors staff should consider in deciding whether to refer tips, complaints and other information for criminal investigation.
- This Directive is not final agency action and is intended as a directive to staff. DEQ may take action that varies from this Directive.
- The Directive does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. It is not intended for use in pleading, at hearing or at trial.

### IV. Background and Objectives of the Criminal Program

Before 1993, Oregon lacked the needed agency infrastructure to coordinate investigation and prosecution of environmental crimes. As a result, there was virtually no criminal prosecution of any environmental violations. In 1993, the Oregon Legislature adopted The Environmental Crimes Act (Act) which established the state’s first environmental felonies.



The most important reason for having an environmental crimes program is deterrence. There are two types of deterrence: specific and general.

- Specific deterrence is directed at the specific person or entity that committed the violation. DEQ has a strong interest in creating specific deterrence for the purpose of educating the violator and through consequences, showing them why they should not violate again.
- General deterrence refers to the widespread deterrence achieved from others seeing the consequences one violator faced for committing the violation. The goal is that when others observe these consequences they too are deterred from committing the same violation.

Criminal sanctions can be more effective at creating deterrence than administrative enforcement for several reasons. First, the penalties for criminal violations can include jail time, which is a personal cost not easily passed on to the employer or customers. Second, the stigma associated with being labeled a “criminal” may affect a business or someone’s reputation in ways an administrative penalty may not. Third, criminal convictions can result in debarment from government contracts, and complications with insurance or other business contracts.

## **V. The Environmental Crimes Coordination Team**

Following adoption of the Act, DEQ formed an Environmental Crimes Coordination Team (ECCT) to maintain and promote communication between the various participants in the criminal investigation process. The ECCT consists of representatives of DEQ, Oregon State Police, EPA’s Criminal Investigation Division (CID), and the Oregon Department of Justice.

Each of the primary players in the environmental crimes program has a defined area of expertise. DEQ inspectors understand the science behind the law and the technical requirements. Laboratory personnel understand the required sampling and analysis protocols. Criminal investigators know the legal aspects of a criminal investigation. Criminal prosecutors understand the legal and criminal system. The communication problems that can result from these separate areas of expertise can result in a case not being properly investigated or prosecuted.

To minimize these communication issues, the ECCT meets regularly to discuss violations which may warrant a criminal investigation. In these meetings, the facts and circumstances are discussed and the criminal investigators determine whether to initiate a criminal investigation. The ECCT also discusses the progress of ongoing criminal investigations. Each party’s roles are outlined further below:

### Environmental Crimes Coordinator

The ECC is housed in DEQ’s Office of Compliance and Enforcement (OCE) and is responsible for coordinating the flow of information and advice between all of the parties involved in the criminal process. The ECC also chairs the meetings of the ECCT.

### Criminal Investigators

The ECCT benefits from the expertise of both state and federal environmental crimes investigators. The Oregon State Police (OSP) representative is a Senior Trooper who maintains an office in DEQ headquarters.<sup>1</sup> EPA's CID agents are housed in the EPA building near DEQ headquarters. These investigators gather evidence and present possible cases to a prosecutor for criminal prosecution in a court of law.

### Prosecutors

Prosecutors, which can be with the County District Attorneys' offices, U.S. Attorney General's office or Oregon Department of Justice, decide whether the facts and circumstances warrant prosecution, oversee preparation of evidence for trial, negotiate plea (settlement) agreements, and conduct the trial. Ultimately, it is the prosecutor's job to determine the government's position on whether a criminal case can and should be brought.

### DEQ's technical staff (inspectors)

DEQ inspectors are not criminal investigators and cannot determine that a violation is a crime or that it should be investigated as a crime.<sup>2</sup> DEQ inspectors use the administrative authority given to DEQ to administer its regulatory program, to identify violations, and to collect evidence for administrative enforcement. However, DEQ's inspectors can become involved in a criminal investigation and the ensuing legal case in several ways.

First, DEQ's inspectors are the most likely person to find a violation during their routine inspections of facilities, through complaint investigation, or through reviewing reports. Thus if a criminal investigation is initiated, the OSP trooper or EPA-CID agent will likely contact DEQ's inspectors for information, documents, or sample results. Additionally, DEQ's inspectors are uniquely able to assist criminal investigators in understanding the regulations, due to their technical expertise. Similarly, DEQ's inspectors can be called as a witness in a criminal trial, either as a factual witness to explain what they discovered during an inspection or as a technical expert. DEQ's inspectors are expected to assist and fully cooperate with the criminal investigator and prosecutor.

Even if an inspector knows that a criminal investigation is underway, DEQ's administrative authority continues. An inspector should do what they would normally do in any other case - their best work using DEQ's administrative authority for the purpose of putting together an administrative enforcement case. Any evidence obtained during the investigation, may ultimately be shared with criminal investigators and prosecutors and used in a criminal prosecution.

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<sup>1</sup> Although the OSP officer is available to help DEQ staff with criminal investigations, questions about whether a violation is appropriate for a criminal investigation should be directed to the ECC. The officer may also be helpful when there is an issue about safety during a DEQ inspection and will serve as DEQ's primary contact with other OSP officers throughout the state, including an additional 12 officers responsible for water quality laws under the Oregon Plan.

<sup>2</sup> For this and ethical reasons, inspectors must never threaten possible criminal action when trying to obtain compliance from the regulated public.

**While there is no legal bar to assisting criminal investigators or prosecutors in their investigation or sharing evidence obtained by DEQ with a criminal investigator, a DEQ inspector cannot *pretend* to be doing an administrative inspection while actually collecting evidence *solely* for a criminal investigation. The standard is good faith – if you have a good-faith reason to collect the evidence for your administrative investigation, you may do so, even if you know or suspect a criminal investigator might want it also.** Criminal investigators cannot direct a DEQ inspector to collect information or evidence unless they involve the inspector in a criminal search warrant, in which case a DEQ inspector should follow the criminal investigator's directions.

If a DEQ staff person becomes involved in a criminal investigation, it is important that DEQ staff maintain any communication regarding the criminal investigation or any communication shared with criminal investigators as confidential, even if DEQ created that communication for its administrative case. DEQ staff must share that information only for work purposes and only with their manager or relevant co-workers. When in doubt about whether a communication should be kept confidential, please contact the ECC.

When asked by others regarding the progress of a criminal investigation, DEQ inspectors should specify that DEQ does not perform criminal investigations and must not confirm or deny the existence of a criminal investigation. When in doubt about an appropriate response, please contact the ECC.

## **VII. Criminal Enforcement – Step by Step Process**

- DEQ inspector discovers an environmental violation through a routine inspection, complaint, informant's or employee's tip, or from another federal, state or local agency.
- DEQ inspector reviews the evidence supporting the violation to see if any of the following criteria are present:
  1. Is there a clear violation of law? Although this seems basic, the misconduct must be in clear violation of a statute, rule, permit or order. Typically, if DEQ developed a policy to clarify an otherwise ambiguous law, a violation of that policy would not be a good criminal case.
  2. Is there a history of noncompliance by this person which indicates that administrative enforcement is not reaching the needed result? The history does not necessarily have to be limited to actions taken by DEQ but can involve similar violations in other states or similar/related violations cited by other agencies.
  3. Was the violator's conduct deceitful, deliberate or dishonest? Good examples are when the violator files false reports, attempts to conceal the misconduct or tampers with monitoring equipment. Also be aware of those circumstances where a person willfully blinds himself to the fact that he is engaging in illegal conduct.

4. Did the violation result in or threaten significant damage to the environment or human health? Although damage is not required, investigators and prosecutors are more likely to be interested in pursuing an environmental crime when the damage or potential damage is clearly evident and significant.

- If the answer to question #1 and any of the other questions is “yes,” the inspector should contact the ECC. If the ECC determines that the violation may warrant a criminal investigation, DEQ staff drafts a memorandum to the ECC outlining the violations and the facts supporting the violations. At this point, the DEQ inspector should not send the enforcement response required under the Enforcement Guidance for Field Staff until after a determination has been made whether or not to pursue a criminal investigation.

- The ECC presents the case to the ECCT although the ECC may ask the DEQ inspector to attend the meeting to provide additional information. OSP or EPA-CID will determine if they are interested in conducting a criminal investigation. Some of the questions they may ask about the case are:

- What resources are necessary to conduct the investigation (staffing, monitoring, testing)?
- What is the clarity and complexity of the statute, rule or permit violated?
- Was the person cooperative with DEQ or other regulatory authorities?
- Did the person voluntarily correct the violation or minimize the violation prior to DEQ involvement?
- How reliable is the source of the complaint? What is the complainant’s motivation for filing the complaint?
- Can the evidence supporting the violation be verified through independent means?
- Is there reliable evidence of the violation *e.g.*, photographs or samples, or must prosecutors rely solely on oral testimony?
- Is a criminal prosecution necessary and appropriate to establish the appropriate level of deterrence or to establish a level playing field?
- Are there extenuating circumstances that mitigate the egregiousness of the violation?
- Does the evidence support the higher burden of proof required for a criminal case *e.g.*, “beyond a reasonable doubt”?
- Are there other possible explanations for the violation?
- Is there an immediate danger to life or property?
- Is there a high risk of or actual environmental harm or harm to the public health?
- How long has the violation been on-going?

- If OSP or EPA-CID decide to pursue a criminal investigation, they will contact the DEQ inspector (and DEQ laboratory, if necessary) to discuss the evidence the DEQ inspector has and to obtain technical assistance. At this point, the ECC and the DEQ inspector should discuss whether to issue the appropriate enforcement response under the Enforcement Guidance for Field Staff (*i.e.*, PEN, WL or EEO). DEQ may delay issuing its enforcement response if doing so may risk the criminal investigation.

- OSP or EPA-CID conduct an investigation, write a report, and present evidence of the crime to the prosecutor. The prosecutor may ask additional questions of OSP, EPA-CID or DEQ staff before deciding whether to prosecute the violation as a crime.

## VII. Parallel Case Proceedings

For the purposes of this document, parallel proceedings means criminal and administrative enforcement activities with respect to the same or related parties or same or related conduct.

In general, there is no legal prohibition to imposing both criminal and administrative sanctions against the same person for the same conduct. In most cases, DEQ will commence an administrative enforcement action while a criminal investigation is being conducted. The DEQ inspector should proceed with issuing the appropriate enforcement response and completing a referral to the OCE for issuance of an administrative enforcement action once the DEQ inspector has consulted with the ECC, as outlined above.

Once OCE receives the referral from the DEQ inspector, the assigned ELS, the OCE manager and the ECC will determine if DEQ should delay issuing an administrative enforcement case until after the criminal investigation is completed.

Often, even if DEQ issues an administrative enforcement case, the resolution of that case may be delayed until criminal proceedings are resolved. This is because the violator is likely to raise self-incrimination or other challenges if DEQ attempts to finalize an administrative case that is related to a pending criminal case since their testimony in an administrative hearing can be used as evidence in the criminal proceeding. Additionally, the results in a criminal case can be used in favor of DEQ in an administrative case.

DEQ staff should consult with the ECC on legal issues in relation to cases or violators which are under criminal investigation, to ensure that DEQ takes a consistent position on the interpretation of regulations and statutes. OCE staff should inform the ECC of the current status of any administrative case including setting of a contested case hearing, settlement negotiations, and compliance status for those matters which are under criminal investigation.

## VIII. Directive and Effective Date

I direct that DEQ staff take the steps and actions described by this Directive. This Directive is effective on:

3-25-13  
Date

  
\_\_\_\_\_  
Joni Hammond, Deputy Director

## SUMMARY OF ENVIRONMENTAL CRIMES

### HAZARDOUS WASTE:

*Misdemeanor:* The person, in violation of any hazardous waste statute, rule, license, permit or order, knowingly treats, stores, disposes of or transports hazardous waste.  
[ORS 468.922, 468.929; Punishable by a fine up to \$10,000 and one year imprisonment.]

*Felony:* The person, in violation of any hazardous waste statute, rule, license, permit or order, knowingly disposes of, stores, or treats hazardous waste and:

(a) As a result, recklessly causes substantial harm to human health or the environment; or

(b) Knowingly disregards the law in committing the violation.

[ORS 468.926, 468.931; Punishable by a fine up to \$200,000 and 10 years imprisonment.]

### AIR POLLUTION:

*Misdemeanor:* The person knowingly violates any air quality statute, a permit, rule, order or applicable requirement.  
[ORS 468.936; Punishable by a fine of up to \$10,000.]

*Felony:* The person, in violation of any air quality statute, rule, permit, order or applicable requirement, knowingly discharges, emits or allows to be discharged or emitted any air contaminant into the outdoor atmosphere and:

(a) As a result, recklessly causes substantial harm to human health or the environment; or

(b) Knowingly disregards the law in committing the violation.

[ORS 468.939; Punishable by a fine up to \$200,000 and 10 years imprisonment.]

### WATER POLLUTION:

*Misdemeanor:* The person, with criminal negligence, violates any water quality statute, rule, standard, license, permit or order. "Criminal negligence" is a legal term that basically means the person acted at least recklessly or possibly intentionally, but in any case, far beyond how a reasonable person should act.  
[ORS 468.943; Punishable by a fine up to \$25,000 and one year imprisonment.]

*Felony:* The person, in violation of any water quality statute, rule, standard, license, permit or order, knowingly discharges, places or causes to be placed any waste into the waters of the state or in a location where the waste is likely to escape or be carried into the waters of the state and:

(a) As a result, recklessly causes substantial harm to human health or the environment; or

(b) Knowingly disregards the law in committing the violation.

[ORS 468.946; Punishable by a fine up to \$200,000 or 10 years imprisonment or both.]

**ENVIRONMENTAL ENDANGERMENT *Felony*:** The person knowingly commits a hazardous waste, air quality, or water pollution felony; and as a result, places another person in imminent danger of death or causes serious physical injury.

[ORS 468.951; Individuals punishable by imprisonment of not more than 15 years, a fine of not more than \$1,000,000 or both. Corporations punishable by a fine of not more than \$2,000,000. Subsequent convictions punishable by imprisonment of not more than 30 years, a fine of not more than \$5,000,000 or both.]

**FALSE INFORMATION *Felony*:** The person:

- (a) Makes any false material statement, representation or certification, knowing it to be false, in any notice, plan, record, report or other document required by any provision of Oregon environmental laws or rules; or
- (b) Omits required information, knowing it to be required, from a document described above; or
- (c) Alters, conceals or fails to file or maintain any document described above in knowing violation of any provision of Oregon's environmental laws.

[ORS 468.953; Punishable by a fine up to \$100,000 and five years imprisonment.]

**OFFENSIVE SUBSTANCES *Misdemeanor*:** The person:

- (a) Discards any offensive substance (*e.g.*, dead animal parts, excrement, putrid nauseous, noisome, decaying, deleterious substance) into any water (whether or not water of state), or
- (b) Places an offensive substance onto land (*i.e.*, any road, street, alley, lane, railroad right of way, lot, field, meadow, or common), or
- (c) Knowingly allows an offensive substance to remain on land they own to the annoyance of any citizen.

[ORS 164.785; Punishable by a fine up to \$5,000 and one year imprisonment.]

**OFFENSIVE LITTERING *Misdemeanor*:** The person intentionally:

- (a) Deposits rubbish, trash, garbage, debris, or refuse on land of another without permission or on a public right of way, or
- (b) Drains septic waste on land of another without permission or on a public right of way.

[ORS 164.805; Punishable by a fine up to \$1,000 and 30 days imprisonment.]

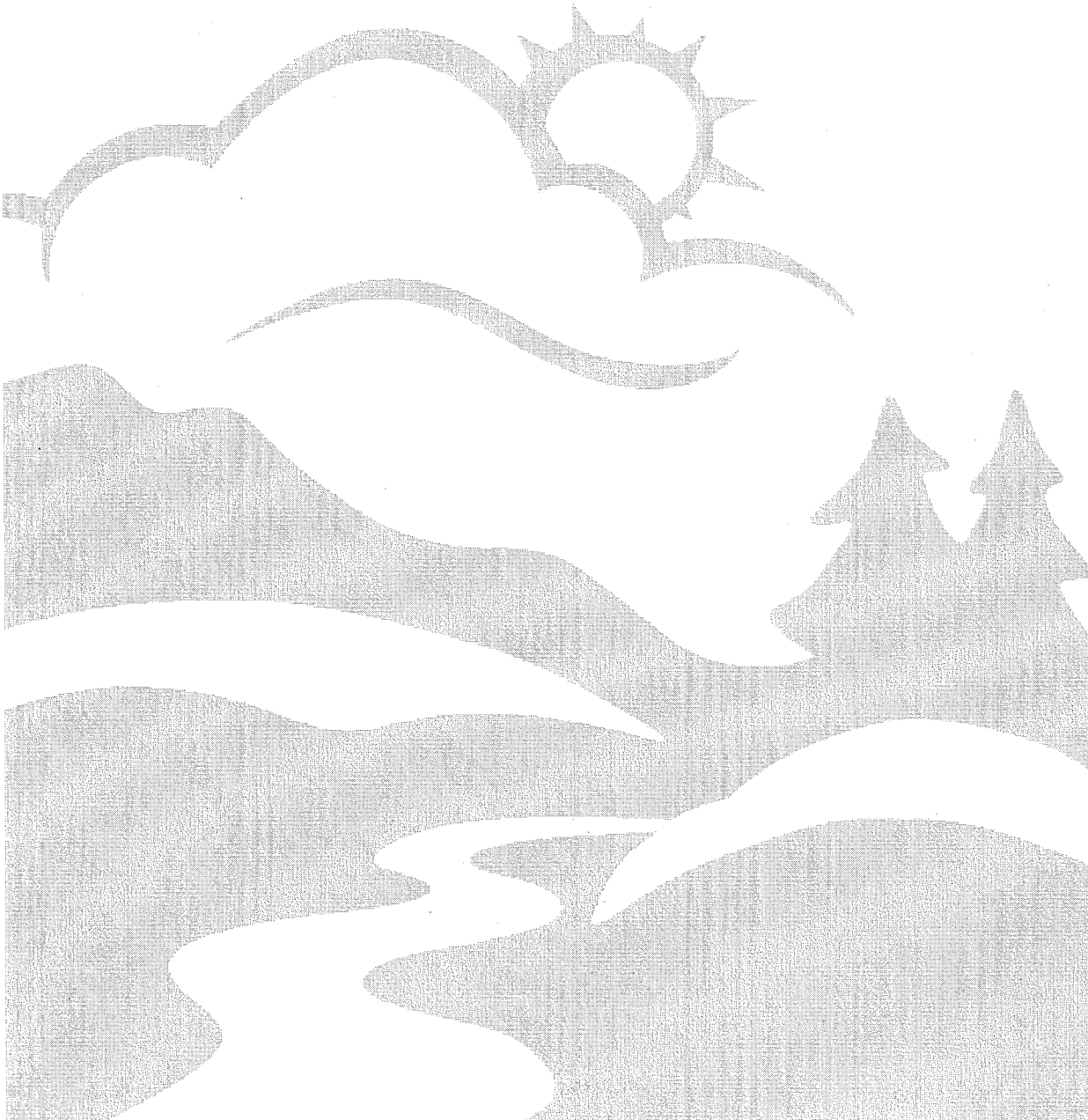
# Procedures for Adopting a Program that Uses Immunity from Enforcement



State of Oregon  
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*DEQ is a leader in  
restoring, maintaining  
and enhancing the quality  
of Oregon's air, land and  
water.*





Alternative formats (Braille, large type) of this document can be made available.  
Contact DEQ's Office of Communications & Outreach, Portland, at (503) 229-5696, or toll-free in Oregon at 1-800-452-4011, ext. 5696.

## Disclaimer

This internal management directive represents the Department of Environmental Quality's directions to staff on when to use immunity from enforcement during technical assistance and other DEQ efforts in which compliance is monitored. This directive is not final agency action and does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This directive should not be construed as rule, nor should the recommendations contained in this directive be construed as a requirement of rule or statute. DEQ anticipates revising this document from time to time as conditions warrant.

## Document Development

Prepared By: Lashie [Signature]

Reviewed By: Anna De Concini

Approved By: [Signature]

Date: 6-2-14

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# 1. Introduction

## 1.1 Background

As a regulatory agency, the primary means through which DEQ operates is: setting standards for behavior through rulemaking, educating the regulated public about standards, assessing compliance, and issuing informal and formal enforcement actions to create an atmosphere in which compliance is encouraged and violations are discouraged. DEQ staff conduct a variety of compliance monitoring actions, including site visits and inspections. To ensure consistency of enforcement response between staff, offices, and programs, DEQ staff are directed to apply an internal management directive called the “*Enforcement Guidance*” which specifies what type of follow-up enforcement actions to take when violations are discovered.

DEQ supplements some of its regulatory programs with “technical assistance” and other educational efforts during which non-enforcement compliance-assistance is offered. During these efforts, participants are given limited immunity from enforcement and the *Enforcement Guidance* does not apply.

## 1.2 Purpose & Applicability

This directive is designed to promote consistency throughout DEQ about when immunity from enforcement may be offered. It applies to all site visits or other compliance monitoring in which compliance may be evaluated and violations may be identified. It does not apply to any efforts *solely* directed at “beyond compliance” such as pollution prevention, toxic use reduction, process efficiency or similar educational efforts if legal compliance will not be evaluated. It also does not apply to situations in which staff may hear about possible violations but the violations are not verified or provable, for example disclosures made during classroom trainings or while talking to phone-in callers about compliance.

## 1.3 Definitions

As used in this Directive, the following definitions apply:

Compliance Assistance: Compliance Assistance includes activities, tools, or technical assistance that provides clear and consistent information for helping the regulated community understand and meet its regulatory obligations, or helping other compliance assistance providers (including government agencies, contractors and grantees) to aid the regulated community in complying with environmental regulations. Although compliance assistance may also help the regulated communities find cost-effective ways to comply with regulations and improve environmental performance through the use of pollution prevention, environmental management practices, and innovative technologies, at least one objective of compliance assistance must be related to achieving or advancing regulatory compliance. [Defined by the Exchange Network Leadership Council, Enforcement and Compliance Data Standard, publ. no. EX000026.2 (July 30, 2008) ([http://exchangenetwork.net/standards/FinalEnfo-Comp17\\_30\\_08.pdf](http://exchangenetwork.net/standards/FinalEnfo-Comp17_30_08.pdf)) and incorporated into the Inspection Protocol Breakthrough dictionary]

Enforcement Guidance: The most recent version of the Internal Management Directive from the Deputy Director stating how she or he expects all staff to respond to possible violations. The document also contains supplemental materials about enforcement processes and concerns. [Definition from the Inspection Protocol Breakthrough dictionary]

Expedited Enforcement Offer (EEO): Issued by an inspector in the field or by mail; it provides the Respondent a chance to certify a return to compliance, and pay a reduced penalty, without further discussion with the

Regulatory Authority and without further litigation. Upon issue it is the equivalent of a Pre-Enforcement Notice; if accepted it becomes the equivalent of a Mutual Agreement and Order. The UST program issues similar documents called "Field Citations." [Definition from the Inspection Protocol Breakthrough dictionary]

**Immunity Program:** DEQ effort in which DEQ communicates directly with members of the regulated community and may identify violations, but during which DEQ intends to refrain from Warning Letters, Pre-enforcement Notices, EEOs, or formal enforcement. Examples include:

- (i) *Hazardous Waste Technical Assistance and information program* – DEQ is required by ORS 466.068 to provide technical assistance to generators of hazardous waste which "shall not result in inspections or other enforcement actions unless there is a reasonable cause to believe there exists a clear and immediate danger to the public health and safety or to the environment."
- (ii) *Toxics users and conditionally Exempt Generators Technical Assistance Program* – DEQ is required by ORS 465.012 to provide technical assistance to toxics users and conditionally exempt generators and is subject to the same enforcement limitations as the Hazardous Waste Technical Assistance and Information Program listed above.
- (iii) *Air Quality Small Business Assistance Program* – The Clean Air Act Amendments of 1990 require that DEQ assist small businesses with advice on permitting, compliance, and pollution prevention. The SBAP is *non-regulatory* in nature and all services are confidential.
- (iv) *UST Technical Assistance Inspection Program for First Time Permittees and Tank Owners* – The Underground Storage Tank program offers limited immunity for first time permittees and tank owners whose operators complete the required training within 90 days of being designated and who request the introductory inspection within 90 days of receiving the operating certificate.

**Inspection:** A visit to a facility or site for the purpose of gathering information to determine compliance, including offsite observations. [Defined by the Exchange Network Leadership Council, Enforcement and Compliance Data Standard, publ. no. EX000026.2 (July 30, 2008) ([http://exchangenetwork.net/standards/FinalEnfo-Compl7\\_30\\_08.pdf](http://exchangenetwork.net/standards/FinalEnfo-Compl7_30_08.pdf)) and incorporated into the Inspection Protocol Breakthrough dictionary.]

**Pre-Enforcement Notice (PEN):** A written notice of an alleged violation that the department is considering for formal enforcement. A PEN generally will identify the alleged violations found, what needs to be done to comply, the consequences of further noncompliance, and the formal enforcement process that may occur. Failure to send a PEN does not preclude the department from issuing an FEA. A PEN is not a formal enforcement action and does not afford any person a right to a contested case hearing. [Defined at OAR 340-012-0038(2) and incorporated into the Inspection Protocol Breakthrough dictionary]

**Site Visit:** On site visit which is less than a comprehensive inspection and may only examine certain targeted violations. [Definition from the Inspection Protocol Breakthrough dictionary]

**Technical Assistance:** A tool used to help the regulated communities find cost-effective ways to comply with regulations and improve environmental performance through the use of pollution prevention, environmental management practices, and innovative technologies. It does not necessarily involve assistance in achieving or advancing regulatory compliance. In some DEQ programs there are statutory limitations on whether information gathered during technical assistance may be used as compliance monitoring information for the purpose of enforcement. [Definition from the Inspection Protocol Breakthrough dictionary]

**Violation:** Noncompliance with one or more legally enforceable obligations by a regulated entity, as determined by a responsible authority. Included in this category are violations of legally enforceable obligations under pre-existing Final Orders (e.g., violations of compliance schedules included in enforcement orders). Also, a transgression of any statute, rule, order, license, permit, or any part thereof and includes both acts and omissions. [Defined by the Exchange Network Leadership Council, Enforcement and Compliance Data Standard, publ. no.

EX000026.2 (July 30, 2008) ([http://exchangenetwork.net/standards/FinalEnfo-Comp17\\_30\\_08.pdf](http://exchangenetwork.net/standards/FinalEnfo-Comp17_30_08.pdf)) and incorporated into the Inspection Protocol Breakthrough dictionary]

**Warning Letter (WL):** A written notice of an alleged violation for which formal enforcement is not anticipated. Ws may contain an opportunity to correct noncompliance as a means of avoiding formal enforcement. A WL generally will identify the alleged violation(s) found, what needs to be done to comply, and the consequences of further noncompliance. A WL is not an FEA and does not afford any person a right to a contested case hearing. [Defined at OAR 340-012-0038(1) and incorporated into the Inspection Protocol Breakthrough dictionary]

## 2. Directive

### 2.1 Offering Immunity

*Staff may only offer immunity from enforcement for any verified or provable violation if the violation was identified during an approved immunity program.* Whether immunity applies in any given case must be determined and documented in advance of the offer of immunity and the site visit.

### 2.2 Immunity Program Approval Process

*Programs offering immunity from enforcement must meet the criteria set forth below and the implementation plan for the program must be approved by the Deputy Director as an exception to the Enforcement Guidance.*<sup>1</sup> The process for modifying the *Enforcement Guidance* is set out in the *Enforcement Guidance* IMD. It requires approval of the relevant program management team, the manager of the Office of Compliance and Enforcement, and the Deputy Director.

A program allowing immunity from enforcement will be approved when the benefits of the program outweigh the advantages of enforcement, which will be determined by looking at the particular circumstances and goals.<sup>2</sup> Routine and semi-random inspections with the possibility of enforcement are known to improve the compliance of the inspected entity and also are known to provide an atmosphere of deterrence in which those not inspected also endeavor to comply (similar to the deterrence created by visible traffic police). However, the use of immunity from enforcement can also provide benefits that outweigh deterrence. For example, some potentially approvable situations include use of immunity for:

- Short-term immunity during initial implementation of new rules or new regulatory programs, especially if the rules apply to less sophisticated industry sectors or people. Such immunity might convey DEQ's interest in helpfulness during the startup and may enhance cooperation. Enforcement in these circumstances may not deter others if the regulated community does not have the knowledge or skills to comply;
- Short-term immunity for newly regulated entities, especially for less sophisticated industry sectors or people, during the early part of their learning curve. Enforcement in these circumstances may not deter others if the regulated community does not have the knowledge or skills to comply;
- Targeted initiatives to address a specific problem (e.g., standard industry sector business practices that are not compliant, environmental problems related to specific geographical areas such as local watershed)

<sup>1</sup> Technical assistance and other non-enforcement compliance-assistance programs already in operation when this directive is issued must review their implementation plans to ensure consistency with this directive within a reasonable time after the adoption of this IMD.

<sup>2</sup> Reducing the costs of enforcement is not a valid sole justification for offering immunity. Resource challenges should be resolved through appropriate reprioritizing of enforcement responses in the *Enforcement Guidance* and/or other procedural streamlining.

may require cooperation which may be enhanced through community engagement and recruitment of participants in a limited non-enforcement compliance-assistance program; and

- Educational outreach based on unsolicited voluntary requests for assistance from small businesses and others help DEQ identify and correct compliance problems that it would not have identified through its own inspections.

### 2.3 Elements of an Approved Immunity Program Internal Management Directive

*The implementation plan for an approved immunity program must be detailed in a written internal management directive that describes, at least, the items below.*

- (1) Criteria for determining which members of the regulated community may participate. The criteria details will depend on the needs and goals of the particular immunity program. For example, eligibility might be based on whether DEQ received an unsolicited invitation; whether the participant is in a particular DEQ geographical or industry sector focus; whether the participant is a small business; whether the company or the environmental manager is new; whether the regulations are new; whether the entity has a history of compliance or non-compliance; or whether the entity is currently or will shortly receive inspection or enforcement.
- (2) A description about how staff should verify, document, and communicate eligibility to the participants (some examples might include: forms documenting how the participant was accepted; response letters confirming the bounds of the immunity to a participant; or details of what staff should verbally tell participants about the bounds of the immunity).
- (3) Clear statements about how the immunity relates to the regulatory program (e.g.: When does the immunity start and stop? Can there be overlapping regulatory inspections? Could failure to correct violations result in enforcement?).
- (4) Clear statements about whether the immunity would apply to all violations identified (e.g.: Would the immunity apply to violations posing a significant risk to public health or the environment? Would the immunity apply to violations that must be otherwise reported on DMRs, semi-annual certifications, or other reports to DEQ?).
- (5) A *general* description of what staff plan (recognizing that staff need flexibility during a visit) to evaluate during the visits and the anticipated level of detail of the evaluation.
- (6) Instructions about how violations should be documented, if documentation is part of the program.
- (7) Instructions about how staff should communicate information to the participant regarding violations found.
- (8) Instructions about how staff should verify that the violations are corrected, if the program intends follow-up.

Attached is a template which programs may use in setting forth the description of their programs for approval. That template may be modified, as appropriate, by each program.

### 3 Interpretation

The terms and provisions of this IMD are subject to reasonable interpretations of DEQ.

### 4 Effective Period and Location

This IMD is effective from the date signed above until DEQ terminates the directive.

## Developing communication strategies for enforcement actions

Effective Date: 2/2/2015

Procedure Number:

<b>Intent/Purpose/ Statement of Need</b>	Determining communications needs and strategies for PEN/enforcement actions
<b>PROCEDURE</b>	Communication strategy development process for enforcement actions
<b>Definitions</b>	
<b>History</b>	Historically, DEQ has not formalized a process for integrating communication efforts and strategies into PEN/enforcement actions.
<b>References</b>	

Communication about controversial or high visibility enforcement actions should happen early between public affairs specialists, permit writers/inspectors and environmental law specialists. Even prior to a PEN being issued, permit writers/inspectors should alert the appropriate public affairs specialist and the program-lead environmental law specialist of the specific violations related to high profile or controversial sources. The permit writer/inspector will also answer the question on the referral form and include the public affairs specialist on the transmittal to OCE.

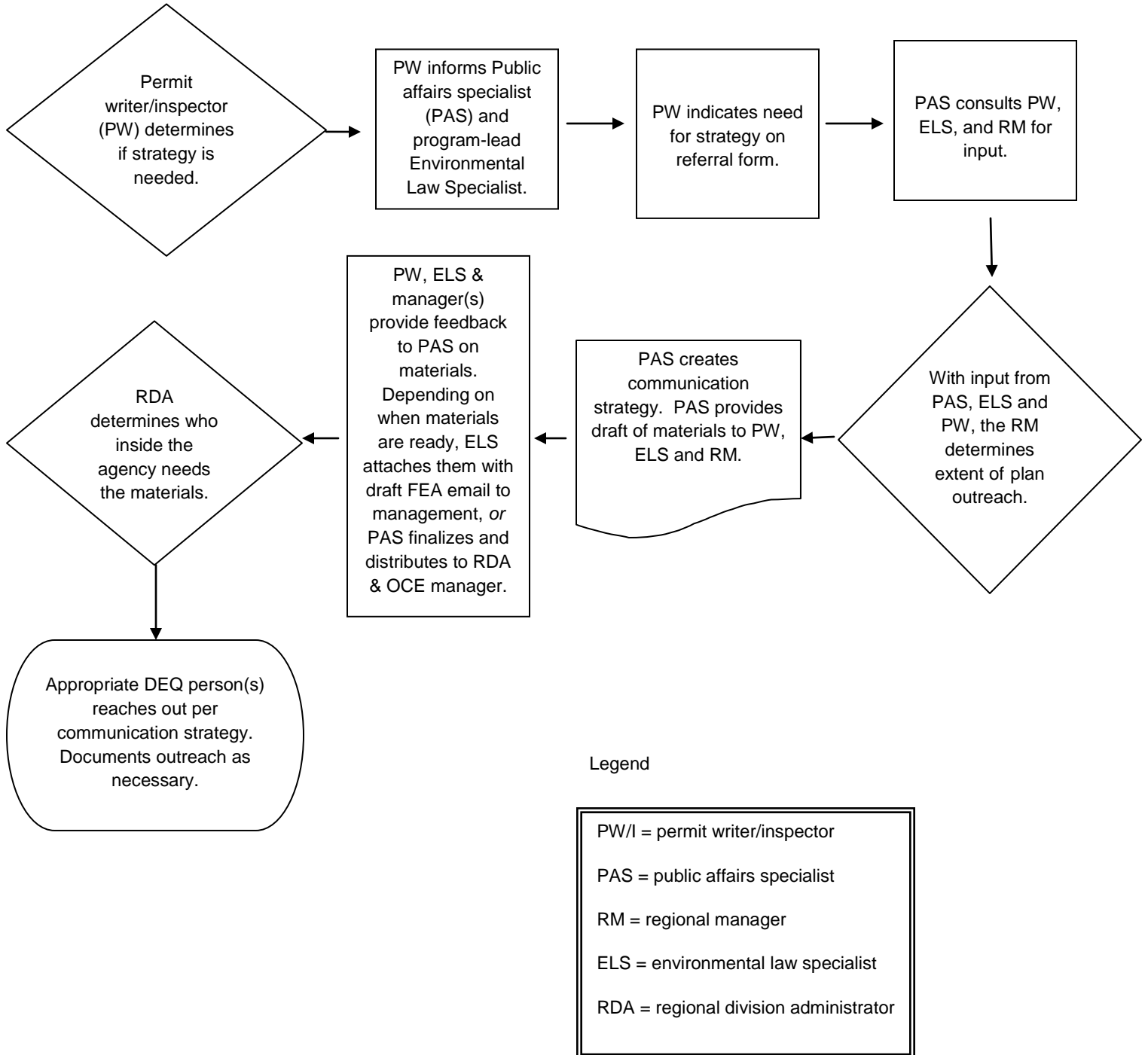
Below are indications that a source may fall into the controversial or high visibility category. Use common sense and good judgment. If in doubt, err on the side of giving notice to your public affairs specialist.

- A permitted facility that is currently undergoing an active cleanup
- High public interest in the permit
- A facility has had a history of complaints and is seeking a permit renewal or modification.
- Involvement or interest by: other agencies, EQC, legislators, the Governor's office, EPA, reporters, citizen groups or other stakeholders
- Prior controversial or high-profile enforcement history
- Facility or industry sector perceives that DEQ is not handling regulation evenly
- Severe economic impacts to the source or possibly community (e.g. tenants at a mobile home park could lose sewage service)
- Penalty is against a local government
- Unusual type of enforcement action, such as a permit revocation or license suspension/revocation
- Large penalty amount

Once notified, the public affairs specialist, in partnership with the permit writer/inspector, environmental law specialist, and regional manager, will create a written communications strategy. The strategy may include any or all of the following: talking points, message map, and/or a communications plan for making the contacts (who, when, how). The regional manager will decide which components of the strategy are appropriate for the case. The permit writer/inspector and environmental law specialist will provide the public affairs specialist with factual and background information and may help draft the documents. After the permit writer/inspector,



environmental law specialist, and regional manager have approved the documents, the public affairs specialist will distribute the finalized strategy to all involved, including the Regional Administrator and OCE Manager. Ideally, when the ELS emails the draft enforcement action for comments by the RDA and manager, the communication strategy will be attached. It is the Regional Administrator's role to further distribute necessary materials to others within the agency, including the Director and Deputy Director, as appropriate.





State of Oregon  
Department of  
Environmental  
Quality

# Internal Management Directive

Subject: Expedited Enforcement Offer  
Considerations & Procedures

IMD Number:

Effective Date: November 1, 2011

Pages: 8

Revision Date: Indefinite

Approval Date: October 31, 2011

## I. PURPOSE & GOAL:

The purpose of this Internal Management Directive is to instruct Programs about how to develop and implement an expedited enforcement program and to answer frequently asked questions regarding the use of expedited enforcement offers (EEOs).

## II. AUTHORITY

Oregon Administrative Rule (OAR) 340-012-0170 outlines DEQ's authority to settle violations. In October 2008, that rule was amended to include explicit authority and discretion for DEQ to settle violations through the use of "expedited enforcement offers" (EEOs). This IMD is adopted under that authority.

## III. APPLICABILITY

This directive sets forth factors for DEQ staff and managers to consider in deciding whether to adopt an EEO program and whether to make EEO settlement offers in particular cases. It sets out an internal process for DEQ staff in developing and using an EEO process. It takes into account DEQ's views as to the proper allocation of its enforcement resources. This directive is not final agency action and is intended as guidance for staff. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. DEQ may take action that varies from this directive.

## IV. INTRODUCTION AND OVERVIEW

EEOs are a streamlined low-cost alternative to traditional formal enforcement and may be used to settle less serious violations of state environmental laws. An EEO is designed to replace the Pre-enforcement Notice and all formal enforcement documents and process, and to make preparation of an enforcement "referral" package unnecessary.

Before issuing any EEOs, the Program must first modify the "Enforcement Guidance" to provide for which violations may be subject to EEOs and under what circumstances. Under the rules, EEOs may not be issued for Class I violations that have been repeated within three years or for violations having a

significant adverse impact on human health or the environment. EEOs should not be used for violators with a lengthy history of non-compliance, for violations having a large economic benefit, and/or violations caused intentionally, recklessly, or flagrantly. These criteria and others should be considered when a program adopts an EEO program and are discussed more fully below

Upon identifying a violation that is subject to an EEO under the program guidance, the inspector drafts and delivers or mails the EEO to the alleged violator. When first issued, the EEO serves two purposes:

- (1) a Pre-enforcement Notice which lists the violations and explains what must be done to correct them, and
- (2) an offer to settle the anticipated penalties for a lesser amount than would be assessed in a formal enforcement process.

When the violator accepts the EEO (generally by paying the penalty and signing the EEO), the EEO becomes a Final Order from the Environmental Quality Commission and the listed corrective actions, if any, become a final compliance order. Violators who accept an EEO will pay a substantially reduced penalty (40% of the moderate magnitude base penalty for that violation listed in OAR 340-012-0140) and agree to waive any right to appeal the matter at a contested case hearing, before the EQC, and beyond.

#### **V. PURPOSE/GOAL OF EEO PROGRAM:**

Expedited enforcement is a less expensive and faster form of enforcement than traditional formal enforcement actions. DEQ expects that expedited enforcement will allow DEQ to do more compliance inspections and more enforcement, to obtain compliance more quickly than the traditional formal enforcement process allows, and to use less DEQ staff time and resources. The kinds of violations for which the EEO process may be the most effective include:

- Situations in which the identity of the violator is easily determined, as opposed to circumstances in which there may be numerous responsible parties or circumstances which require extensive research by DEQ.
- Violations that are not factually complicated or do not require collection and evaluation of extensive evidence.
- Violations which can be specified in a simple compliance order, and can be easily and quickly corrected without Department oversight or on-site verification.

#### **VI. HOW TO DEVELOP AN EEO PROGRAM:**

A program that wants to do expedited enforcement must amend the section of the *Enforcement Guidance* (the "*Guidance*") that applies to its program (*see* step-by-step instructions to amend enforcement guidance at subsection 1, below). The program should amend the *Guidance's* existing enforcement response (currently "A" for PEN and referral, or "B" response for WL, etc.) for those violations the program wants to make eligible for EEOs. Because EEOs are less resource intensive, it is expected that the group of violations that become subject to EEOs will include some violations which

currently have an “A” response and some that currently have a “B” response. A program must also address other required criteria relating to EEOs in its guidance (see subsection 3, below).

1. How to amend the enforcement guidance:

The staff person originating the concept for including EEOs in the program should first discuss with his or her manager. After the manager agrees, the staff person should:

(i) Phone or email the Environmental Law Specialist (ELS) who specializes in that program area to discuss the need for a change. (This is the ELS most often assigned to handle the formal enforcement action referrals from the program.) The ELS and the staff person identify which violations will be eligible for EEOs and establish parameters for the criteria discussed in OAR 340-012-0170(2)(c) (*e.g.*, how to address economic benefit, mental state, etc.) and below at subsection 3. (See Appendix A, attached, for a list of ELSs and contact information). These proposed changes to the guidance should be memorialized in a draft document that is then forwarded to the regional manager and OCE Policy Advisor (Les Carlough) for approval.

(ii) Once the program staff person, manager, ELS and OCE Policy Advisor agree upon a draft, the program manager emails the proposed guidance revisions to the Program Management Team (or RMT, if applicable) and the OCE manager. Program managers in other regions and offices should be asked to review and comment on the proposed changes to the guidance.

(iii) The Policy Advisor and ELS will attend the PMT or RMT’s meeting or participate in the email discussion to answer questions about the proposed new guidance.

(iv) If the PMT does not approve the proposed guidance, it will send the proposal back to originating staff and ELS with specific reasons for disapproval and, if desired, recommendations for changes to the proposal. If the PMT approves the proposal with changes, it should send the approved revised proposal out for staff comment prior to finalizing. Once PMT approves the proposed guidance, the ELS will forward it to the OCE manager.

(v) Programs must let the Revenue Section know that it’s going to be starting an EEO program. This should be done after the program’s guidance changes have been approved by the PMT.

(vi) The ELS and the program staff person should make any required revisions to the EEO template for the specific program. The program’s revisions should be sent to the OCE Administrative Specialist (Deb Nesbit) in OCE so she can order tablets of EEO forms from the printer. This will also establish lines of communication between the program and Deb Nesbit so she can prepare to track EEOs issued to the programs.

(vii) The OCE manager reviews proposed guidance. If not approved, it is returned to the ELS for further discussion with the PMT and Senior Policy Advisor. If the OCE Manager approves, it is conveyed to the Deputy Director for signature.

(viii) The program should consider whether and how to “advertise” the EEO program to its regulated community and, to this end, should work with OCO to come up with a communications plan, if necessary.

(ix) When signed, OCE announces the revision to all affected staff, amends the guidance on the web, and distributes to OCE and program staff.

(x) Program staff must be trained on the new EEO program and processes before issuing any EEOs.

## 2. Violations not eligible for EEOs:

The rule prohibits the use of EEOs to settle certain violations and the program must include these two exceptions in its guidance:

(i) A Class I violation that has been repeated within the previous three years. This means that an EEO may not be used for any violation that either falls under the same Class I classification as a prior violation or repeats conduct that is now classified as Class I. The previous Class I violation need not have been the subject of prior formal enforcement, but must have been documented in a Warning Letter or Pre-enforcement Notice; or

(ii) A violation that had a “significant adverse impact” on human health or the environment. In making a determination on the severity of the impact, *“the department will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and department rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, the department may consider any single factor to be conclusive.”* OAR 340-012-0130. Typically, these violations will show a demonstrably serious environmental impact.

## 3. Criteria programs must consider when developing EEO guidance:

A program may exclude additional violations from eligibility for EEOs based on other criteria or circumstances. However, the Program *must consider* the following criteria, whether or not it eventually incorporates them:

(i) Economic benefit gained by an alleged violator as a result of the noncompliance. Because the economic benefit portion of the penalty cannot be assessed through an EEO, it is important to ensure that the reduced penalty does not result in the violator retaining a net economic gain for the violation and to ensure the violator does not choose non-compliance over the cost of the civil penalty. Depending on the violation, a program may want to set a generalized maximum economic benefit over which expedited enforcement cannot be offered for any violation, to set a maximum economic benefit for certain violations, or to prohibit EEOs for violations that tend to have a significant economic benefit.

(ii) Whether the violator has been the subject of prior formal enforcement action or received warnings for the same or similar violations.<sup>1</sup> A program should set a standard by which to judge violators' past history related to the same or similar violations. For instance, should a violator that has received a prior formal enforcement action be excluded from expedited enforcement? What about a violator that has two or more FEAs in the past 36 months? The program may want to modify the existing Guidance to establish cut-offs for how many previous WLs have been issued for the same or similar violations before an EEO is issued and before traditional formal enforcement is initiated. Since EEOs are designed to minimize the regulatory process and the amount of communication with the violator, they will not typically be the most effective tool in handling chronic or ongoing compliance problems.

(iii) Whether the violation is isolated or ongoing. As noted above, the EEO process may not provide sufficient discussion time or penalty for DEQ to help solve the compliance problems and deter future violations.

(iv) The "mental state" of the violator. The higher the mental state (the more reckless or intentional or flagrant), the more likely that the low-penalty EEO will not be effective in changing the behavior of the violator. Programs should consider not offering EEOs when the mental state of the violator is reckless, intentional, or flagrant.

Other considerations a program may want to include: deciding whether to impose a ceiling on how many violations can be settled with one EEO and whether and how to cite multiple occurrences of the same violation.

#### 4. Guidance on the compliance order part of the EEO

Programs may want to establish standard expectations on whether and what to order recipients to do in response to identified violations. There are no universal standards applicable to all programs, however, programs should consider the following:

(i) Steps in the compliance order should be sufficiently important to warrant the effort needed to track completion.

(ii) The orders should be as short a duration as possible, while allowing sufficient time for the recipient to do the work. Orders of longer duration or that require more extensive DEQ negotiation, involvement or oversight should be done through traditional formal enforcement.

(iii) Make sure the order is clear on when compliance will be deemed complete. Ending steps should not require open-ended deadlines or extensive DEQ involvement. Consider using final reports, certifications, receipts and/or photographs of compliance instead of DEQ site re-inspection when possible.

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<sup>1</sup> This must be considered in addition to repeated Class I's discussed in paragraph 2(i) above.

## V. THE EEO PROCESS/MECHANICS:

EEOs may be used for any documented violations that meet the program guidance developed as described above. Violations may be documented through any compliance monitoring activity such as inspection, monitoring report review, or evaluation or compliance certification. The EEO may be used to streamline the inspection report preparation, but should not be used in place of an inspection report. ***The inspector must still adequately document the violation with notes, reports, photographs and whatever other evidence would normally be used for formal enforcement.*** If the person does not agree to accept the EEO, the matter will be referred for formal enforcement where this additional evidence may be needed.

### 1. The EEO form:

A three-page page EEO form has been developed by and is maintained by OCE. The pages of the form have colored copies. The color designations are listed at the bottom of the form and their uses are as follows:

- white for the DEQ inspector's file,
- blue for the facility's own files,
- pink is for the EEO recipient to sign and return,
- yellow is for the Revenue Section, and
- green is a permanent copy which remains in the booklet.

Programs may order printed EEO forms through OCE which will then issue tablets of forms to the program. Each EEO form is prenumbered and printed on self-copying NCR paper bound in tablets. An example of the EEO form is included as Attachment No.2 to this IMD.

### 2. Issuing an EEO and what happens after 30 days:

The person or entity named on the EEO must be a "person" who is legally liable for the violation(s) listed in the EEO and must be precisely named as an individual if a natural person, as the government subdivision if public entity, or as the legal business name registered with the Secretary of State Corporations Division if a corporation, limited liability company, partnership, etc. Only one person may be named on each EEO. If more than one person is legally liable for the violation, additional EEOs may be issued at the discretion of the program. The EEO must clearly state what the violations are and, if a compliance order is included, clearly state what must be done to correct the violations or circumstances and the deadline with which that must be done.

An EEO may be offered in person or through the mail. Before offering an EEO an inspector will have to consider a violator's past history of non-compliance, the amount of EB involved in the violation, and any other factors outlined in the program's guidance. For these reasons it is anticipated that inspectors may often mail the EEO.

Regardless of whether the EEO is offered in person or via mail, an inspector must endeavor to deliver the EEO to someone authorized to make decisions on behalf of the violator or who works in a supervisory or managerial role.

If the EEO is delivered in person, an inspector should explain that the EEO is an offer to settle a violation and to accept the offer a recipient must do 3 things: 1) sign the EEO;<sup>2</sup> 2) send the EEO form back to DEQ; and 3) pay the reduced penalty amount written on the form. These things must be done within 30 days of the date the offer is made.

An offer is made the day the EEO is hand-delivered or mailed to the recipient and should be the same as the date written into the "Date Issued" space on the EEO form (page 1); it is not necessarily the date the violation occurred or the date the EEO is physically received. The EEO is officially "good" until it "expires" 30 days from the "date issued." DEQ may not designate alternate dates for when an offer legally begins. Signed EEOs and payments are received by DEQ's Revenue Section. EEOs must be accepted "as is" without further negotiation – DEQ will not do "payment plans" or environmental supplement projects with EEOs.

### 3. Tracking EEOs:

The program and/or the inspector must track EEOs that were issued but have "expired" – in other words, the 30 day period has come and gone and the EEO was not paid, signed and returned to DEQ. In this instance, the unaccepted EEO stands in the place of a Pre-enforcement Notice and the inspector completes a referral form (which may reference relevant parts of the EEO), compiles any other evidence (inspection reports, photos, etc.) and sends the referral package to OCE for formal enforcement. Because any EEO that is not accepted may result in a referral, formal enforcement action, and possibly a contested case hearing, inspectors should remember to always compile the necessary evidence to substantiate DEQ's claims against a violator while preparing an EEO.

In some instances the EEO may order corrective action that takes longer than the 30 days. It is the responsibility of the inspector to track compliance with any corrective action ordered in an EEO. In the event the violator accepts the EEO by signing the form and returning it to DEQ along with payment within the 30 days but fails to take corrective action, the inspector must follow the guidance for violation of a Department Order.

OCE issues tablets of EEOs to inspectors. When an inspector issues an EEO to a violator he/she fills out all the relevant blocks of information on page 1 and page 3 of the EEO (page 2 is pre-printed instructions to the violator) and hand-delivers or sends the blue copy and the pink copy to the violator. The inspector keeps the white copy for the file and emails a scanned copy the OCE Administrative Assistant (Deb Nesbit). The green copy stays in the tablet and becomes the "official record" for DEQ's record retention policy. The inspector sends the yellow copy to the Revenue Section (this may be done by e-mailing a scanned copy of the document). A copy of the issued EEO is also sent to Deb Nesbit in OCE.

A violator that "accepts" the EEO will sign the pink copy and send it to DEQ's Revenue Section along with payment. The Revenue Section will not process any EEO payments that are made after **35 days** from the

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<sup>2</sup> While DEQ does want to obtain a copy of the signed EEO, payment alone will constitute acceptance under the terms of the EEO.



date of issuance. Once payment is processed, the Revenue Section will send an email to the inspector who issued the EEO and to Deb Nesbit for entry into the Enforcement database. The EEO is now a final order and is a part of a violator's compliance history.

EEO's that were issued in error may only be withdrawn if DEQ was in error that the violations existed. Only in the most extraordinary circumstances should an EEO be withdrawn so that the matter may be referred for formal enforcement instead. Unlike Pre-enforcement Notices, which may be withdrawn simply via written correspondence, and EEO is an "offer" to settle a violation. If an inspector or program needs to withdraw an EEO that was issued *and has not yet been accepted*, the program must submit a signed memorandum to the Revenue Section and OCE to "cancel" or withdraw an EEO and must also send written correspondence to the EEO recipient informing them of the withdrawal and any alternative enforcement response. If the person accepts the EEO before learning of the withdrawal, the EEO is accepted and the order becomes final.

4. Media:

When the program adopts an EEO program, it should consider whether and how to involve and notify its stakeholders and whether to consider comments on the EEO program guidance. There is no requirement for public involvement, beyond what we did as part of the rulemaking that created our authority for the EEO program, though some programs may wish to use the process to gather ideas from the public or to inform the public about the program and how it is to be handled.

EEOs are not formal enforcement until accepted by the recipient. When they are accepted, they become Final Orders and will be included in efforts by the Office of Compliance and Enforcement and the Office of Communications and Outreach to advertise the news of the penalties and enforcement actions. On a monthly basis the Office of Communications and Outreach will compile a table of EEOs that have been accepted. This table will be sent to media outlets and may be used on DEQ's website. Unaccepted EEOs are referred to OCE for formal enforcement and will be covered in a press release when the formal enforcement action is issued. EEOs will also be used as "prior significant actions" in case of future enforcement.

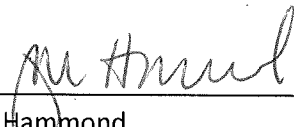
**VI. INTERPRETATION**

The terms and provisions of this directive are subject to reasonable interpretation by the Department.

**VII. EFFECTIVE DATE**

This Directive is effective on November 1, 2011.

10.31.11  
Date

  
Joni Hammond  
Deputy Director

## **ATTACHMENT 1 – CONTACT INFORMATION**

For questions regarding content of this IMD should be directed to Courtney Brown, OCE Environmental Law Specialist or Les Carlough, OCE Senior Policy Advisor.

For questions regarding media-specific EEO programs contact the following OCE Environmental Law Specialist:

- Tanks field citation program – Susan Elworth
- Onsite sewage – Bryan Smith
- Open burning – Jenny Root
- Dry Cleaners – Sarah Wheeler
- Hazardous waste – Sarah Wheeler

# Appendix M

## Formal Enforcement Action Document Production Process

1. Inspector determines a violation has occurred by way of a compliance inspection, complaint response, or review of compliance report.
2. Inspector refers to the Enforcement Guidance for Field Staff to determine appropriate enforcement response (WL, WLOC, EEO, Field Citation, or PEN). Inspector drafts response and gives it to their manager for review and approval. The manager is expected to inform the appropriate Regional District Administrator (RDA) as necessary of controversial or sensitive actions. (see also [Enforcement Communications](#))
3. Inspector enters inspection/violation information into ACES.
4. Inspector signs and mails the Pre-Enforcement Notice (PEN) to the alleged violator.
5. PEN response (if applicable) is received by inspector.
6. Within 15 working days<sup>1</sup> of issuing the PEN or, if the PEN includes a request for response, 15 days within receiving PEN response<sup>2</sup>, inspector prepares and sends a referral to OCE. The referral must be sent to OCE electronically as follows:

For programs using ACES:

- a. Creates a folder and copies all relevant inspection files to the OCE Enforcement Referral shared drive located here: [\\deqhq1\ENFReferrals](#). Relevant files will include all evidence related to the case, such as Warning Letter/PEN, response, complaint form, inspection reports, photos, maps, permits, plans etc. Name the folder with respondent's name and PEN or EEO number, if applicable – for example, *McCormickPEN1527*
- b. Sends an email to [OCEReferral@deq.oregon.gov](mailto:OCEReferral@deq.oregon.gov) with a link to the folder on the OCE Enforcement Referral shared drive. Folder must contain complete referral; and
- c. Sends an electronic copy of the referral form to the regional program manager, lead worker (as applicable), and regional public affairs specialist (if communication strategy is needed).

For programs using YDO:

- a. Check YDO Enforcement record for completeness: All violations are linked and the information is accurate.

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<sup>1</sup> “Working days” means Monday through Friday, minus holidays, regardless of a person’s personal work schedule. If an inspector or ELS will be out of the office for extended leave, they should discuss with their manager whether someone else should be responsible for their portion of the enforcement process. Managers need to appoint an acting manager in their absence.

<sup>2</sup> The 15 days runs from receiving the PEN response (regardless of the quality of that response) or from when the PEN response timeframe expires, whichever occurs first.

- b. Create a new folder in Enforcement shared drive ([\\DEQhq1\ENFReferrals](#)) and give it the Respondent's name
- c. Copy all of the records needed for the referral into that folder (including the referral form)
- d. Copy the link to the folder into the comments box on the Enforcement screen.
- e. Check the "Refer to OCE" box on the Enforcement screen, and Save.

The screenshot shows a form section titled "Refer to OCE" with a checked checkbox. Below the checkbox is a red instruction: "Please include the link to all referral documents in the Referral Comment box below." Underneath this is a text input field labeled "Referral Comment:" with a help icon (question mark in a circle) to its right.

7. Within 3 working days of OCE receiving the referral, the OCE case coordinator:
  - a. Determines and documents the correct legal entity.
  - b. Creates a new enforcement record for the case in SharePoint Referral Log and ACES or YDO, which includes the case number, case name, program, and the referral received date.
    - i. OCE Referral Log on SharePoint will have a link to the appropriate folder in the OCE Enforcement Referral shared site.
  - c. Creates an OCE hardcopy file with referral.
  - d. Gives the hardcopy file to OCE manager for assignment. OCE manager enters assignment and date in SharePoint and ACES or YDO. OCE manager gives the file to OCE Case Coordinator, who emails confirmation of receipt and ELS assignment to the inspector.
8. Within 2 days of assignment, ELS contacts the inspector to inform them that the case has been assigned and to confer on case strategy. Inspector should convey to ELS any input or issues raised by the regional program manager or RDA but not provided in the referral.
9. ELS reviews the referral.<sup>3</sup> If the ELS requires further information, the ELS will explain to the inspector what information is missing.<sup>4</sup>
10. ELS drafts the Formal Enforcement Action (FEA) documents with input from the inspector.

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<sup>3</sup> This step should be completed as soon as possible after assignment to ensure that any additional information is requested in a timely manner.

<sup>4</sup> If the referral appears to be so incomplete as to warrant additional training for the inspector, the ELS should discuss those deficiencies with the inspector and the regional program manager.

11. Within 15 working days of assignment, ELS uploads FEA documents to SharePoint for inspector's review and approval. ELS emails inspector link to let them know the documents have been uploaded.
12. Within 3 working days, the inspector provides, via email, either:
  - a. comments or suggested edits to the ELS in redline, using track changes via SharePoint, or
  - b. Approves the FEA documents without changes.<sup>5</sup>

Note – If the inspector and ELS are unable to reach agreement on the FEA documents, the issues should be elevated to the regional program manager and OCE manager for resolution.

13. Within 2 working days, ELS incorporates or responds to the inspector's comments. ELS will save revised versions of the FEA documents to SharePoint. If requested by the inspector, the ELS will provide the inspector with another chance to review.
14. Within 2 working days of receiving inspector approval, ELS:
  - a. Saves the FEA documents to SharePoint and notifies the OCE manager, regional program manager, RDA, Implementation Administrator, and Deputy Director via email with cc's to the RDA's assistant. ELS keeps the paper file. OCE manager has 5 working days to provide comments and approval to ELS. If a communication strategy is required for the case, the email should attach any documents that have been prepared (e.g. message map or talking points), or if the communication document is not yet complete, provide information regarding the status of the strategy. The ELS must use the approved email routing template, which includes:
    - i. The specific date that the FEA documents will move to next step (i.e. 5 working days); and
    - ii. Any information necessary for the complete review of the documents (i.e. factual background, Economic Benefit, why multiple penalties were assessed).

Note – Approval by the regional program manager, RDA and Deputy Director is not required for moving to next step. RDA or Deputy Director determines if notification to legislators is necessary.

15. Within 2 working days, ELS incorporates comments received from Step 14, enters penalty and violation data into ACES<sup>6</sup> or YDO, and provides final FEA documents to OCE manager, printed on letterhead and dated 2 days ahead along with the hardcopy case file and
  - a. Saves to SharePoint; and
  - b. Sends email to inspector, regional manager, RDA, Implementation Administrator, Deputy Director, and Program Administrator notifying them of the date the case is scheduled to issue. ELS must use the approved pre-issuance email template.

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<sup>5</sup> If the FEA documents appear to be missing essential elements or have so many errors it appears the documents have not been proofread, the inspector should return the FEA documents to ELS with a copy to the OCE manager.

<sup>6</sup> The ELS should enter the violations, the penalty amounts, the date the FEA will be issued, and any applicable corrective actions prior to giving the documents to the OCE manager for signature.

- 16.** Within 2 working days, OCE manager provides signed final FEA documents to the OCE Case Coordinator for mailing. The Case Coordinator sends hard copy of final FEA documents to Respondent via certified mail and an electronic PDF copy to RDA, regional program manager, inspector, regional public affairs specialist, and other listed cc's. The original Notice and copy of the cover letter are placed into OCE's hardcopy case file. The OCE Case Coordinator saves the PDF in the OCE Enforcement Share drive. The ELS enters information into ACES or YDO.

# Using Immunity from Enforcement in the 401 Water Quality Certification Program



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Northwest Region**  
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DEQ is a leader in restoring, maintaining and enhancing the quality of Oregon's air, land and water.



State of Oregon  
Department of  
Environmental  
Quality

Documents can be provided upon request in an alternate format for individuals with disabilities or in a language other than English for people with limited English skills. To request a document in another format or language, call DEQ in Portland at 503-229-5696, or toll-free in Oregon at 1-800-452-4011, ext. 5696; or email [deqinfo@deq.state.or.us](mailto:deqinfo@deq.state.or.us).



# Disclaimer

This directive is intended solely as guidance for DEQ employees. It does not constitute rulemaking by the Environmental Quality Commission and may not be relied upon to create an enforceable right or benefit, substantive or procedural, enforceable at law or in equity, by any person. With written managerial approval, DEQ employees may deviate from this directive. DEQ anticipates revising this directive from time to time as conditions warrant.

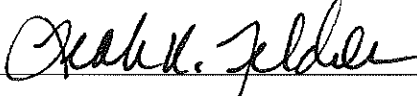
# Document Development

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# 1. Introduction

## 1.1 Background of the 401 Water Quality Certification program

The 401 Water Quality Certification (WQC) program is authorized through OAR 340-048, 340-041, and ORS 468B.035 through 468B.047. This program ensures that projects that require a federal license or permit, and may discharge to waters of the state, will meet state water quality standards and other applicable requirements of state law. DEQ recognized that although the 401 WQC is part of a federal license or permit, prior to the 401 Enforcement Guidance, the 401 program previously had no standard mechanism to ensure that conditions of the 401 WQC were being met, and no consistent approach to enforcing violations of a 401 WQC.

## 1.2 Purpose & Applicability

This IMD establishes an immunity program pursuant to the IMD on Procedures for Adopting a Program that Uses Immunity from Enforcement. This directive applies to all operators<sup>1</sup> covered under a 401 WQC. The program has opted to provide immunity to some operators, in limited circumstances, due to the newness of the compliance and enforcement component of the 401 WQC program. The intent is to encourage new operators to seek DEQ technical assistance, to help DEQ identify compliance issues, and to improve compliance with 401 WQCs.

Immunity from a violation or violations of a 401 WQC may be offered in the following situations:

- *When an operator requests technical assistance (TA) or advice from DEQ 401 staff on complying with its 401 WQC;*
- *Immunity will only be given one time per operator.*
- *Immunity may not be offered if any of the exceptions in section 1.3.4 of this directive apply*

## 1.3 Implementation

### 1.3.1 How will participants be selected for immunity?

DEQ staff will not “select” participants for immunity. Any operator to whom DEQ has issued a 401 WQC that requests TA or education prior to a first time inspection may be given immunity if none of the exceptions in section 1.3.4 apply. DEQ staff may inform operators of the immunity program, and that an operator must request immunity from enforcement to be eligible, prior to a first time inspection.

### 1.3.2 How will staff document eligibility and communicate the offer of immunity?

If an operator requests TA and/or education, DEQ staff will explain verbally that DEQ may offer immunity from violation(s) observed during a site inspection only once. In addition, DEQ staff should explain the exceptions from immunity (section 1.3.4) and that immunity may terminate during an inspection if the conditions described in section 1.3.4 are observed.

DEQ staff should then follow-up with a letter to the operator that explains when immunity will apply (the date and location of the site visit) and includes a written description of the exceptions to

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<sup>1</sup> For purposes of this IMD, an “operator” or “operators” means the entity or person to whom DEQ issues the 401 WQC.

immunity in section 1.3.4. The 401 WQC program also anticipates outlining this procedure on the website, offering trainings, sending emails, etc.

### **1.3.3 What are the bounds of the immunity?**

Immunity will begin when a violation is observed during a first-time, operator-requested TA or educational site inspection. Immunity may be offered only once; violations at the permitted project or licensed facility observed on subsequent site visits or that occur after the TA site inspection will not be immune from enforcement and may trigger DEQ formal or informal enforcement (e.g. a warning letter, expedited enforcement offer or Pre-Enforcement Notice), according to the Enforcement Guidance. If multiple violations are found during a first-time TA site inspection, immunity may still be given, unless the exceptions described in section 1.3.4 below apply.

### **1.3.4 What are the exceptions from immunity?**

Immunity may *not* be given in situations where:

- There exists *actual* significant harm to the public health, safety or to the environment or DEQ has reasonable cause to believe there is an *imminent* threat of significant harm to public health, safety, or the environment. In the event of actual significant harm or an imminent threat of significant harm to public health, safety, or the environment, immunity from enforcement will terminate immediately. DEQ staff will proceed in accordance with the Enforcement Guidance;
- Violations of water quality standards or conditions of the 401 WQC that were committed intentionally, willfully or flagrantly;
- The operator has had previous violations of the 401 WQC; or
- The operator has had a previous violation of other water quality rules, laws or permits which has been the subject of previous DEQ enforcement or one-time immunity.

### **1.3.5 What will be reviewed in a technical assistance inspection?**

Staff will explain that the inspection is a technical assistance inspection and not a compliance inspection. Staff will walk through the site and the 401 WQC with the operator to ensure all conditions are being followed or, if it's a post-construction inspection, that the stormwater facilities were built as proposed. If DEQ staff observes any violations staff should document those violations and provide advice on how the operator can correct the violations (see section 1.3.6). DEQ staff may also inspect the site for other conditions that may result in violations of other state water quality standards, rules and laws.

### **1.3.6 What if staff observes violations during a technical assistance inspection?**

Violations must be documented in the 401 Water Quality Inspection Worksheet. Staff should gather evidence supporting the existence of a violation such as photos, drawings, grab samples, written notes, and/or maps, etc in order to document which violations are immune from enforcement should there be subsequent violations at the site.

Staff must communicate verbally with on-site contractors and the operator and follow-up with an immunity letter that documents the violation but informs the operator that they will be granted immunity from enforcement according to this IMD. If corrective action is required, the letter should

clearly request the operator to take corrective action within a specified timeframe and submit documentation to DEQ by a specified deadline.

If any violation falls under the exceptions in section 1.3.4 then none of the violations observed during the TA inspection are eligible for immunity. DEQ staff must follow the Enforcement Guidance and follow up with a warning letter, EEO or Pre-Enforcement Notice, if applicable.

### **1.3.7 Will the Program include a verification step to determine if the participant has corrected the violation(s)?**

Verification of corrective actions may be achieved through a follow-up site visit, or, if a site visit is not possible, a written summary of corrective actions documented by the operator and submitted to DEQ. Failure to implement any corrective actions requested by DEQ within the timeframe requested may result in revocation of immunity.

## **2. Directive**

### **2.1 Directive on Modification of the *Enforcement Guidance***

Upon approval of this IMD, the introduction of the relevant program specific guidance table in *Enforcement Guidance* is amended according to Attachment A.

### **2.2 Directive to Program Staff**

Upon approval of this IMD, staff working in the 401WQC program are authorized to implement the immunity program as described above. Any violations identified during a technical assistance inspection as described in this IMD are exempt from the *Enforcement Guidance* and need not result in Warning Letter, Expedited Enforcement Offer, or Pre-Enforcement Notice, unless specifically exempted from Immunity as described above.

## **3 Interpretation**

The terms and provisions of this IMD are subject to reasonable interpretations of DEQ.

## **4 Effective Period and Location**

This IMD is effective from the date signed above until DEQ terminates the directive.

## **Attachment A**

### OCE water quality guidance used for 401 WQC compliance and enforcement

*Staff will follow the Enforcement Guidelines for all violations of any statute, rule, permit, or order, identified through document review, inspections, complaints, or any other form of compliance monitoring. Immunity can be offered from enforcement pursuant to the terms of the IMD of Using Immunity from Enforcement.*



**TABLE 1**  
**Default Violations Guidance (OAR 340-012-0053)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

**Notes on specific violations:**

The classifications for “submitting false, inaccurate or incomplete information . . . “ (-0053(1)(b)), “failing to provide access . . . “ (-0053(1)(c)), and “using fraud or deceit to obtain DEQ approval, permit, certification, or license” (-0053(1)(d) only apply if that conduct is illegal according to program statutes, rule, permit, or order.

Do not issue EEOs for any of the Class I violations below or any Class II violation that caused significant environmental harm.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. *See* Section 6.3.3 in the Enforcement Guidance for further directions on that process.

Contact the ELS assigned to your program for any questions about applying this guidance.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><u>CLASS I VIOLATIONS</u></b>		
0053(1)(a)	Violating a requirement or condition of a commission or department order, consent order, agreement, consent judgment (formerly called judicial consent decree) or compliance schedule contained in a permit;	Send WL if all of the following apply: (i) the violation was not done willfully or was due to “good cause;” (ii) the violation was not repeated; (iii) the violation involves a non-substantive requirement; and (iv) the violation did not exacerbate the existing environmental problem or cause environmental harm. Otherwise, send PEN and refer.  If OCE sends a Notice of Default or other written notice informing a respondent that the respondent is in violation of a Final Order, no WL or PEN need be issued.



**TABLE 1**  
**Default Violations Guidance (OAR 340-012-0053)**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
		<p>Coordinate with the Environmental Law Specialist handling the matter.</p> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p> <p>Violation of MAO requirements: Refer for Penalty Demand Notice unless either the person and DEQ have agreed and modified the deadlines in the MAO before the violation occurred or the MAO allowed for that violation (some MAOs allow delay or deviation if outside the reasonable control of the person and the Department is notified in a timely manner). For enforcement of Water Quality MAOs, see the Water Quality IMD attached as an Appendix to the Enforcement Guidance.</p>
0053(1)(b)	Submitting false, inaccurate or incomplete information to DEQ where the submittal masked a violation, caused environmental harm, or caused DEQ to misinterpret any substantive fact;	<p>Send PEN and refer if the program statutes, rules, permit or order require submission of information and any of the following apply: (i) the violator knew or should have known that the information submitted was false, incomplete or inaccurate and the violator signed a certification that the information being submitted was true or accurate; (ii) the falsification masked a violation; (iii) the violation caused environmental harm; (iv) the violation caused the Department to issue a permit or license it would not have otherwise issued. Send WL if the violator was otherwise in compliance and did not know and would not reasonably have known the information submitted was false, inaccurate or incomplete.</p> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
0053(1)(c)	Failing to provide access to premises or records as required by statute, permit, order, consent order, agreement or consent judgment (formerly called judicial consent decree), or	<p>Send PEN and refer if the person denying access was informed by a Department representative that permitting access to the Department was required by statute, permit, or order. Otherwise, send WL.</p> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>

**TABLE 1**  
**Default Violations Guidance (OAR 340-012-0053)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
0053(1)(d)	Using fraud or deceit to obtain DEQ approval, permit, certification, or license.	Send PEN and refer.
<b><u>CLASS 2 VIOLATIONS</u></b>		
0053(2)	Violating any otherwise unclassified requirement.	<p><i>For non-permit related violations:</i></p> <ol style="list-style-type: none"> <li>1. For first occurrence of violation send PEN and refer if significant environmental harm. Otherwise, send WL.</li> <li>2. For repeated violations of the same requirement, for which a WL (or WL with opportunity to correct) has been sent (or self reporting has occurred), send PEN and refer (or send EEO if the program issues EEOs) upon the second violation within 60 months.</li> <li>3. For repeated violations of different requirements, for which WLs (including those with opportunity to correct) have been sent (or self reporting has occurred), send PEN and refer (or send EEO if the program issues EEOs) upon the third violation within 60 months.</li> </ol> <p><i>For Permit-related violations:</i></p> <ol style="list-style-type: none"> <li>1. For first occurrence of violation send PEN and refer if significant environmental harm. Otherwise, send WL or WL with opportunity to correct.</li> <li>2. For repeated violation of emission and effluent limits send PEN and refer (or send EEO if the program issues EEOs) a violation of the same emission standard/effluent limit that was the subject of a WL issued within the last 36 months (including those with opportunity to correct). For a violation of a different emission or effluent limit, send PEN and refer (or send EEO if the program issues EEOs) if two WLs have been sent for emission standard or effluent limitations violations within the last 36 months.</li> <li>3. For repeated violation of non-emissions or non-effluent requirement for which a warning letter (or warning letter with opportunity to correct) has been sent (or self reporting has occurred), send PEN and refer (or send EEO if the program issues EEOs) upon the third violation within 36</li> </ol>

**TABLE 1**  
**Default Violations Guidance (OAR 340-012-0053)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p align="center">months.</p> <p>Note: for certain WQ and SW permit violations, an NPV may be required. See the introductions to the WQ and SW guidance and the Enforcement Guidance.</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could be designated and listed on EPA’s watch list as “high priority violations” (HPVs).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations. The annotations in the left hand column along with the Division 12 citation are to help the user more quickly identify program-specific classifications: Cleaner Air Oregon (CAO), Clean Fuels Program (CFP), Climate Protection Program (CPP), Greenhouse Gas Reporting Program (GHG), Heat Smart (HS), Landfill Gas Emissions (LFG), Open Burning (OB) and Third Party Verification (3PV).

Asbestos violations (ASB) are covered in a separate Table 2A.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.5 of the Enforcement Guidance for further directions on that process.

Contact OCE for any questions about applying this guidance.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><i>CLASS I VIOLATIONS</i></b>		
AQ 0054(1)(a)	Constructing a new source or modifying an existing source without first obtaining a required New Source Review/Prevention of Significant Deterioration (NSR/PSD) permit.	Send PEN and refer.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ - CAO 0054(1)(b)	Constructing a new source, as defined in OAR 340-245-0020, without first obtaining a required Air Contaminant Discharge Permit that includes permit conditions required under OAR 340-245-0005 through 340-245-8050 or without complying with Cleaner Air Oregon rules under OAR 340-245-0005 through 340-245-8050.	<p><i>For Standard ACDPs</i> Send PEN and refer if source should have obtained a new Standard ACDP containing CAO program requirements.</p> <p><i>For Basic, General, or Simple ACDPs:</i> Send WLOC if source should have obtained a Basic, Simple, or General ACDP containing CAO program requirements, but had no actual or constructive knowledge (reasonably should have known) of the need to have a permit. Actual or constructive knowledge may include a scenario where the company has other <u>permitted</u> facilities in Oregon, or had previously not needed a permit but had been directed by DEQ that future growth or expansion may result in the need to have a permit.</p> <p>Send PEN and refer if source had actual or constructive knowledge or if source fails to comply with WLOC.</p>
AQ - CAO 0054(1)(c)	Failing to conduct a source risk assessment, as required under OAR 340-245-0050.	Send PEN and refer.
AQ - CAO 0054(1)(d)	Modifying a source in such a way as to require a permit modification under OAR 340-245-0005 through 340-245-8050, that would increase risk above permitted levels under OAR 340-245-0005 through 340-245-8050 without first obtaining such approval from DEQ.	Send PEN and refer.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ 0054(1)(e)	Operating a major source, as defined in <a href="#">OAR 340-200-0020</a> , without first obtaining the required permit.	Send PEN and refer.
AQ - CAO 0065(1)(f)	Operating an existing source, as defined in OAR 340-245-0020, after a submittal deadline under OAR 340-245-0030 without having submitted a complete application for a Toxic Air Contaminant Permit Addendum required under OAR 340-245-0005 through 340-245-8050.	Send PEN and refer.
AQ 0054(1)(g)	Exceeding a Plant Site Emission Limit (PSEL).	Send PEN and refer.
AQ - CAO 0054(1)(h)	Exceeding a risk limit, including a Source Risk Limit, applicable to a source under OAR 340-245-0100.	Send PEN and refer.  <u>Note:</u> Applies to permitted sources with permits that expressly include an applicable risk limit.
AQ 0054(1)(i)	Failure to install control equipment or meet emission limits, operating limits, work practice requirements, or performance standards as required by New Source Performance Standards under OAR 340 division 238 or National Emission Standards for Hazardous Air Pollutant Standards under OAR 340 division 244.	Send PEN and refer.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ 0054(1)(j)	Exceeding a hazardous air pollutant emission limitation.	Send PEN and refer.  Note: This would also include violations of VOC or other surrogate emission limits that are established in a NESHAP requirement to limit Hazardous Air Pollutants.
AQ 0054(1)(k)	Failing to comply with an Emergency Action Plan.	Send PEN and refer.
AQ 0054(1)(l)	Exceeding an opacity or emission limit (including a grain loading standard) or violating an operational or process standard, that was established pursuant to New Source Review/Prevention of Significant Deterioration (NSR/PSD).	Send PEN and refer.
AQ 0054(1)(m)	Exceeding an emission limit or violating an operational or process standard that was established to limit emissions to avoid classification as a major source, as defined in <a href="#">OAR 340-200-0020</a> .	Send PEN and refer.
AQ - CAO 0054(1)(n)	Exceeding an emission limit or violating an operational limit, process limit, or work practice requirement that was established to limit risk or emissions to avoid exceeding an applicable Risk Action Level or other requirement under OAR 340-245-0005 through 340-245-8050.	Send PEN and refer.
AQ 0054(1)(o)	Exceeding an emission limit, including a grain loading standard, by a major source, as defined in <a href="#">OAR 340-200-0020</a> , when the violation was detected during a reference method stack test.	Send PEN and refer, if the violation is detected during a reference method stack test conducted for the purposes of demonstrating compliance

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ 0054(1)(p)	Failing to perform testing or monitoring, required by a permit, permit attachment, rule or order, that results in failure to show compliance with a Plant Site Emission Limit or with an emission limitation or a performance standard established under New Source Review/Prevention of Significant Deterioration, National Emission Standards for Hazardous Air Pollutants, New Source Performance Standards, Reasonably Available Control Technology, Best Available Control Technology, Maximum Achievable Control Technology, Typically Achievable Control Technology, Lowest Achievable Emission Rate, Toxics Best Available Control Technology, Toxics Lowest Achievable Emission Rate, or adopted under section 111(d) of the Federal Clean Air Act.	<p>Send PEN and refer under any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(i) for the second similar violation within 36 months for which a previous WL or PEN has been sent, or</li> <li>(ii) the last similar violation was documented during DEQ’s most recent inspection or records review, the inspection or review occurred more than 36 months ago and DEQ sent WL or PEN, or</li> <li>(iii) if the failure to perform <i>testing</i> is more than 60 days late, or</li> </ul> <p><b>NOTE:</b> If the only reason for the testing is to assure efficient operation of equipment or to verify an emission factor, it is not a 0054(1)(p) classification. Use applicable guidance at 0054(2)(b) or 0054(3)(a).</p> <ul style="list-style-type: none"> <li>(iv) if the failure to <i>monitor</i> meets all of the following: <ul style="list-style-type: none"> <li>• The monitoring is required to show compliance with an emission limit or standard* (includes monitoring of production or operating parameters under NSPS or NESHAPs that are a surrogate for emissions, or to demonstrate compliance with a PSEL); and</li> <li>• More than 5% of an individual data parameter required for a 6-month reporting period of continuous compliance is missing (if applicable); and</li> <li>• The source cannot reliably demonstrate that it was in compliance during that period of missing data.</li> </ul> </li> </ul> <p><b>NOTE:</b> If the only reason for the monitoring is assure efficient operation of equipment or process or does not directly measure or determine compliance with an emission limit or standard,* this is not a 0054(1)(p) classification. Use guidance at 0054(2)(b). If missing data can be</p>



**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p style="text-align: center;">reconstructed to demonstrate compliance with the emission limit or standard* this is not a 0054(1)(p); use guidance at 0054(3)(b).</p> <p>Otherwise, send WL.</p> <p>*“Emission limit or standard” means a requirement in permit or rule (state or federal) which limits the quantity, rate, or concentration of emissions of regulated pollutants on a continuous basis, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, prescribe operation or maintenance requirements or work practices that are set to assure continuous emission reduction. (340-200-0020(54))</p>
AQ 0054(1)(q)	Causing emissions that are a hazard to public health.	Send PEN and refer.
AQ – ASB 0054(1)(r) through 0054(1)(w)	<i>See Table 2A.</i>	
AQ – OB/HS 0054(1)(w)	Openly burning materials which are prohibited from being open burned anywhere in the state by OAR 340-264-0060(3); or burning materials in a solid fuel burning device, fireplace, trash burner or other device as prohibited by OAR 340-262-0900(1).	<p><b><u>Residential Open Burning of Prohibited Materials</u></b> – Use the following guidance if the responsible person is a “residential owner-occupant” and the prohibited materials appear to have been generated in or around the dwelling.</p> <p>Send PEN and refer if any of the following apply:</p> <ul style="list-style-type: none"> <li>(i) The violation had a significant adverse impact on human health or the environment; or</li> <li>(ii) In the judgment of the inspector, the regional manager, the regional administrator, and the OCE manager, the burn represented an especially egregious act. Use the penalty justification memo process to obtain the approvals <i>before</i> sending a PEN (see Section 6.3.5 of the Enforcement Guidance). Examples of factors that might make the burning especially egregious include: <ul style="list-style-type: none"> <li>• proximity to sensitive receptors (<i>e.g.</i>, homes, schools, hospitals, etc.);</li> </ul> </li> </ul>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<ul style="list-style-type: none"> <li>• meteorological conditions that aggravated the effects of the burn;</li> <li>• involvement of materials with a high potential for serious environmental harm (<i>e.g.</i>, PVC, flooring, carpeting, vinyl, wire insulation, counter tops, polyvinylidene chloride, other synthetic materials containing chlorine, hazardous chemicals and compounds, fiberglass, or asbestos); and large quantities of total material burned (prohibited and non-prohibited material); or</li> </ul> <p>(i) This is the second or more violation within 60 months.</p> <p>Send EEO if all the following are met:</p> <ul style="list-style-type: none"> <li>(i) Two or more tires or one or more cubic yards of prohibited materials were ignited; and</li> <li>(ii) DEQ, fire department, or other agencies received multiple complaints about the burn; and</li> <li>(iii) The responsible person has been previously informed of the open burning rules verbally or in writing by the DEQ, fire department, or other agencies or sources; and</li> <li>(iv) The responsible person was not forthright with information about the open burn, or refused to extinguish the fire or resisted allowing the fire department to extinguish the fire if applicable; and</li> <li>(v) The burn did not have a significant adverse impact on human health or the environment (considering any relevant factors).</li> </ul> <p><b>Note:</b> For all open burning violations that involve large quantities of material where the program believes the economic benefit of open burning the material versus properly disposing of it is significant compared to the reduced penalty amount of the EEO, the program should consider instead issuing a PEN and referral to OCE. See guidance in the <a href="#">open burning EEO instructions document</a>.</p> <p>If neither the PEN nor the EEO criteria apply, send WL.</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p><b><u>Non-Residential Open Burning of Prohibited Materials</u></b></p> <p>Send PEN and refer if any of the following apply:</p> <ul style="list-style-type: none"> <li>(i) The burn had a significant adverse impact on human health or the environment (considering any relevant factors); or</li> <li>(ii) In the judgment of the inspector, the regional manager, the regional administrator, and the OCE manager, the burn represented an especially egregious act. Use the penalty justification memo process to obtain approvals <i>before</i> sending the PEN (See Section 6.3.5 of the Enforcement Guidance). See the Residential Open Burning guidance above for examples of “egregious.”; or</li> <li>(iii) This is the second or more violations within 60 months; or</li> <li>(iv) The violation occurred at a DEQ permitted facility where a permit condition specifically prohibits all open burning or open burning prohibited materials.</li> </ul> <p>Send EEO if more than one cubic yard of prohibited materials were ignited.</p> <p><b>Note:</b> For all open burning violations that involve large quantities of material where the program believes the economic benefit of open burning the material versus properly disposing of it is significant compared to the reduced penalty amount of the EEO, the program should consider instead issuing a PEN and referral to OCE. See guidance in the open burning EEO instructions document.</p> <p>If neither the PEN or EEO apply, send WL.</p> <p><b><u>Indoor Burning of Prohibited Materials</u></b> (in a solid fuel burning device, fireplace, trash burner, etc.)</p> <p>Send a “Burn Information Letter” whenever there is a lack of sufficient proof of the violation.</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p>Send a “Burn Information Letter” upon first provable violation (<i>i.e.</i>, inspector on-site can smell burning plastics, violator admitted to burning the prohibited materials, etc.) within last two years.</p> <p>Send WL upon second provable occurrence within two years.</p> <p>Send PEN and refer third provable violation in two years (<i>i.e.</i>, provable violation occurring after a WL).</p>
AQ 0054(1)(x)	Failing to install certified vapor recovery equipment.	<p>Send WLOC giving 30 calendar days from date of the WLOC to submit a schedule for installation of certified vapor equipment if this is the first violation and the violator has not received previous information or technical assistance from DEQ concerning the vapor recovery requirements.</p> <p>Otherwise, send PEN and refer.</p>
AQ 0054(1)(y)	Delivering for sale a noncompliant vehicle by an automobile manufacturer in violation of Oregon Low Vehicle Emission rules set forth in OAR 340 division 257.	<p>Send PEN and refer if violation involves more than one vehicle or upon the second violation of the same requirement within 36 months.</p> <p>Otherwise, send WL.</p>
AQ 0054(1)(z)	Exceeding an Oregon Low Emission Vehicle average emission limit set forth in OAR 340 division 257.	Send PEN and refer.
AQ 0054(1)(aa)	Failing to comply with Zero Emission Vehicle (ZEV) sales requirements set forth in OAR 340 division 257.	Send PEN and refer.
AQ 0054(1)(bb)	Failing to obtain a Motor Vehicle Indirect Source Permit as required in OAR 340 division 257.	<p>Send WLOC.</p> <p>Send PEN and refer if violator fails to comply with WLOC.</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ 0054(1)(cc)	Selling, leasing, or renting a noncompliant vehicle by an automobile dealer or rental car agency in violation of Oregon Low Emission Vehicle rules set forth in OAR 340 division 257.	Send PEN and refer if violator is an automobile dealer or upon the second violation of the same requirement within 36 months.  Otherwise, send WL.
AQ - CFP 0054(1)(dd)	Violating any of the clean fuel standards set forth in OAR 340-253-0100(6), and in Tables 1 and 2 of OAR 340-253-8010.	Send PEN and refer.
AQ - CFP 0054(1)(ee)	Committing any action related to a credit transfer that is prohibited in OAR 340-253-1005(8).	Send PEN and refer.
AQ - CFP 0054(1)(ff)	Inaccurate reporting that causes illegitimate credits to be generated in the Oregon Clean Fuels Program, OAR chapter 340, division 253, or that understates a registered party's true compliance obligation in deficits under such program.	Send PEN and refer for violations involving 100 or more illegitimate credits or for a second violation in 36 months.  Otherwise, send WLOC giving 30 calendar days from date of WLOC to correct violation.  <b>Note:</b> For registration or reporting violations involving inaccurate information or fraud, also consider the OAR 340-012-0053(1)(b) and 340-012-0053(1)(d) classifications in Table 1 (Default violations guidance).
AQ - CFP 0054(1)(gg)	Misstating material information or providing false information when submitting an application for a carbon intensity score under OAR 340-253-0450, OAR 340-253-0460, or OAR 340-253-0470, or when submitting an	Send PEN and refer.  (see <a href="#">Appendix I, Conducting the Criminal Enforcement Program</a> )

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
	application for advance credits under OAR 340-253-1100.	
AQ - CFP 0054(1)(hh)	Failing to timely submit a complete and accurate annual compliance report under OAR 340-253-0650.	<p><i>For failures to report (report not yet submitted):</i> Send WLOC giving 5 business days from date of WLOC to submit report.</p> <p>Send PEN and refer if violator fails to comply with WLOC, for second violation within 36 months, or if failure to report has occurred for one year or more.</p> <p><i>For late reports (report submitted after deadline):</i> Send WL.</p> <p>Send PEN and refer for second violation in 36 months.</p> <p><i>For incomplete or inaccurate reports:</i> Send WLOC giving 30 days from date of WLOC to correct the error.</p> <p>Send PEN and refer (1) if violator fails to comply with WLOC, or (2) for second violation within 36 months.</p> <p><b>Note:</b> For registration or reporting violations involving inaccurate information or fraud, also consider the OAR 340-012-0053(1)(b) and 340-012-0053(1)(d) classifications in Table 1 (Default violations guidance).</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ - GHG 0054(1)(ii)	Failing to timely submit a complete and accurate emissions data report under OAR 340-215-0044 and OAR 340-215-0046.	<p><i>If the failure to report, late report, incomplete report, or reporting inaccuracy impacts Climate Protection Program applicability determinations, compliance instrument distribution, or compliance obligations:</i> Send PEN and refer. If reporting errors, identify reporting error in PEN and give 45 calendar days from discovery to correct per OAR 340-215-0044(2)(c).</p> <p><i>For all other failures to report (report(s) not yet submitted):</i> Send WLOC giving 15 calendar days from date of WLOC to submit emissions data report.</p> <p>Send PEN and refer if violator fails to comply with WLOC, for second violation within 36 months (either late reporting or failure to report), or if failure to report has occurred over three or more years.</p> <p><i>For all other late reports (report(s) submitted after deadline):</i> Send WL.</p> <p>Send PEN and refer for second violation in 36 months (either late reporting or failure to report), or if reports submitted late cover three or more years.</p> <p><i>For all other incomplete or inaccurate reports:</i> Once DEQ has sufficient information to determine that a report is incomplete or inaccurate, send WLOC identifying the reporting error and giving 45 calendar days (from the date of discovery) to correct per OAR 340-215-0044(2)(c).</p> <p>Send PEN and refer if violator fails to comply with WLOC or for second violation (inaccurate or incomplete emissions data report) within 36 months.</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – 3PV 0054(1)(jj)	Submitting a verification statement to DEQ prepared by a person not approved by DEQ under OAR 340-272-0220 to perform verification services.	Send PEN and refer.
AQ – 3PV 0054(1)(kk)	Failing to timely submit a verification statement that meets the verification requirements under OAR 340-272-0100 and OAR 340-272-0495.	Send WLOC giving 15 calendar days from date of WLOC to submit or correct verification statement.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.
AQ – 3PV 0054(1)(ll)	Failing to submit a revised application or report to DEQ according to OAR 340-272-0435.	Send PEN and refer.
AQ – 3PV 0054(1)(mm)	Failing to complete re-verification according to OAR 340-272-0350(2).	Send PEN and refer.
AQ – LFG 0054(1)(nn)	Failing to timely submit a Methane Generation Rate Report or Instantaneous Surface Monitoring Report according to OAR 340-239-0105.	Send WLOC giving 15 calendar days from the date of the WLOC to submit or correct the report.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.
AQ – LFG 0054(1)(oo)	Failing to timely submit a Design Plan or Amended Design Plan in accordance with OAR 340-239-0110(1).	Send PEN and refer.
AQ – LFG 0054(1)(pp)	Failing to timely install and operate a landfill gas collection and control system according to OAR 340-239-0110(1).	Send PEN and refer.



**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – LFG 0054(1)(qq)	Failing to operate a landfill gas collection and control system or conduct performance testing of a landfill gas control device according to the requirements in OAR 340-239-0110(2).	Send PEN and refer.
AQ – LFG 0054(1)(rr)	Failing to conduct landfill wellhead sampling under OAR 340-239-0110(3).	<p>Send WL for first time violations of the wellhead sampling requirement, if the violator is missing less than 10 percent of total samples* for the six-month reporting period.</p> <p>Send PEN and refer if the violator is missing 10 percent or more of total samples* for the six-month reporting period, or for second violation within 36 months.</p> <p><i>*Note:</i> total samples means total number of wellheads x 4 parameters (nitrogen, oxygen, temperature, pressure) x 6 months</p>
AQ – LFG 0054(1)(ss)	Failing to comply with a landfill compliance standard in OAR 340-239-0200.	Send PEN and refer.
AQ – LFG 0054(1)(tt)	Failing to conduct monitoring or remonitoring in accordance with OAR 340-239-0600 that results in a failure to demonstrate compliance with a landfill compliance standard in OAR 340-239-0200 or the 200 ppmv threshold in OAR 340-239-0105(5)(b) or OAR 340-239-0400(2)(c).	Send PEN and refer.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – LFG 0054(1)(uu)	Failure to take corrective actions in accordance with OAR 340-239-0600(1).	Send PEN and refer.
AQ – LFG 0054(1)(vv)	Failing to comply with a landfill gas collection and control system permanent shutdown and removal requirement in OAR 340-239-0400(1).	Send PEN and refer.
AQ 0054(1)(ww)	Delivering for sale a new noncompliant on highway heavy duty engine, truck or trailer in violation of rules set forth under OAR 340 division 261.	Send PEN and refer if violation involves more than one vehicle or upon the second violation of the same requirement within 36 months.  Otherwise, send WL.
AQ – CPP 0054(1)(xx)	Failing to notify DEQ of changes in ownership or operational control or changes to related entities under OAR 340-271-0120.	For late notifications, where covered entity submits a notification after the 30 day deadline in OAR 340-271-0120, send WL unless the late notification impacts applicability determinations or compliance instrument distribution. Send PEN for second late notification violation within 36 months.  For failures to notify DEQ, send PEN and refer.
AQ – CPP 0054(1)(yy)	Owning or operating a covered entity, identified in OAR 340-271-0110, after a submittal deadline under OAR 340-271-0150(1)(a) or OAR 340-271-0330(1)(b) without having submitted a complete application for a Climate Protection Program permit or Climate Protection Program permit addendum required under OAR 340-271-0150.	Send WLOC giving 5 business days from the date of the WLOC to submit the permit application or permit addendum.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – CPP 0054(1)(zz)	Emitting covered emissions from a covered entity, as identified in OAR 340-271-0110, that is a new source, as defined in OAR 340-271-0020, without having been issued a BAER order under OAR 340-271-0320 and a permit issued under OAR 340-271-0150(3)(c).	Send PEN and refer.
AQ – CPP 0054(1)(aaa)	Failing to submit a BAER assessment or an updated BAER assessment according to OAR 340-271-0310.	<p><i>BAER assessment (or updated assessment) submitted late.</i> Send WL.</p> <p>Send PEN and refer if the violation is repeated within 5 years.</p> <p><i>BAER assessment (or updated assessment) not submitted.</i> Send WLOC with request to submit in 15 days.</p> <p>Send PEN and refer if not submitted by WLOC deadline or if the violation is repeated within 5 years.</p> <p><i>BAER assessment (or updated assessment) incomplete or inaccurate.</i> Send information request letter citing OAR 340-271-0310(3). The letter should identify any information missing under OAR 340-271-0310(2) and include a deadline (date certain) to provide the information.</p> <p>If any required information is not provided by deadline in letter described above, send PEN and refer. Consider issuing BAER order based on information available to DEQ as part of Notice of Civil Penalty Assessment and Order and according to OAR 340-271-0310(3).</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – CPP 0054(1)(bbb)	Failing to comply with a BAER order issued under OAR 340-271-0320.	Send PEN and refer.
AQ – CPP 0054(1)(ccc)	Failing to comply with a condition in a permit, Climate Protection Program permit, or Climate Protection Program permit addendum issued according to OAR 340-271-0150 that requires the reduction of greenhouse gas emissions.	Send PEN and refer.
AQ – CPP 0054(1)(ddd)	Failing to demonstrate compliance according to OAR 340-271-0450.	Send PEN and refer.
AQ – CPP 0054(1)(eee)	Failing to comply with the requirements for trading of compliance instruments under OAR 340-271-0500 or 340-271-0510.	Send PEN and refer.
AQ – CPP 0054(1)(fff)	Submitting false or inaccurate information on any application or submittal required under OAR Chapter 340 division 271.	Send PEN and refer. (see <a href="#">Appendix I, Conducting the Criminal Enforcement Program</a> )
AQ – CFP 0054(1)(ggg)	Failing to register as a regulated party in the Oregon Clean Fuels Program under OAR 340-253-0100(1) and (4).	If the regulated entity is an importer of finished fuels or has recently began importing fuels and still has the opportunity to meet its compliance obligation by the annual reporting deadline, send WLOC and give 15 calendar days to register.  Otherwise, send PEN and refer.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – CFP 0054(1)(hhh)	Failure by a fuel producer to inform DEQ of its operational carbon intensity exceeds its certified carbon intensity as described in OAR 340-253-0400(8) and (9) when those certified carbon intensities generated illegitimate credits as described in OAR 340-253-1005(7).	Send PEN and refer for violations involving 100 or more illegitimate credits or for second violation in 36 months.  Otherwise, send WLOC giving 30 calendar days from date of WLOC to correct violation.
<b><i>CLASS II VIOLATIONS</i></b>		
AQ 0054(2)(a)	Constructing or operating a source required to have an Air Contaminant Discharge Permit (ACDP) or registration without first obtaining such permit or registration, unless otherwise classified.	Send WL or WLOC (providing 30 days to submit permit application) if all three of the criteria below are met: (i) The difference in emissions from the source, operating with or without a permit, is equal to, or less than: 2.0 tons per year for the sum of any particulate emissions; 5.0 tons per year for the sum of all criteria and hazardous air pollutants; or 20% of the Significant Emission Rate (SER) of any individual pollutant (excluding the lower SER’s in areas like Medford). This may require making some reasonable assumptions about the source emissions and the WL may include requirements for the source to test or document their actual emissions; and (ii) The source had no actual or constructive knowledge of the need to have a permit. If the company has other facilities in Oregon or other states that have permits, the company should have known. If the company had previously not needed a permit but had been warned that future growth or expansion may result in the need to have a permit, the company should have known; and (iii) The source is not a federal major source subject to NSR or PSD that began construction with a construction permit.  Otherwise, send PEN and refer.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ 0054(2)(b)	Violating the terms or conditions of a permit, permit attachment or license, unless otherwise classified.	<p>Send PEN and refer under any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(i) The second similar violation within 36 months,</li> <li>(ii) the last similar violation was documented during DEQ’s most recent inspection that occurred more than 36 months ago and DEQ sent WL or PEN, or</li> <li>(iii) If the violation was an emission limit violation not otherwise classified.</li> </ul> <p>Otherwise send WL.</p>
AQ 0054(2)(c)	Modifying a source in such a way as to require a permit or permit attachment modification from DEQ without first obtaining such approval from DEQ, unless otherwise classified.	<p>Send PEN and refer under any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(i) This is the second similar violation within 36 months, or</li> <li>(ii) The last similar violation was documented during DEQ’s most recent inspection that occurred more than 36 months ago and DEQ sent WL or PEN</li> </ul> <p>Otherwise send WL or WLOC (providing 30 days to submit application)</p>
AQ 0054(2)(d)	Exceeding an opacity limit, unless otherwise classified.	<p>For opacity exceedances that are a NSPS or NESHAP standard, use guidance at 0054(1)(i).</p> <p>Send PEN and refer under any of the following circumstances:</p> <ul style="list-style-type: none"> <li>(i) if the magnitude is major according to <a href="#">OAR 340-012-0135(1)(a)(A)</a>, or</li> <li>(ii) if it is a major source, as defined in <a href="#">OAR 340-200-0020</a> and one of the following applies: <ul style="list-style-type: none"> <li>• the method of detection is a COM, the limit is 0-20% opacity, and the exceedance is &gt;5% opacity over the limit (<i>e.g.</i>, limit is 15%, measured opacity is &gt;20%) for &gt;5% of the operating time during the reporting period, or</li> <li>• the method of detection is a COM, the limit is &gt;20% opacity, and the exceedance is &gt;10% opacity over the limit (<i>e.g.</i>, limit is 40%, measured opacity is &gt;50%) for &gt;5% of the operating time during the reporting period, or</li> </ul> </li> </ul>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<ul style="list-style-type: none"> <li>• the method of detection is Method 9 VE readings, the limit is 0-20% opacity, and the exceedance is &gt;1.50 times the limit (<i>e.g.</i>, limit is 10%, measured opacity is &gt;15%), or</li> <li>• the method of detection is Method 9 VE readings, the limit is &gt;20% opacity, and the exceedance is &gt;1.25 times the limit (<i>e.g.</i>, limit is 40%, measured opacity is &gt;50%).</li> </ul> <p>(iii) If this is the second similar violation within 36 months, or            (iv) The last similar violation was documented during DEQ’s most recent inspection that occurred more than 36 months ago and DEQ sent WL or PEN.</p> <p>Otherwise send WL.</p>
AQ 0054(2)(e)	Exceeding a Volatile Organic Compound (VOC) emission standard, operational requirement, control requirement or VOC content limitation established by OAR 340 division 232.	<p>Send PEN and refer under any of the following circumstances:</p> <p>(i) The violation results in any of the following:</p> <ul style="list-style-type: none"> <li>• An exceedance of an emission limitation or standard by more than 10 percent, or</li> <li>• An exceedance of a VOC content limitation by more than 10 percent, or</li> <li>• Under-control emissions by more than one-tenth of the minimum control requirements.</li> </ul> <p>(ii) If this is the second similar violation within 36 months, or            (iii) The last similar violation was documented during DEQ’s most recent inspection that occurred more than 36 months ago and DEQ sent WL or PEN.</p> <p>Otherwise send WL.</p>
AQ 0054(2)(f)	Failing to timely submit a complete ACDP annual report or permit attachment annual report.	<p>Send PEN and refer under any of the following circumstances:</p> <p>(i) the report cannot be submitted due to lack of record-keeping or monitoring (except for Area Source NESHAP Categories first subject to the permit requirements in the previous two reporting periods), or</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p>(ii) The second violation within 36 months (except for new Area Source NESHAP Categories, send PEN and refer for the third violation within 36 months).</p> <p>Otherwise, send WL or WLOC if report is not yet received.</p> <p>Note: Apply a fifteen calendar day grace period for submittal without sending WL or PEN.</p>
AQ 0054(2)(g)	Failing to timely submit a certification, report, or plan as required by rule, permit, or permit attachment, unless otherwise classified.	<p>Send PEN and refer under any of the following circumstances:</p> <ul style="list-style-type: none"> <li>• For a semi-annual compliance certification that is: <ul style="list-style-type: none"> <li>○ 60 or more calendar days late, or</li> <li>○ was never submitted, or</li> <li>○ has not been submitted in accordance with a previous WLOC citing a late report, or</li> <li>○ remains incomplete beyond a deadline set in a previous WLOC;</li> </ul> </li> <li>• For all other reports, plans or violations, if it is the second violation within 36 month.</li> </ul> <p>Otherwise send WLOC.</p> <p>Note: Apply a seven calendar day grace period for late submittal without sending a WL or PEN (except for semi-annual compliance certifications).</p>
AQ 0054(2)(h)	Failing to timely submit a complete permit application, ACDP attachment application, or permit renewal application.	<p><i>For ACDP</i></p> <p>Send WLOC to submit application within 30 calendar days, if permit has not yet expired.</p> <p>Send PEN and refer under any of the following circumstances:</p> <p>(i) if the source does not submit the renewal application according to the WLOC schedule, or</p>



**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p>(ii) if the violation is repeated within 60 months (or 120 months if a 10-year permit), or            (iii) if the source is operating without a permit because the permit has expired</p> <p><b>NOTE:</b> ACDP sources that do not submit a renewal application timely (by due date in permit or rule), are not administratively-extended and expire upon the expiration date on the permit.</p> <p><i>For Title V – No application submitted</i></p> <p>New Title V sources that fail to submit a timely application (within one year of becoming subject to Title V) receive no application shield and are operating without a Title V permit until a permit is issued. Follow guidance at 0054(1)(e). For a minor source failing to timely submit a Title V permit application, follow same guidance.</p> <p><i>For Title V- no renewal application by deadline:</i></p> <p>(1) Send WLOC to submit application if permit has not yet expired.            (2) If permit has expired, follow the guidance at 0054(1)(e).</p> <p><i>For Title V- Incomplete application for renewal:</i></p> <p>Applications that are obviously incomplete should be rejected and returned to permittee for completion. If this results in a late application, but permit has not expired, send WL or WLOC if application has not yet been received. For applications that require further review by DEQ to determine completeness or that have passed the 60-day window to reject (<a href="#">OAR 340-218-0040(1)(b)D</a>):</p> <p>(1) Send <a href="#">letter</a> requesting additional information needed. Additional letters can be sent if, in the course of reviewing application and drafting permit, DEQ determines</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p>that additional information is needed. In no case should a second letter be sent requesting the same previously-requested information.</p> <p>(2) If permittee does not respond to letter by submitting requested information, Send <a href="#">WLOC</a> if the permit has not yet expired.</p> <p>(3) Send <a href="#">PEN</a> and refer for <i>operating without a Title V permit</i> if permittee fails to submit requested information and the permit has expired.</p> <p>Send PEN and refer if the last renewal application was late.</p> <p><b><u>NOTE:</u></b> Title V permits do not expire unless we fail to either receive a permit renewal application timely or the application is incomplete upon permit expiration date. If the application was submitted timely, but DEQ has a pending request for additional information and due date for submittal of the requested information is after expiration date on permit, the permit is administratively extended until the date we deem the application incomplete.</p>
AQ - CAO 0054(2)(i)	Failing to submit a timely and complete toxic air contaminant emissions inventory as required under OAR 340-245-0005 through 340-245-8050.	<p>Send WLOC to submit the toxic air contaminant emissions inventory within 30 calendar days.</p> <p>Send PEN and refer if the emissions inventory is not submitted in accordance with the WLOC or if the violation is repeated within 60 months.</p>
AQ – OB/HS 0054(2)(j)	Failing to comply with open burning requirement for commercial, construction, demolition, or industrial waste in violation of OAR 340-264-0080 through 0180.	<p>Send EEO for:</p> <ul style="list-style-type: none"> <li>(i) open burns containing more than 10 cubic yards of these materials, or</li> <li>(ii) open burns containing more than five but less than 10 cubic yards of these materials if the violation is the second violation within 60 months, or</li> <li>(iii) open burns containing less than five cubic yards of these materials if the violation is the third violation within 60 months.</li> </ul>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p>Otherwise send WL.</p> <p>Send a PEN and refer for any similar violations for which an EEO has been issued within the past 60 months.</p> <p><b>Notes:</b></p> <p>(1) Open burning of legitimate agricultural waste is not a violation of open burning rules unless they are burning prohibited materials as listed in OAR 340-264-0060(3). Refer to the Class I open burning violation (OAR 340-012-0054(1)(w)) for prohibited materials.</p> <p>(2) For all open burning violations that involve large quantities of material where the program believes the economic benefit of open burning the material versus properly disposing of it is significant compared to the reduced penalty amount of the EEO, the program should consider instead issuing a PEN and referral to OCE. See guidance in the open burning EEO instructions document.</p>
AQ - OB 0054(2)(k)	<p>Failing to comply with open burning requirements in violation of any provision of OAR 340 division 264, unless otherwise classified; or burning materials in a solid fuel burning device, fireplace, trash burner or other device as prohibited by OAR 340-262-0900(2).</p> <p><i>Note- This Class II violation (340-262-0900(2)) is for burning paper other than that used to kindle a fire.</i></p>	<p><b><u>Open burning</u></b></p> <p>Send WL. Send a WL for the next two similar violations within 60 months.</p> <p>Send an EEO for the fourth similar violation within 60 months.</p> <p>Send a PEN and refer for any similar violation thereafter within 60 months.</p> <p><b><u>Indoor Burning of Prohibited Materials (paper)</u></b> (in a solid fuel burning device, fireplace, trash burner, etc.)</p> <p>Send “Burn Information Letter.”</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ 0054(2)(l)	Failing to replace, repair, or modify any worn or ineffective component or design element to ensure the vapor tight integrity and efficiency of a stage I or stage II vapor collection system.	Send WL.  Send PEN and refer the second similar violation within 36 months.
AQ – ASB 0054(2)(m)&(n)	<i>See Table 2A.</i>	
AQ 0054(2)(o)	Violating on road motor vehicle refinishing rules contained in OAR 340-242-0620.	Send WL.  Send PEN and refer on the second violation within 36 months.
AQ 0054(2)(p)	Failing to comply with an Oregon Low Emission Vehicle reporting, notification, or warranty requirement set forth in OAR division 257.	Send WLOC for the first occurrence.  Send PEN and refer upon the second violation of the same requirement within 36 months or if violator fails to comply with the WLOC.
AQ - CFP 0054(2)(q)	Failing to receive Green-e certification for Renewable Energy Certificates used to generate incremental credits when required by OAR 340-253-0470.	Send WLOC requiring the violator to submit the proper certification.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.
AQ - CFP 0054(2)(r)	Failing to register as an aggregator or submit an aggregator designation form under OAR 340-253-0100(3) and (4)(c).	Send WLOC giving 15 calendar days from date of WLOC to register.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.
AQ - CFP 0054(2)(s)	Failing to keep complete and accurate records under OAR 340-253-0600.	Send WL or WLOC (if correctable) giving 30 calendar days from date of WLOC to submit records (if able).  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ - CFP 0054(2)(t)	Failing to ensure that a registered party has the exclusive right to the environmental attributes that it has claimed for biomethane, biogas, or renewable electricity either directly as a fuel or indirectly as a feedstock under OAR chapter 340, division 253 by either the registered party, the fuel producer, and/or fuel pathway holder.	<p>Send PEN and refer.</p> <p><b>Note:</b> This classification covers both (1) a violation of failing to submit renewable electricity certificates (REC) or renewable thermal certificates (RTC), and (2) multiple claims on the same volume of renewable electricity or renewable natural gas.</p>
AQ - CFP 0054(2)(u)	Failing to timely submit a complete and accurate quarterly report under OAR 340-253-0630.	<p><i>For failures to report (report not yet submitted):</i> Send WLOC giving 5 business days from date of WLOC to submit report.</p> <p>Send PEN and refer if violator fails to comply with WLOC, for second violation within 36 months, or if failure to report has occurred for one year or more.</p> <p><i>For late reports (report submitted after deadline):</i> Send WL.</p> <p>Send PEN and refer for second violation in 36 months.</p> <p><i>For incomplete or inaccurate reports:</i> Send WLOC giving 30 days to correct the error.</p> <p>Send PEN and refer (1) if violator fails to comply with WLOC, or (2) for second violation within 36 months..</p> <p><b>Note:</b> For registration or reporting violations involving inaccurate information or fraud, also consider the OAR 340-012-0053(1)(b) and 340-012-0053(1)(d) classifications in Table 1 (Default violations guidance).</p>

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ – 3PV 0054(2)(v)	Violating any requirement under OAR Chapter 340 division 272, unless otherwise classified.	If violation is uncorrectable, send WL. If violation is correctable, send WLOC giving 15 days (or other appropriate amount of time) for corrective action.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.
AQ – LFG 0054(2)(w)	Violating any requirement under OAR chapter 340, division 239, unless otherwise classified.	<i>Note:</i> For violations of permit conditions derived from division 239, see AQ 0054(2)(b).  Send WL/WLOC.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.
AQ 0054(2)(x)	Failing to comply with the reporting notification or warranty requirements for new engines, trucks, and trailers set forth in OAR Chapter 340, division 261.	Send WLOC for the first occurrence.  Send PEN and refer upon the second violation of the same requirement within 36 months or if violator fails to comply with the WLOC.
AQ – CPP 0054(2)(y)	Violating any requirement under the Climate Protection Program, OAR Chapter 340, division 271, unless otherwise classified.	Send WL/WLOC.  Send PEN and refer if violator fails to comply with WLOC, for second violation within 36 months, or if violation impacts Climate Protection Program applicability determinations, compliance instrument distribution or compliance obligations.
AQ – CPP 0054(2)(z)	Violating any condition in a permit, Climate Protection Program permit, or Climate Protection Program permit addendum issued according to OAR 340-271-0150, unless otherwise classified.	Send WL/WLOC.  Send PEN and refer if violator fails to comply with WLOC, for second violation within 36 months, or if violation impacts Climate Protection Program applicability determinations, compliance instrument distribution or compliance obligations.
AQ – CFP 0054(2)(aa)	Failing to notify DEQ of a change of ownership or control of a registered party under OAR chapter 340, division 253.	Send WLOC giving 15 days to submit the updated registration form.  Send PEN and refer if violator fails to comply with WLOC, for second violation within 36 months, or if violation impacts Third Party Verification applicability.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
<b><i>CLASS III VIOLATIONS</i></b>		
AQ 0054(3)(a)	Failing to perform testing or monitoring required by a permit, rule or order where missing data can be reconstructed to show compliance with standards, emission limitations or underlying requirements;	Send WL. This Class III violation that is found without Class I or Class II violations will be referred only according to Regional Administrator’s discretion.
AQ 0054(3)(b)	Constructing or operating a source required to have a Basic Air Contaminant Discharge Permit without first obtaining the permit;	Send WLOC requiring submittal of a permit application within 30 calendar days.  Send PEN and refer for the second occurrence of this violation within the last 60 months or for failure to submit a permit application in accordance with a WLOC.
AQ 0054(3)(c)	Modifying a source in such a way as to require construction approval from DEQ without first obtaining such approval from DEQ, unless otherwise classified;	Send WLOC requiring submittal within 30 calendar days.  Send PEN and refer for the second occurrence of this violation within the last 60 months.
AQ – ASB 0054(3)(d)&(e)	<b><i>See Table 2A.</i></b>	
AQ 0054(3)(f)	Licensing a noncompliant vehicle by an automobile dealer or rental car agency in violation of Oregon Low Emission Vehicle rules set forth in OAR 340 division 257;	Send WL. Send PEN and refer for repeated violations, upon Regional Administrator’s discretion.
AQ - CFP 0054(3)(g)	Making changes to a submitted quarterly or annual report under OAR Chapter 340, division 253 without DEQ approval under OAR 340-253-0650(4).	Send WL or WLOC if the issue remains uncorrected giving 30 calendar days to correct the error.  Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.

**Table 2**  
**Air Quality Violations Guidance (OAR 340-012-0054)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ - CFP 0054(3)(h)	Failing to upload transactions to a quarterly report by the 45-day deadline under OAR 340-253-0630.	<p>Send WL or WLOC if the issue remains uncorrected giving 7 calendar days to submit records.</p> <p>Send PEN and refer if violator fails to comply with WLOC or for second violation within 36 months.</p>



## Table 2A Asbestos Violations Guidance

The guidance table below directs compliance staff on the appropriate enforcement response for asbestos program violations. For all other air quality violations, see Table 2. Compliance staff must first determine the substantive violations (violations of OAR Chapter 340, Division 248). Next, compliance staff must determine how the violation is classified according to OAR Chapter 340, Division 12. The classification of the violation (e.g., OAR 340-012-0054(1)(r)), will dictate the appropriate enforcement response (WL, EEO or PEN) according to the Table below.

Deviation from the Guidance in the Table – Deviation must be approved by the Regional Asbestos Manager, Regional Division Administrator, and OCE Manager. See Section 6.3.5 of the Enforcement Guidance for further directions on the No-Penalty Justification (NPJ) and Penalty Justification (PJ) process.

Contact OCE for any questions about applying this guidance.

### **Asbestos – significant public health risk analysis**

Several of the guidance sections below require the inspector to determine whether the violation caused a *significant public health risk*. The inspector will consider all reasonably available information and, using their best professional judgment, will consider all the factors below in their totality. However, any single factor may be conclusive.

Compliance staff may determine that the violation caused a significant public health risk if:

- a. The material was comprised of more than five percent asbestos.
- b. The type of asbestos presents a heightened public health risk (e.g., amosite or tremolite).
- c. The asbestos was contained in a friable material prior to being abated.
- d. The length of time the asbestos was openly accumulated was 48 hours or more.
- e. The violator did not take actions that would have mitigated or prevented actual fiber release, such as partial packaging or covering, or wetting of the material.
- f. There is evidence of actual exposure, or the likelihood of actual public exposure to asbestos, based upon factors such as the location of the abatement project (inside or outside, urban or rural), whether the building was occupied, worker exposure, weather (e.g. high winds) that spread asbestos fibers, etc.

*EXAMPLE of a situation that caused a significant public health risk:* Friable asbestos-containing material was openly accumulated, with no mitigation or ineffective mitigation, in a high-traffic location or in a location near sensitive receptors (e.g. in a home with a baby, next to a school).

## Table 2A Asbestos Violations Guidance

*EXAMPLE of a situation that did NOT cause a significant public health risk:* Friable asbestos-containing material was abated in a vacant building by an unlicensed contractor. There are no homes or businesses directly adjacent to the building and the material was accumulated inside the building without appropriate packaging. No one was entering the building except the contractor. The public health risk would be low in this example.

### **Asbestos Expedited Enforcement Offer (EEO)**

#### **EEO criteria:**

EEOs may be issued only if the violation-specific guidance in the table below calls for an EEO and only if ALL the criteria below are met. The analysis of the EEO criteria should be documented in the file.

1. None of the violations for the current action warrant a PEN under the guidance table below (if any of the violations warrant a PEN, then ALL violations must be documented in one PEN and referred for formal enforcement).
2. If the responsible party is a DEQ-licensed asbestos abatement contractor, the violation must be a Class II or Class III violation, or a Class I work practice violation that does not create a significant public health risk.
  - a. CCB-licensed general contractors that are not licensed asbestos abatement contractors are eligible for EEOs for all Class I, II and III violations that otherwise meet the EEO criteria.
3. DEQ has not issued an EEO or PEN for the same Class I violation (same Division 248 rule) in the last three years.
4. None of the violations had a significant public health risk, as determined using the analysis above.
5. The violator did not incur a significant economic benefit as a result of the violation. Generally, for asbestos projects, DEQ may consider avoided costs totaling more than \$10,000 to be a significant economic benefit. To make this determination, first estimate the avoided costs: survey costs, notification fees, cost to hire a licensed asbestos abatement contractor, disposal costs. Do not include travel and per diem costs. Then, subtract any costs actually incurred to complete the asbestos abatement and clean up the site.
6. The violator did not cause the violation flagrantly.<sup>1</sup>

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<sup>1</sup> As defined in Division 12, “Flagrant” or “flagrantly” means the respondent had actual knowledge that the conduct was unlawful and consciously set out to commit the violation. (For example, a violation is “flagrant” if DEQ tells the Respondent that the conduct is unlawful and then the Respondent does it anyway.).

## Table 2A Asbestos Violations Guidance

### EEO process<sup>2</sup>

1. Asbestos compliance inspector: If you determine that the case is eligible for an EEO based on the criteria above, consult with ELS Asbestos Lead or Backup Lead in the Office of Compliance and Enforcement before processing the EEO. This consultation can be via email, or a short meeting or phone call to talk through the criteria.
2. Draft the EEO, using the EEO template:
  - a. *Which violations to include:* If the Guidance calls for an EEO, and there are other violations that call for a Warning Letter, ALL violations must be documented in the EEO, with penalties assessed only for the violations that warrant an EEO.
  - b. *Calculating EEO penalties:* According to OAR 340-012-0170(2)(e), EEO penalties are 40% of the moderate base penalty listed in OAR 340-012-0140. This means that for any Respondent that is NOT a residential owner-occupant, each Class I violation receives an EEO penalty of \$1,600; each Class II violation receives an EEO penalty of \$800; and each Class III violation receives an EEO penalty of \$280. For residential owner-occupants, each Class I violation receives an EEO penalty of \$200, each Class II violation receives an EEO penalty of \$100, and each Class III violation receives an EEO penalty of \$40.
  - c. *Corrective actions:* You may include corrective actions in the EEO.
3. Send to regional asbestos program manager for review and approval.
4. Once approved by manager, enter violations and EEO enforcement data in YDO and issue the EEO via email and regular mail.
5. Make a “heads up” call to the Respondent on the day that you issue the EEO using the talking points below:
  - a. DEQ is issuing an Expedited Enforcement Offer (EEO) due to violations of Oregon’s asbestos rules. An EEO is an offer to settle the violation(s) for a reduced civil penalty.
  - b. Explain: the EEO amount, violations alleged, and any corrective actions.
  - c. You cannot appeal the EEO; it is a take it or leave it offer. If you disagree with the violations, you may “reject” the EEO by not paying the penalty. Then, DEQ will issue a formal enforcement action that you can appeal.
  - d. If you would like to accept the EEO, you will need to make the payment in 30 days.
  - e. The EEO will be sent via email and regular mail. Please review the document carefully when you receive it, and you may contact me if you have additional questions.
6. Mark your calendar to check on the EEO status in 30 days.

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<sup>2</sup> This process will be reviewed, and updated as needed, by the Asbestos program managers, staff, and OCE within 15 months after the adoption of this guidance.

**Table 2A**  
**Asbestos Violations Guidance**

7. If the EEO is not paid in 30 days, withdraw the EEO in YDO, and refer the case to OCE for formal enforcement using YDO. Make sure to include a link with the referral packet that includes evidence to support the violations. You do not need to issue a PEN.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><i>CLASS 1 VIOLATIONS</i></b>		
AQ - ASB 0054(1)(r)	Violating a work practice requirement for asbestos abatement projects;	<p>I. For all work practice violations, <u>except</u> for survey violations, (covered in II below), send WL if all the following conditions are met:</p> <ul style="list-style-type: none"> <li>(i) The DEQ inspector makes a determination using the guidance in the introduction to this Table that the project did <u>not</u> create a significant public health risk; and</li> <li>(ii) The violator has not received a previous WL or PEN for the same violation.</li> </ul> <p>For second work practice violation in 36 months that does not create a significant public health risk (e.g., viewing window), send EEO if EEO criteria are met.</p> <p>Otherwise, send PEN and refer.</p> <p>II.a. For survey violations at <u>commercial buildings</u>:</p> <p>Send WL for first violation of survey report rule (OAR 340-248-0270(3)(d)) UNLESS:</p> <ul style="list-style-type: none"> <li>• The survey report does not describe the areas surveyed according to OAR 340-248-0270(3)(d)(E), or</li> <li>• There is no table of ACM and presumed ACM according to OAR 340-248-0270(3)(d)(H), or</li> <li>• There are no recommended response actions according to OAR 340-248-0270(3)(d)(I), or</li> <li>• The lab report and chain of custody are not included according to OAR 340-248-0270(3)(d)(J).</li> </ul>

**Table 2A**  
**Asbestos Violations Guidance**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<p>Otherwise, send EEO for first survey violation* within 36 months, if EEO criteria are met, using process above.</p> <p>Otherwise, send PEN and refer.</p> <p>II.b. For survey violations at <u>residential buildings</u>, send WL for first survey violation* within 36 months.</p> <p>For second survey violation* in 36 months, send EEO if EEO criteria are met, using process above.</p> <p>Otherwise, send PEN and refer.</p> <p>*A survey violation is any violation of OAR 340-245-0270(1)-(4), regardless of whether it was a commercial or residential project.</p>
AQ - ASB 0054(1)(s)	Improperly storing or openly accumulating friable asbestos material or asbestos-containing waste;	<p>Send EEO if criteria are met, using process above.</p> <p>Otherwise, send PEN and refer.</p>
AQ - ASB 0054(1)(t)	Conducting an asbestos abatement project, by a person not licensed as an asbestos abatement contractor;	<p>Send WL if the violator has not received a previous WL or PEN for the same violation AND both of the following conditions are met:</p> <ul style="list-style-type: none"> <li>(i) You make a determination using the guidance in the introduction to this Table that there is <u>not</u> a significant public health risk; and</li> <li>(ii) The violator is not licensed with the Oregon Construction Contractors Board, did not receive training in the identification of asbestos, and likely was not aware of the possible presence of asbestos.</li> </ul> <p>Otherwise, send EEO if criteria are met, using process above.</p> <p>Otherwise, send PEN and refer.</p>

**Table 2A**  
**Asbestos Violations Guidance**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ - ASB 0054(1)(u)	Violating an OAR 340 division 248 disposal requirement for asbestos-containing waste material;	<p>For violations of OAR 340-248-0280 sections (4), (6), (7), (8), (9), and (5), if the disposal was at a permitted disposal site but not completed as soon as possible:</p> <ul style="list-style-type: none"> <li>(i) Send WL for first violation in 36 months;</li> <li>(ii) Send EEO for second violation in 36 months, if EEO criteria are met;</li> <li>(iii) Otherwise, send PEN and refer.</li> </ul> <p>For violations of OAR 340-248-0280 sections (1), (2), (3), (11), (12), and (5), if the disposal was not at a permitted disposal site:</p> <ul style="list-style-type: none"> <li>(i) Send EEO for first violation in 36 months, if EEO criteria are met;</li> <li>(ii) Otherwise send PEN and refer.</li> </ul>
AQ - ASB 0054(1)(v)	Failing to hire a licensed contractor to conduct an asbestos abatement project;	<p>Send WL if all conditions are met:</p> <ul style="list-style-type: none"> <li>(i) The violation was committed by a residential owner-occupant*; and</li> <li>(ii) The owner-occupant had not previously received a WL or PEN from DEQ for any asbestos violation; and</li> <li>(iii) The owner-occupant had not been advised or notified in any way of the requirement to hire a licensed abatement contractor or of the presence of asbestos in the home.</li> </ul> <p>Otherwise, send EEO if criteria are met, using process above.</p> <p>Otherwise, send PEN and refer.</p> <p><i>*Note that if the residential owner-occupant performs the asbestos abatement work themselves as part of a renovation, it is not a violation of Division 248. This violation is for someone hiring an unlicensed contractor.</i></p>

**Table 2A**  
**Asbestos Violations Guidance**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><i>CLASS 2 VIOLATIONS</i></b>		
AQ - ASB 0054(2)(m)	Failing to provide timely, accurate or complete notification of an asbestos abatement project;	<p>Send WL if this is the first notification violation (any violation of OAR 340-248-0260) in the last 36 months.</p> <p>For the second notification violation in the last 36 months, send EEO if criteria are met, using process above.</p> <p>For the third notification violation in the last 36 months, send PEN and refer.</p>
AQ - ASB 0054(2)(n)	Failing to perform a final air clearance test or submit an asbestos abatement project air clearance report for an asbestos abatement project;	<p><i>For failing to submit final air clearance report</i>, send WLOC giving 30 calendar days to submit report.</p> <p>If report is not submitted by deadline in WLOC, or for second violation in 36 months, send EEO if criteria are met, using process above.</p> <p>For third violation in 36 months, send PEN and refer.</p> <p><i>For failing to perform final air clearance</i> (e.g., NPE has been taken down and air clearance test cannot be performed), send EEO if violation meets EEO criteria.</p> <p>Otherwise, send PEN and refer.</p>
<b><i>CLASS 3 VIOLATIONS</i></b>		
AQ - ASB 0054(3)(d)	Failing to revise a notification on an asbestos abatement project when necessary, unless otherwise classified;	<p>Send WL for first-time revision violations (i.e., the Respondent has not received a WL or PEN for any violation of OAR 340-0260(10) in the past 36 months).</p> <p>For the second violation in 36 months, send EEO if the violation meets EEO criteria.</p> <p>Otherwise, send PEN and refer.</p>

**Table 2A**  
**Asbestos Violations Guidance**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
AQ - ASB 0054(3)(e)	Submitting a late air clearance report that demonstrates compliance with standards for an asbestos abatement project;	<p>Send WL.</p> <p>For the second violation in 36 months, send EEO if the violation meets the EEO criteria.</p> <p>Otherwise, send PEN and refer.</p>



## **Table 3**

### **Water Quality Violations Guidance (OAR 340-012-0055)**

#### **Introduction**

The guidance table below directs compliance staff on the appropriate enforcement response for water quality violations. For stormwater violations see Table 3A and for TMDL violations see Table 3B. The table below includes Division 12 classification changes that became effective on January 6, 2014. Division 12 classifications are used as a basis for the enforcement guidance and to calculate penalties but are not the proper way to cite a violation of law. For that purpose, use the relevant program statutes, rules, permits or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations into a single classification. If there is no applicable classification in the table below, consult Table 1 for the Default Classifications.

#### **Repeated Violations**

If the specific guidance does not indicate whether to refer repeated violations, follow the guidance for the Class II violations in Table 1 for the Default Classifications. For classifications of effluent limit violations, a repeated violation is a repeat of an exceedance of a *pollutant parameter* that is limited in the permit. For example, a violation of a daily limit for BOD and a subsequent violation of a monthly limit for BOD would be a repeated violation. The period of a repeated violation begins with the date of the issuance of the prior informal enforcement action (WL/PEN). For example, if a WL for a BOD daily limit exceedance occurs on January 1, 2020 and DEQ issues a WL for the violation on January 1, 2021, the period for determining whether a violation repeats would begin on January 1, 2021. If the same permittee exceeds a monthly BOD limit on or before December 31, 2023 (36 month period), then DEQ will elevate the enforcement response.

#### **Special notes on some types of violations:**

##### **Violations involving “causing pollution” (-0055(1)(a)) and “unpermitted discharges to waters of the state (-0055(1)(b))”**

For many unpermitted waste discharges, both causing pollution of waters of the state (ORS 468B.025(1)(a)) and discharging wastes to waters of the state without a permit (ORS 468B.050(1)(a)) are applicable to the violation. In these instances, the general preference is to cite ORS 468B.050(1)(a) as the violation. Except in cases where impairment of a beneficial use is well documented, proving discharge of a waste to a water of the state will be easier to prove than causing pollution. In addition, there is no substantive difference in how the two violations are addressed by the enforcement guidance or Division 12. Instances where it is preferable to cite causing pollution are those where the specific facts of the case make it more difficult to prove a discharge, for example, release of algae blooms from a reservoir to a creek or turbidity increases resulting from a dredging project.

## **Table 3**

### **Water Quality Violations Guidance (OAR 340-012-0055)**

If the inspector has evidence that the unpermitted discharge caused a water quality standards violation, cite ORS 468B.025(1)(b) *and* one of the violations above.

#### **Violations involving “beyond reasonable control” (BRC)**

A finding of BRC will result in a WL. For the purpose of the Water Quality Guidance (except for SSO violations which are specifically addressed below), “beyond reasonable control” means the violation resulted from: (i) an act of war, sabotage, or unforeseeable and unpreventable vandalism; (ii) an extreme act of nature; (iii) negligence on the part of local, state or federal government; (iv) an act or omission of a 3rd party (not including an agent of violator) without regard to whether any such act or omission was or was not negligent; or (v) the violation could not have been reasonably anticipated or prevented. Before making a final determination of beyond reasonable control, an inspector must consult with the lead or backup lead ELS for the water quality program. The inspector will send OCE an email to initiate the consultation. OCE will maintain a BRC consultation tracking sheet. In deciding whether the violation could not have been reasonably anticipated or prevented, focus on whether the violator took all of the steps DEQ expected of the violator, including following permit requirements, following operational and maintenance plans, addressing repeated violations, and implementing such other reasonable steps that, if taken, would have eliminated the violation. A finding of beyond reasonable control must be based on known facts and circumstances and is not appropriate when the cause of the violation is not known or not understood. An example of a violation which was not reasonably preventable: equipment failure is when the equipment is subject to a reasonable inspection and maintenance and replacement schedule and there are reasonable alarm/backup systems in place.

#### **Reporting violations:**

1. If a source failed to submit their discharge monitoring report (DMR) by the deadline in the permit, follow the guidance for “failing to timely submit a report or plan as required by rule, permit, or license, unless otherwise classified” (340-012-0055(2)(b)),
2. If a DMR is received with information missing or data entry or calculation errors but the source supplies the information later, follow the guidance for “failing to submit a complete discharge monitoring report” (-0055(3)(a)).
3. If the source does not submit a DMR with complete information and the source does not later supply the information:
  - a. If the missing data is required by Schedule B, follow the guidance for “failing to collect monitoring data required in Schedule B of the permit” (-0055(1)(o)). A referral to OCE for failing to monitor in accordance with Schedule B should include an estimated economic benefit for the avoided monitoring costs.
  - b. If the missing data is not required by Schedule B, follow guidance for “Violating any management, monitoring, or operational plan established pursuant to a waste discharge permit, unless otherwise classified” (-0055(2)(d));
4. If the monitoring data is submitted but procedural errors or QA/QC errors render the information questionable:

### **Table 3**

#### **Water Quality Violations Guidance (OAR 340-012-0055)**

- a. If the data is still sufficiently reliable for the purpose for which it is required, e.g. determining compliance with an effluent limit, follow guidance for “Violating any management, monitoring, or operational plan established pursuant to a waste discharge permit, unless otherwise classified” (-0055(2)(d)). Regional staff may use all information available to make this finding, including surrounding circumstances such as knowledge of the waste stream, other parameters tested, and samples taken prior to or after the errors.
  - b. Otherwise, follow guidance for “failing to collect monitoring data required in Schedule B of the permit” (-0055(1)(o)).
5. If the source submits required information or data for which there is no basis or the information or data seems fraudulent, the source is in violation of OAR 340-045-0015(d) which is classified at (-0053(1)(b)): *“Submitting false, inaccurate or incomplete information to DEQ where the submittal masked a violation, caused environmental harm, or caused DEQ to misinterpret any substantive fact.”*
- It may also be criminal act. Please consult OCE Environmental Crimes Coordinator before taking any action on these violations.

#### **Violations during start-up of new wastewater treatment systems (major treatment plant modification)**

Under 40 CFR § 122.29(d)(4), new treatment systems are allowed a start-up period within the shortest feasible time (not to exceed 90 days). Violations that occur during start-up will not receive a formal enforcement action if the permittee submits documentation that the start-up was properly planned, prepared and executed. Instead, the inspector should issue a warning letter for these violations. These violations do not count as repeats towards past and/or future violations for purposes of escalating the enforcement response according to the table below.

#### **Violations during stress testing of new wastewater treatment systems**

DEQ expects the system owner to stress-test the new system within the first year of operation so that potential deficiencies can be identified and corrected during the contractor’s and manufacturer’s warranty period. DEQ will use enforcement discretion for violations that occur during this time if:

- The violations were not due to negligence on the part of the permittee,
- The permittee provided DEQ with at least seven days prior notice of the stress-testing, and
- The permittee submits documentation that the violations were caused by stress-testing.

If all of the above criteria are met, the inspector should issue a warning letter for these violations, and these violations do not count as repeats towards past and/or future violations for purposes of escalating the enforcement response according to the table below.

#### **Violations involving sanitary sewer overflows (SSOs)**

SSOs should be evaluated on a case-by-case basis according to the following guidance:

*Send PEN and refer if:*

### **Table 3**

#### **Water Quality Violations Guidance (OAR 340-012-0055)**

1. The SSO was not reported orally to OERS or DEQ within 24 hours as required by the permit. (Follow guidance described in 0055(2)(b) and 0055(3)(a) for violations of the written reporting requirements), or
2. The SSO was spilled to waters of the state, had actual or potential significant environmental or human health impact (Please review SSO Enforcement Decision Tree when determining actual or significant impact at any volume), and was not beyond reasonable control, or
3. The SSO was spilled to land and the permittee's failure to take appropriate action created a significant potential impact to human health, or
4. Permittee has chronic SSO issues that prior WLs or PENs have not resolved.

*Take no action other than documentation in the file if one of the following applies:*

1. The SSO was caused by unpreventable vandalism or similar force majeure; or
2. The cause of the current SSO was beyond reasonable control AND we do not expect the permittee to prevent similar SSOs in the future (i.e., we do not expect permittee to modify system management in any way based on the knowledge of the SSO so a WL would serve no educational purpose); or
3. The SSO was 400 gallons or less, spilled to the ground and did not reach surface water; permittee properly reported, cleaned up, and took appropriate public notice measures; and the SSO was not part of a chronic problem.

*If neither the PEN or the "no action alternative apply" send WL or WLO.*

For the purposes of this SSO guidance, "beyond reasonable control" means "the violation could not have been reasonably anticipated or prevented and DEQ is objectively satisfied that the permittee's efforts were appropriate based on what permittee knew at the time of the SSO." Before making a final determination of beyond reasonable control, an inspector should consult with the lead ELS for water quality program. A finding of beyond reasonable control must be based on known facts and circumstances and is not appropriate when the cause of the SSO is not known or not understood. Things to consider in determining whether the SSO was beyond reasonable control include:

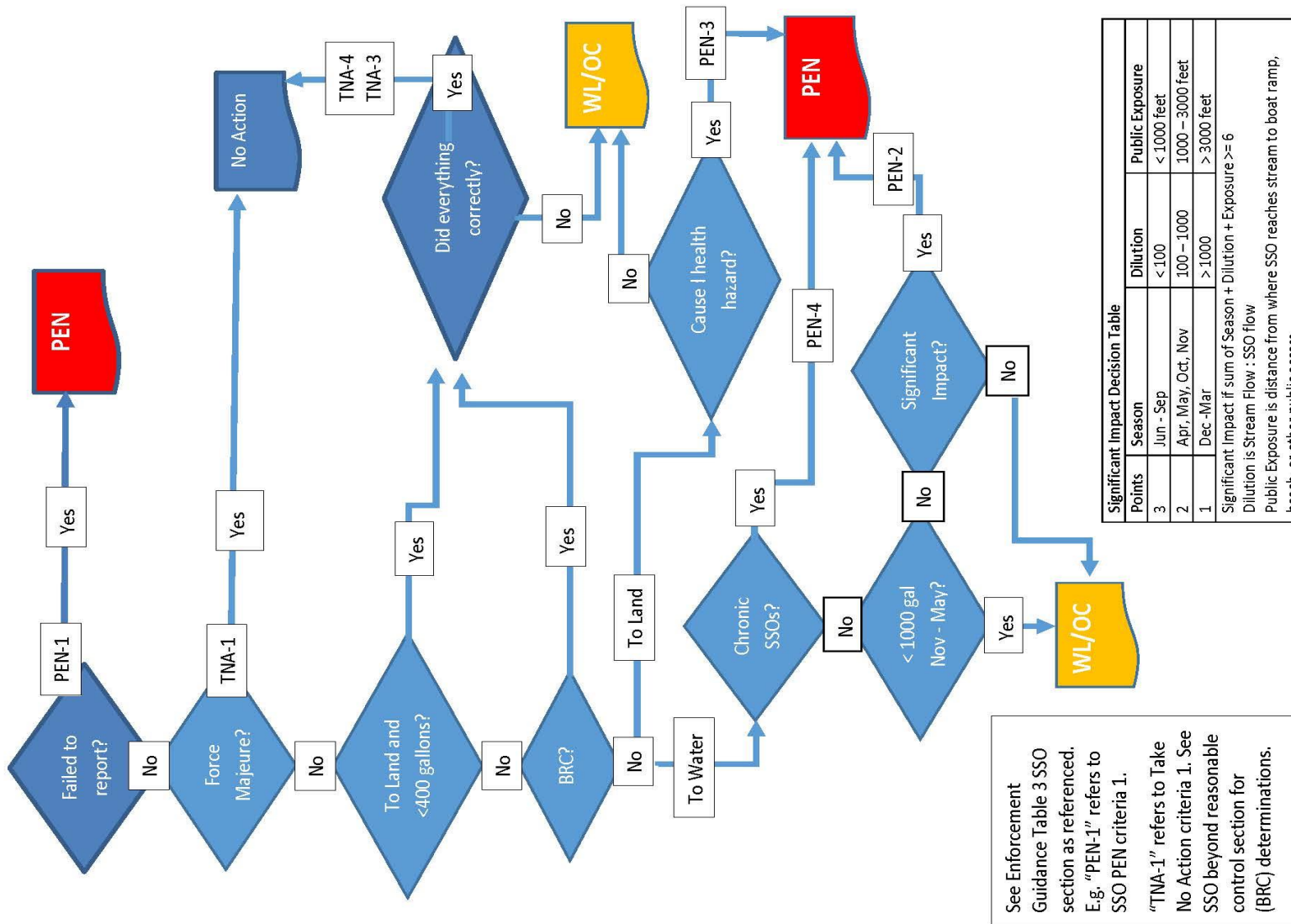
- Was the SSO caused by a storm outside the system design criteria (more than a one-in-five-year, 24-hour duration event in winter; or a one-in-ten-year, 24-hour duration event in summer)?
- Did permittee properly executed its CMOM or comparable spill-prevention plan related to this SSO?
- Does permittee have a good asset management system and is it following the maintenance schedule in the asset management system?
- Did permittee's failure to implement appropriate levels of I/I control plans possibly contribute to the SSO?

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

- Did permittee properly maintain the collection and treatment system elements from where this SSO originated; for example if the SSO was caused by a blockage, permittee has a reasonable cleanout and TV schedule and made reasonable effort to control FOG.
- Did failure of alarms or backup systems cause or worsen the SSO?

**Table 3**  
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**Decision Tree For SSO Enforcement**  
 See Table 3 of the Enforcement Guidance for Details



See Enforcement Guidance Table 3 SSO section as referenced. E.g. "PEN-1" refers to SSO PEN criteria 1. "TNA-1" refers to Take No Action criteria 1. See SSO beyond reasonable control section for (BRC) determinations.

Points	Season	Dilution	Public Exposure
3	Jun - Sep	<100	< 1000 feet
2	Apr. May, Oct, Nov	100 - 1000	1000 - 3000 feet
1	Dec -Mar	> 1000	> 3000 feet

Significant Impact if sum of Season + Dilution + Exposure >= 6  
 Dilution is Stream Flow : SSO flow  
 Public Exposure is distance from where SSO reaches stream to boat ramp, beach, or other public access.

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
<b><i>CLASS 1 WATER QUALITY VIOLATIONS</i></b>				
WQ 0055(1)(a)	Causing pollution of waters of the state;	See Statue, Rule or Order column.	See Statue, Rule or Order column.	Send PEN and refer unless violation was beyond reasonable control (see definition in the introduction to this Table).  Otherwise send WL.  NOTE: When the cause of the violation is an accidental spill of oil or hazardous material, follow guidance in Table 14 (Oil and Hazardous Materials Spills Guidance).

\* An Underground Injection Control (UIC) system is any man-made system that is used to discharge to the subsurface. Violations of any of the following are UIC violations:

- (1) WPCF no. 520A1; no. 1400B discharging to a drainfield; no. 1500B injecting any fluid into the ground; no. 1800; no. 5600B; or no. 4400; or
- (2) Any industrial or mixed industrial and domestic fluid, sludge or solid waste discharged to a drainfield, drywell, french drain, drill hole, abandoned well, or floor drain that goes to ground or drainfield; or
- (3) Any on-site system that discharges more than 2500 gallons per day of domestic-only sewage or that serves 20 or more people.

For further information, see <http://deq05/wq/uic/uichome.htm#InjectionClasses>.

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
WQ 0055(1)(b)	Reducing the water quality of waters of the state below water quality standards;	See Statute, Rule or Order column.	See Statute, Rule or Order column.	Send PEN and refer unless the violation was beyond the permittee's reasonable control (see definition in the introduction to this Table).  Otherwise send WL/O.
WQ 0055(1)(c)	Discharging any waste that enters waters of the state, either without a waste discharge permit or from a discharge point not authorized by a waste discharge permit;	Send PEN and refer unless the violation was beyond the permittee's reasonable control. (see definition in the introduction to this Table). Otherwise send WL/O.  For SSO violations, see the introduction to this table.	Follow guidance under the column for WPCF permits.	Follow guidance under the column for WPCF permits.
WQ 0055(1)(d)	Operating a discharge source or conducting a discharge activity without first obtaining an individual permit or applying for coverage under a general permit for that discharge or disposal activity;	Send PEN and refer, unless source was unaware of the need to obtain permit and could not reasonably be expected to know of requirement, and no changes in source's actions or conduct are needed to comply with permit requirements.	For sources that should have obtained a NPDES permit to discharge wastewater, follow guidance under the column for WPCF permits.  .	Follow the guidance under the column for WPCF or NPDES permits depending on which permit applies.



**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
		Otherwise send WL/O. If they fail to submit application within 30 days, send PEN and refer.		
WQ 0055(1)(e)	Failing to comply with statute, rule, or permit requirements regarding notification of a spill or upset condition, which results in a non-permitted discharge to public waters;	Send PEN and refer. Because discharge entered waters of the state, the NPV requirements do not apply. For SSO violations, see the introduction to this table.	Send PEN and refer.	Send PEN and refer.
WQ 0055(1)(f)	Failing to take appropriate action, as required by the municipal wastewater treatment works owner's department-approved pretreatment-compliance oversight program, against an industrial discharger to the municipal treatment works who violates any pretreatment standard or requirement, if the violation impairs or damages the treatment works, or causes major harm or poses a major risk of harm to public health or the environment;	Send PEN and refer.  * Note: formal enforcement action against the user should only occur if the local pretreatment authority did not take appropriate action.  Normally, the NPV requirement will not apply to this violation because of the exceptions (violation was intentional, or the violation would “not normally occur for more than five consecutive days”).	Follow guidance under the column for WPCF permits.	N/A
WQ 0055(1)(g)	Making unauthorized changes, modifications, or alterations to a facility operating under a	<i>For all violations except those at WPCF 1000 permitted facilities:</i> Send PEN and refer if the permittee received a NPV or PEN	Send PEN and refer unless modification did not result in	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
	Water Pollution Control Facility (WPCF) or National Pollutant Discharge Elimination System (NPDES) permit;	<p>in the 36 months before the violation. Otherwise consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (violation was intentional, or the violation would “not normally occur for more than five consecutive days”).</p> <p><i>For violations at WPCF 1000 permitted facilities:</i> Send WL giving 45 calendar days from date of WL to submit plans and specs. Send PEN and refer if permit registrant fails to submit plans and specs by deadline in WL.</p>	<p>effluent limit exceedance or significantly reduce wastewater treatment or control efficiency.</p> <p>Otherwise send WL/O. In the WL, request approvable plan be submitted within 30 days or other acceptable schedule. If plan is not received within 30 days, or by another date agreed to by DEQ, send PEN and refer. If modifications are unacceptable, send second WL/O requiring that permittee eliminate unauthorized modifications within a reasonable time. If this does not occur, send PEN and refer. (Note: activities related to maintenance or replacement of worn or broken equipment do not require DEQ approval.)</p> <p>If a second violation occurs within 36 months of issuance of a WL or PEN, send PEN and refer.</p>	
WQ 0055(1)(h)	Allowing operation or supervision of a wastewater treatment and collection system without proper	Send PEN and refer if the permittee received a NPV or PEN in the 36 months before the violation. Otherwise consult	Send PEN and refer unless violation did not result in effluent limit exceedance; otherwise send WL/O. In the WL, request	Send PEN and refer, unless violation did not result in effluent limit exceedance.

**Table 3**  
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<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
	certification, by the permittee and/or owner;	<p>Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (violation was intentional, or the violation would “not normally occur for more than five consecutive days”).</p>	<p>correction within 30 days or other acceptable schedule. If not corrected within 30 days or by another date agreed to by DEQ, send PEN and refer.</p> <p>If a second violation occurs within 36 months of issuance of a WL or PEN, send PEN and refer.</p> <p>(Note: This violation only applies to the owner and/or permittee of the sewerage facility; it does not apply to the operator.)</p>	<p>Otherwise send WL/O. In WL request violation be corrected within 30 days or by another acceptable schedule. If not corrected within 30 days or by other agreed upon date, send PEN and refer.</p> <p>(Note: This violation only applies to an owner and/or permittee of a collection system that is connected to a permitted system.)</p>
WQ 0055(1)(i)	Applying biosolids or domestic septage to a parcel of land that does not have department approval for land application;	<p>Send PEN and refer, unless biosolids or domestic septage did not enter waters of the state.</p> <p>Otherwise send WL/O.</p> <p>If a second violation occurs within 36 months of issuance of a WL or PEN, send PEN and refer.</p>	Follow guidance under the column for WPCF permits.	Follow guidance under the column for WPCF permits.
WQ 0055(1)(j)	Applying biosolids that do not meet the pollutant, pathogen or one of the vector attraction	Send PEN and refer, unless biosolids did not enter waters of the state.	Follow guidance under the column for WPCF permits.	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
	reduction requirements of 40 CFR 503.33(b)(1) through (10);	<p>Otherwise send WL.</p> <p>If a second violation occurs within 36 months of issuance of a WL or PEN, send PEN and refer.</p>		
WQ 0055(1)(k)	<p>Violating a technology based effluent limitation [TBEL], except for removal efficiency, in an NPDES or WPCF permit if: (A) the discharge level (except for a pH and bacteria) exceeds the limitation by 50% or more; (B) the discharge is outside the permitted pH range by more than 2 pH unit; (C) the discharge exceeds a bacteria limit as a result of an inoperative disinfection system where there is no disinfection; or (D) the discharge of recycled water exceeds a bacteria limit by more than five times the limit.</p> <p>Note: all bacteria limits are considered TBELs for the purposes of enforcement.</p>	<p>Send PEN and refer, if violation is not beyond reasonable control, and one of the following applies:            (1) pH is more than 2 pH units outside the TBEL pH range;            (2) bacteria exceedance is due to inoperative disinfection system;            or            (3) bacteria exceedance is greater than 5 times the limit in recycled water.</p> <p>Otherwise, send WL/O.</p> <p>If a third violation occurs within 36 months of issuance of a WL or PEN, send PEN and refer.</p>	<p>Send PEN and refer if violation is not beyond reasonable control.            Otherwise send WL or WL/O.</p>	N/A
WQ 0055(1)(l)	Violating a water quality based effluent limitation [WQBEL] in an NPDES permit;	N/A	Send PEN and refer unless;	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
			<p>(1) violation is beyond reasonable control, or</p> <p>(2) Exceedance is less than twice the limit and receiving stream flow during exceedance was greater than twice the flow used to calculate the WQBEL. (Use monthly average stream flow for violations of monthly limits); or</p> <p>(3) WQBEL is based on a TMDL waste load allocation, the exceedance is less than 50% over the limit, and the load is less than 50% of the sum of the WLA for all permittees.</p> <p>If a second violation occurs within 36 months of issuance of a WL or PEN, send PEN and refer.</p> <p>Otherwise, send WL/O.</p> <p>NOTES:  All limits based on TMDLs are considered WQBEL.</p> <p>If exceedance of the WQBEL also causes a violation of water quality</p>	

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
			<p>standard, cite the water quality standard and follow guidance for enforcement of standard violations (OAR 340-012-0055(1)(b)).</p> <p>For stream flow data, go to <a href="http://waterdata.usgs.gov/or/nwis/rt">http://waterdata.usgs.gov/or/nwis/rt</a> and click on Statewide Stream Flow Table. If a nearby stream gage is not available, use StreamStats 50% duration stream flow for the month the exceedance occurred.</p>	
WQ 0055(1)(m)	Violating a WPCF permit limitation in a designated groundwater management area if the exceedance is of a parameter for which the groundwater management area was established;	<p>Send PEN and refer if the permittee received a NPV or PEN in the 36 months before the violation. Otherwise consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (the violation would “not normally occur for more than five consecutive days”)</p>	N/A	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
WQ 0055(1)(n)	<p>Failing to report an effluent limitation exceedance;</p> <p>(For wastewater permits, this applies to failure to comply with the 24-hour reporting requirements only. See the “Reporting Violations” section above for guidance on other reporting violations.)</p>	<p>Send PEN and refer if the permittee received a NPV or PEN in the 36 months before the violation. Otherwise consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (violation was intentional, or the violation would “not normally occur for more than five consecutive days”)</p>	<p>PEN and refer if the violation was not beyond reasonable control and one of the following applies: Permittee failed to report within 24 hours any of the following:</p> <ul style="list-style-type: none"> <li>(1) Permittee failed to report within 24 hours noncompliance that may endanger human health or the environment, including, but not limited to, any exceedance of a daily limit of any toxic pollutant.</li> <li>(2) Exceedance of any daily or single sample bacteria limit. For permits that allow permittee to resample and average out of an exceedance, Permittee must still report within 24 hours any exceedance, even if resampling has begun.</li> <li>(3) Any unanticipated bypass that exceeds any permit limit.</li> <li>(4) Any upset that exceeds any bacteria permit limit.</li> </ul> <p>Otherwise send WL/O.</p>	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
			NOTE: Under scenario (2) and (4) above, if the permittee averages out of an exceedance, then there is no violation of the limit or the reporting requirement.	
WQ 0055(1)(o)	Failing to collect monitoring data required in Schedule B of the permit.	<p>See <i>reporting violations</i> at the introduction to this table.</p> <p>Send PEN and refer, unless violation was beyond the reasonable control of permittee or one of the following applies:</p> <ul style="list-style-type: none"> <li>(1) There are no effluent limits or benchmarks for the missed parameters.</li> <li>(2) During the reporting period, at least one sample was collected and the missed sampling was less frequent than the limit averaging period (e.g., no more than one week of missing data for a weekly limit and no more than one day of missing data for a daily limit or benchmark).</li> </ul> <p>Then send WL. Send PEN and refer if Respondent receives a</p>	Follow WPCF Guidance.	N/A



**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
		PEN or two WLs for failure to monitor within the previous 36 months.		
WQ 0055(1)(p)	Contracting for operation or operating a prohibited Underground Injection Control (UIC) system other than a cesspool that only disposes of human waste;	N/A	N/A	Send PEN and refer, if resources are available to follow-up.  Otherwise send WL/O.
WQ 0055(1)(q)	Operating an Underground Injection Control (UIC) system that causes a data verifiable violation of federal drinking water standards in an aquifer used as an underground source of drinking water, or	N/A	Send PEN and refer.	Send PEN and refer.
WQ 0055(1)(r)	Failing to substantially implement a stormwater plan in accordance with an NPDES permit.	N/A	See Table 3A below.	N/A
<b><u>CLASS 2 VIOLATIONS</u></b>				
WQ 0055(2)(a)	Violating a technology based effluent limitation, except for removal efficiency, in an NPDES or WPCF permit if: (A) the discharge level (except for technology based-pH) exceeds the limitation by 20	Send PEN and refer if the permittee received a NPV, PEN or two WLs in the 36 months before the violation. Otherwise consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send	Send PEN and refer if violation is not beyond reasonable control and Respondent received two WLs or a PEN for violation of the same parameter within the previous 36 months.	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
	percent or more, but less than 50 percent, for biochemical oxygen demand (BOD), carbonaceous chemical oxygen demand (CBOD), and total suspended solids (TTS), or by 10 percent or more, but less than 50 percent, for all other limitations, (B) the discharge is outside the permitted pH range by more than 1 pH unit but less than or equal to 2 pH units, (C) the discharge exceeds a bacteria limit by a factor of five or more, unless otherwise classified, or (D) the discharge of recycled water exceeds a bacteria limit by an amount equal to or less than five times the limit.	<p>PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (the violation would “not normally occur for more than five consecutive days”)</p>	<p>Otherwise send WL/O.</p> <p>Send PEN and refer if the violation is not corrected as requested in the WLO.</p>	
WQ 0055(2)(b)	Failing to timely submit a report or plan as required by rule, permit, or license, unless otherwise classified;	<p><i>If report or plan was received late: Send WL.</i></p> <p><i>If report or plan has not been received and is late: Send WL/O. If the report is a DMR, request permittee submit within 30 days or notify the Department if they failed to collect the monitoring data. If no data was collected, follow guidance for</i></p>	Follow the guidance under WPCF	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
		<p>OAR 340-012-0055(1)(o) above. If report or plan is not submitted within the time requested, send PEN and refer.</p> <p>Repeat violations: Send PEN and refer if two WLs or a PEN was issued for late submittals within the prior 36 months.</p>		
WQ 0055(2)(c)	Causing any wastes to be placed in a location where such wastes are likely to be carried to waters of the state by any means;	N/A	N/A	<p>Send WL. If the violation has not been corrected, otherwise send WL/O.</p> <p>If they fail to correct the violation as requested in WL/O, send PEN and refer.</p> <p>Upon second occurrence within 36 months of issuance of WL/O or PEN send PEN and refer for formal enforcement.</p>
WQ 0055(2)(d)	Violating any management, monitoring, or operational plan established pursuant to a waste	Send PEN and refer if the permittee received a NPV or PEN in the 36 months before the violation. Otherwise consult	Send WL. If the violation is correctable, send WL/O. If violation not corrected by date specified in WL/O, send PEN and	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
	discharge permit, unless otherwise classified; or	<p>Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (the violation would “not normally occur for more than five consecutive days”)</p>	refer. If Permittee has been issued two WLs or a PEN within the previous 36 months, send PEN and refer.	
WQ 0055(2)(e)	Failing to timely submit or implement a Total Maximum Daily Load (TMDL) Implementation Plan, by a Designated Management Agency (DMA), as required by department order.	N/A	See Table 3B below.	N/A
WQ 0055(2)(f)	Failing to comply with the requirements in OAR 340-044-0018(1) to obtain authorization by rule to construct and operate an underground injection system.	N/A	Send WL/O with opportunity to correct. If violation not corrected by date specified in WL, send PEN and refer. If Permittee has been issued two WLs or a PEN within the previous 36 months, send PEN and refer.	Send WL/O with opportunity to correct. If violation not corrected by date specified in WL, send PEN and refer.
<b><i>CLASS 3 VIOLATIONS</i></b>				
WQ 0055(3)(a)	Failing to submit a complete discharge monitoring report;	Send WL/O. Request permittee submit within 30 days or notify	Follow guidance under WPCF.	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div 12. Violation Language	WPCF Permits (except UIC* provisions)	NPDES Permits (and WPCF UIC* provisions)	Statute, Rule or Order
		<p>the Department if they failed to collect the monitoring data. If no data was collected, follow guidance for OAR 340-012-0055(1)(o) above. If not submitted within the time requested, send PEN and refer. Repeat Violations: If violator received WL or PEN for same violation with the prior 12 months, send PEN and refer.</p>		
WQ 0055(3)(b)	<p>Violating a technology based effluent limitation, except for removal efficiency, in an NPDES or WPCF Permit if: (A) the discharge level (except for pH and bacteria) exceeds the limitation by less than 20% for biochemical oxygen demand (BOD), carbonaceous chemical oxygen demand (CBOD), and total suspended solids (TSS), or by less than 10% for all other limitations, (B) the discharge is outside the permitted pH range by 1 pH unit or less, or (C) the discharge (except for reclaimed water) exceeds a bacteria limit by less than five times the limit;</p>	<p>Send WL.</p> <p>If Permittee has been issued two WLs or a PEN within the previous 12 months, consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (the violation would “not normally occur for more than five consecutive days”)</p>	<p>Send WL.</p> <p>If Permittee has been issued two WLs or a PEN for violation of a limit of the same pollutant within the previous 12 months, send PEN and refer.</p>	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
WQ 0055(3)(c)	Failing to achieve a removal efficiency established in an NPDES or WPCF permit;	<p>Send WL. If Permittee has been issued two WLs or a PEN within the previous 12 months, consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation because of the exceptions (the violation would “not normally occur for more than five consecutive days”)</p>	Send WL. If Permittee has been issued two WLs or a PEN within the previous 12 months, send PEN and refer.	N/A
WQ 0055(3)(d)	Failing to register an Underground Injection Control (UIC) system, except for a UIC system prohibited by rule; or	Send WL/O. If Permittee has been issued two WLs or a PEN within the previous 12 months, send PEN and refer	N/A	N/A
WQ 0055(3)(e)	Failing to follow the owner’s department-approved pretreatment program procedures, where such failure did not result in any harm to the treatment works and was not a threat to the public health or the environment.	<p>Send WL/O. If Permittee has been issued two WLs or a PEN within the previous 12 months, consult Enforcement Guidance on NPVs. If an exception to the NPV requirement applies, send PEN and refer. If no exception applies, send NPV WL and refer for NPV.</p> <p>Normally, the NPV requirement will not apply to this violation</p>	Send WL/O. If Permittee has been issued two WLs or a PEN within the previous 12 months, send PEN and refer.	N/A

**Table 3**  
**Water Quality Violations Guidance (OAR 340-012-0055)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>WPCF Permits (except UIC* provisions)</b>	<b>NPDES Permits (and WPCF UIC* provisions)</b>	<b>Statute, Rule or Order</b>
		because of the exceptions (the violation would “not normally occur for more than five consecutive days”)		

## **Table 3A**

### **WQ Stormwater Violations Guidance (OAR 340-012-0055)**

#### **Introduction**

The guidance table below directs compliance staff on the appropriate enforcement response for *violators that have or should have coverage under a stormwater general permit*. Specifically, this guidance applies to the following general NPDES permits: 1200-Z, 1200-A, 1200-C, and 1200-CA. For all other water quality violations, please refer to Table 3. If the violator is not registered under a general permit, do not cite permit violations. And, if DEQ would not register the violator under a general permit, refer to Table 3.

The Division 12 classifications detailed below became effective on January 6, 2014, and are used as a basis for the enforcement guidance and to calculate penalties but are not the proper way to cite a violation of law. For that purpose, use the relevant program statutes, rules, permits or order. Some classifications in Division 012-0055 that do not apply to stormwater registrants have been removed from the table below. If there is no applicable classification in the table below, consult Table 1 for the Default Classifications.

If the specific guidance does not indicate whether to refer repeated violations, follow the guidance for the Class II violations in Table 1 for the Default Classifications.

#### **Special notes on some types of violations:**

##### **Violations involving “causing pollution” (-0055(1)(a)) and “unpermitted discharges to waters of the state (-0055(1)(b))”**

For many unpermitted waste discharges, both causing pollution of waters of the state (ORS 468B.025(1)(a)) and discharging wastes to waters of the state without a permit (ORS 468B.050(1)(a)) are applicable to the violation. In these instances, the general preference is to cite ORS 468B.050(1)(a) as the violation. Except in cases where impairment of a beneficial use is well documented, proving discharge of a waste to a water of the state will be easier to prove than causing pollution. In addition, there is no substantive difference in how the two violations are addressed by the enforcement guidance or Division 12. Instances where it is preferable to cite causing pollution are those where the specific facts of the case make it more difficult to prove a discharge, for example, release of algae blooms from a reservoir to a creek or turbidity increases resulting from a dredging project.

If the inspector has evidence that the unpermitted discharge caused a water quality standards violation, cite ORS 468B.025(1)(b) *and* discharging waste to waters of the state without a permit (ORS 468B.050(1)(a)).

##### **Violations involving “beyond reasonable control”**

For the purpose of this Table 3A, WQ Stormwater Violations Guidance, Beyond Reasonable Control (BRC) means the violation resulted from: (i) an act of war, sabotage, or unforeseeable and unpreventable vandalism; (ii) an extreme act of nature; (iii) negligence on the part of local, state or



## **Table 3A**

### **WQ Stormwater Violations Guidance (OAR 340-012-0055)**

federal government; (iv) an act or omission of a 3rd party (not including an agent of violator) without regard to whether any such act or omission was or was not negligent; or (v) the violation could not have been reasonably anticipated or prevented. In deciding whether the violation could not have been reasonably anticipated or prevented, focus on whether the violator took all the steps DEQ expected of the violator, including following permit requirements, following operational and maintenance plans, addressing repeated violations, and implementing such other reasonable steps that, if taken, would have eliminated the violation. A finding of beyond reasonable control must be based on known facts and circumstances and is not appropriate when the cause of the violation is not known or not understood. An example of a violation which was not reasonably preventable: equipment failure when the equipment is subject to a reasonable inspection and maintenance and replacement schedule and there are reasonable alarm/backup systems in place.

#### **Reporting violations:**

1. If a source failed to submit their discharge monitoring report (DMR) by the deadline in the permit, follow the guidance for “failing to timely submit a report or plan as required by rule, permit, or license, unless otherwise classified” (340-012-0055(2)(b)).
2. If a DMR is received with information missing but the source supplies the information later, follow the guidance for “failing to submit a complete discharge monitoring report” (-0055(3)(a)).
3. If the source does not submit a DMR with complete information and the source does not later supply the information:
  - a. If the missing data is required by Schedule B, follow the guidance for “failing to collect monitoring data required in Schedule B of the permit” (-0055(1)(o)).
4. If the monitoring data is submitted but procedural errors or QA/QC errors render the information questionable:
  - a. Follow guidance for “failing to collect monitoring data required in Schedule B of the permit” (-0055(1)(o)).
5. If the source submits required information or data for which there is no basis or the information or data seems fraudulent, the source is in violation of OAR 340-045-0015(5)(d) which is classified at (-0053(1)(b)). It may also be criminal act. Please consult OCE Environmental Crimes Coordinator before taking any action on these violations.

#### **Expedited Enforcement Offers (EEOs) OAR 340-012-0170(2)**

Expedited Enforcement Offers (EEOs) may be offered to settle violations of the following stormwater NPDES General Permits only: 1200-C, 1200-CA, 1200-CN, 1200-Z, and 1200-A. DEQ agents implementing DEQ stormwater NPDES General Permits may refer violations eligible for EEOs directly to OCE and OCE will issue the EEO.

Payment of the penalty must be within 30 days. If a corrective action is also required to resolve a violation, a deadline for corrective action that is longer than 30 days may be specified on the EEO violation page. If a registrant fails to pay an EEO within the time allowed, then compliance staff

## **Table 3A**

### **WQ Stormwater Violations Guidance (OAR 340-012-0055)**

should refer to OCE in YDO. An EEO is accepted and becomes a Final Order when the payment is received by DEQ. At that time, the corrective actions requested also becomes a Final Order and must be completed by the deadline specified in the EEO. If the corrective action is not completed by the deadline, please refer the “Default Violations Guidance” for Class I violations of a department order (-0053(1)(a) in Table 1 for how to proceed.

EEOs are appropriate only if the violation-specific guidance calls for an EEO and only if:

- None of the violations for the current action warrant a PEN under the Guidance (if so, ALL violations must be documented in one PEN and are referred for formal enforcement);
- The violator does not have a Class I violation that was repeated (i.e., they received a WL, PEN, or EEO for Class I violations) within the last three years;
- None of the violations had a significant adverse impact on human health or the environment;
- The violator did not obtain a significant economic benefit as a result of the violation. Generally, for stormwater industrial sites, DEQ may consider avoided costs totaling more than \$35,000 over a five-year period to be a significant economic benefit. In addition, for stormwater construction sites, DEQ may consider a construction activity of 20 acres or more that was unpermitted for six months or more as creating a significant economic benefit for the violator; or
- Violator does not have a lengthy history of non-compliance and/or cause the violation intentionally, recklessly or flagrantly.

If in doubt about a violator’s eligibility for an Expedited Enforcement Offer, please consult with Environmental Law Specialist Stormwater Enforcement Lead in the Office of Compliance and Enforcement.

If the Guidance calls for an EEO, and there are other violations that call for a warning letter, ALL violations must be documented in the EEO, with penalties assessed only for the violations that warrant an EEO.

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
<i><b>Class I Water Quality Violations</b></i>			
WQ 0055(1)(a)	Causing pollution of waters of the state;	Send PEN and refer, unless the violation was beyond reasonable control then send WL/OC.  NOTE: When the violator has permit coverage, must document a violation of a permit condition in addition to alleging “causing pollution.”	Follow the guidance for 1200-Z/1200-A
WQ 0055(1)(b)	Reducing the water quality of waters of the state below water quality standards;	Send PEN and refer, unless the violation was beyond reasonable control then send WL/OC.  NOTE: When the violator has permit coverage, also cite condition of the permit that prohibits a violation of a water quality standard. Refer to OAR 340-041.	Follow the guidance for 1200-Z/1200-A
WQ 0055(1)(c)	Discharging any waste that enters waters of the state, either without a waste discharge permit or from a discharge point not authorized by a waste discharge permit;	Send PEN and refer unless the violation was beyond reasonable control, then send WL/OC.  NOTE: Only use this classification if there is evidence of a discharge. If there is no evidence of a discharge refer to 0055(1)(d) below.	Follow the guidance for 1200-Z/1200-A
WQ 0055(1)(d)	Operating a discharge source or conducting a discharge activity without first obtaining an individual permit or applying for coverage	Send EEO with corrective action to submit complete application materials (or 1200-Z No Exposure Certification) within <b>60</b> days.  Send PEN and refer if the violation is repeated within 36 months or if the estimated avoided	Send EEO with corrective action to submit complete application materials within <b>30</b> days.  Send PEN and refer for second occurrence within 36 months.

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
	under a general permit for that discharge or disposal activity;	cost of operating the discharge source is significant.	
WQ 0055(1)(e)	Failing to comply with statute, rule, or permit requirements regarding notification of a spill or upset condition, which results in a non-permitted discharge to public waters;	Send PEN and refer.	Send PEN and refer.
WQ 0055(1)(g)	Making unauthorized changes, modifications, or alterations to a facility operating under a National Pollutant Discharge Elimination System (NPDES) permit;	<p>Send WL/OC with a <b>45</b>-day opportunity to correct. If not corrected send PEN and refer.</p> <p>Send PEN and refer for the second occurrence of this classification within 36 months.</p> <p>NOTE: Example of facility change includes changing the monitoring location without approval.</p> <p>For failure to submit a revised SWPCP, apply 0055(2)(b). For failure to substantially implement a SWPCP apply 0055(1)(r).</p>	<p>Send WL/OC with a <b>45</b>-day opportunity to correct for failure to submit an Environmental Management Plan. Send PEN and refer if not corrected by the deadline.</p> <p>Send PEN and refer if registrant has received a WL/OC for this classification within 36 months.</p> <p>NOTES: For failure to apply for new permit coverage for construction activities (stockpiling, staging, etc.) within a phase not identified in an ESCP if registrant does not implement controls, follow guidance for 0055(1)(d).</p> <p>For failure to submit a revised ESCP, apply 0055(2)(b). For failure to substantially implement an ESCP, apply 0055(1)(r).</p>
WQ 0055(1)(k)	Violating a technology based	Send EEO for a Class I violation of a numeric TBEL.	For <i>narrative</i> TBEL limit violations follow 1200-Z/1200-A

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
	<p>effluent limitation [TBEL], except for removal efficiency, in an NPDES or WPCF permit: (A) the discharge level (except for a pH and bacteria) exceeds the limitation by 50% or more: (B) the discharge is outside the permitted pH range by more than 2 pH units; [deleted sub (C)(D) b/c N/A]</p>	<p>Send PEN and refer for a Class I violation of a numeric TBEL for the second occurrence of any classification of numeric TBEL violation within 36 months.</p> <p>NOTES: Escalation of a numeric TBEL exceedance is based on any violation of Class I, Class II (0055(2)(a)) or Class III (0055(3)(b)).</p> <p>For violations of <i>narrative</i> TBELs, apply and cite Table 1, 0053(2). For second occurrence, send EEO.</p> <p>Multiple violations of narrative TBELs <i>may</i> amount to a failure to substantially implement a plan (0055(1)(r)).</p> <p>All bacteria limits are considered TBELs for the purpose of enforcement.</p>	
WQ 0055(1)(l)	Violating a water quality based effluent limitation [WQBEL] in an NPDES permit;	<p>Send PEN and refer for an exceedance of a numeric WQBEL. Numeric exceedance must be determined through DMR review.</p> <p>Send PEN and refer for a violation of a <i>narrative</i> WQBEL. Violation must be determined through BMPs or controls evaluation.</p> <p>NOTE: All limits based on TMDLs are considered WQBELs.</p>	N/A

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
		For the 1200-Z: Narrative WQBELs apply to iron and e. coli; numeric WQBELs apply to copper, lead, zinc, and pH after compliance schedule.	
WQ 0055(1)(o)	Failing to collect monitoring data required in Schedule B of the permit;	<p>Send WL if registrant failed to conduct any monitoring from a single sampling event as required.</p> <p>Send EEO if registrant failed to conduct monitoring from more than a single sampling event or if registrant has received a WL for this classification within 36 months.</p> <p>Send PEN and refer if registrant has received an EEO for this classification of violation within 36 months.</p> <p>The guidance above is generally based on an <i>annual</i> compliance evaluation.</p> <p>For violations of visual observations, apply Table 1-0053(2). Send EEO for second occurrence within 36 months.</p>	<p>Send WL for minor location and frequency pH sampling violations where monitoring sufficiently demonstrated that registrant did not discharge high pH water.</p> <p>Send EEO for other failures to conduct pH sampling or visual monitoring violations.</p> <p>Send PEN and refer if registrant has received an EEO for this classification of violation within 36 months.</p>
WQ 0055(1)(r)	Failing to substantially implement a stormwater plan in accordance with an NPDES permit;	<p>Send PEN and refer.</p> <p>If the failure to implement the SWPCP was not “substantial” apply 0055(2)(d) and send WL/OC.</p>	<p>Send PEN and refer.</p> <p>If the failure to implement the ESCP was not “substantial” apply 0055(2)(d) and send WL/OC.</p>

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
		<p>NOTES: Failing to substantially implement a SWPCP includes, but is not limited to, the following circumstances:</p> <ul style="list-style-type: none"> <li>a. Failure to implement plan posed a risk of harm to human health or the environment;</li> <li>b. The controls not implemented are part of Tier 2 corrective action; or</li> <li>c. Previously sent enforcement response for failure to implement narrative TBEL under Table 1 – 0053(2).</li> </ul>	<p>NOTE: Failing to substantially implement an ESCP includes, but is not limited to, the following circumstances:</p> <ul style="list-style-type: none"> <li>a. Failure to implement plan caused a prohibited discharge ; or</li> <li>b. Failure to implement plan posed a risk of harm to human health or the environment.</li> </ul>
<b><i>Class II Water Quality Violations</i></b>			
WQ 0055(2)(a)	Violating a technology based effluent limitation, except for removal efficiency, in an NPDES or WPCF permit if: (A) the discharge level (except for technology based-pH) exceeds the limitation by 20 percent or more, but less than 50 percent, for biochemical oxygen demand (BOD), carbonaceous chemical oxygen demand (CBOD), and total	<p>Send WL for a Class II violation of numeric TBELs.</p> <p>Send PEN and refer for a Class II violation of numeric TBEL for the second occurrence of any Classification of a numeric TBEL violation within 36 months.</p> <p>NOTE: Escalation of a numeric TBEL exceedance is based on any violation of Class I (0055(1)(k), Class II (0055(2)(a)) or Class III (0055(3)(b)).</p> <p>For violations of narrative TBELs, apply and cite Table 1 0053(2). For second occurrence, EEO.</p>	N/A

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
	suspended solids (TTS), or by 10 percent or more, but less than 50 percent, for all other limitations, (B) the discharge is outside the permitted pH range by more than 1 pH unit but less than or equal to 2 pH units, (C) the discharge exceeds a bacteria limit by a factor of five or more, unless otherwise classified; [deleted sub D b/c N/A]		
WQ 0055(2)(b)	Failing to timely submit a report or plan as required by rule, permit, or license, unless otherwise classified;	<p><i>Discharge Monitoring Reports:</i></p> <p>Send WL if DMR was submitted late.</p> <p>Send WL/OC if DMR has not been received, with a 30-day opportunity to correct for first and second occurrence. If DMR is not received by the opportunity to correct deadline, apply guidance for 0055(1)(o).</p> <p>Send EEO if registrant has received two WLs within 36 months.</p> <p>Send PEN and refer if the registrant has received an EEO for failure to timely submit a DMR within 36 months.</p>	<p><i>All reports and plans:</i></p> <p>Send WL if report or plan was submitted late.</p> <p>Send WL/OC if report or plan has not been received, with a 30-day opportunity to correct to submit the report or plan. If the report or plan is not received by opportunity to correct deadline, send EEO.</p> <p>Send PEN and refer if registrant has received an EEO for this classification of violation within 36 months.</p> <p><i>YDO Implementation w/o approved waiver</i></p>



**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
		<p><i>All other reports and plans:</i></p> <p>Send WL if report or plan was submitted late.</p> <p>Send WL/OC if report or plan has not been received, with a <b>30</b>-day opportunity to correct for first and second occurrence. If the report or plan is not received by opportunity to correct deadline, send PEN and refer.</p> <p>Send EEO if registrant has received two WLs within 36 months.</p> <p>Send PEN and refer if registrant has received an EEO for failing to timely submit a report or plan other than a DMR within 36 months.</p> <p><i>YDO Implementation w/o approved waiver</i></p> <p>After existing 1200-Z registrants are notified to report electronically (eDMR) – 1<sup>st</sup> year:  (When paper DMR is received, but not the eDMR)</p> <ul style="list-style-type: none"> <li>• First quarter – Accept paper DMR, send email requiring YDO registration and DMR to be submitted in YDO.</li> <li>• Second quarter – Send WL/O with 30-day opportunity to correct requiring YDO registration and DMR</li> </ul>	<p>When paper report received but not electronically:</p> <ul style="list-style-type: none"> <li>• Request re-submittal in YDO.</li> <li>• Send WL/OC with 30-day opportunity to correct requiring submittal through YDO.</li> <li>• Send EEO for repeat violations within 36 months.</li> </ul>

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
		<p>submission in YDO.</p> <ul style="list-style-type: none"> <li>• Third quarter – Send EEO requiring YDO registration and DMR submission in YDO.</li> <li>• Fourth quarter – PEN and refer.</li> </ul> <p>After existing registrants are notified to submit all other reports and plans electronically: When paper is received, but not submitted in YDO</p> <ul style="list-style-type: none"> <li>• Request re-submittal in YDO.</li> <li>• WL/O with 30-day opportunity to correct requiring submittal through YDO.</li> <li>• EEO for repeat violations within 36 months.</li> </ul>	
WQ 0055(2)(c)	Causing any wastes to be placed in a location where such wastes are likely to be carried to waters of the state by any means;	<p>Send WL/OC with a 30-day opportunity to correct. If not corrected, send PEN and refer.</p> <p>Send PEN and refer if registrant received a WL for this classification of violation within 36 months.</p> <p>NOTE: Apply 0055(1)(a), (b), or (c) when there is evidence of a discharge.</p>	See 1200-Z/1200-A
WQ 0055(2)(d)	Violating any management, monitoring, or	Send WL/OC with a 30-day opportunity to correct. If not corrected, send PEN and refer.	See 1200-Z/1200-A

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
	operational plan established pursuant to a waste discharge permit, unless otherwise classified;	Send PEN and refer if registrant received a WL/OC for this classification of violation within 36 months.  NOTE: If the violations of the plan are “substantial” see 0055(1)(r).	
<b><i>Class III Water Quality Violations</i></b>			
WQ 0055(3)(a)	Failing to submit a complete discharge monitoring report;	Send WL/OC for first and second occurrence.  Send EEO if registrant has received two WL/OCs for this classification of violation within 36 months or an EEO for this violation within the last 36 months.  NOTE: Apply 0055(2)(b), for failure to timely submit DMR in circumstances related to paper DMR received after eDMR required.	N/A
WQ 0055(3)(b)	Violating a technology based effluent limitation, except for removal efficiency, in an NPDES or WPCF Permit if: (A) the discharge level (except for pH and bacteria) exceeds the limitation by less than 20% for biochemical oxygen demand (BOD),	Send WL for a Class III violation of numeric TBELs.  Send EEO for a Class III violation of numeric TBELs for the second occurrence of any classification of numeric TBEL violation within 36 months.  Send PEN and refer for a Class III violation of a numeric TBEL for the third occurrence of any classification of numeric TBEL violation in 36 months.	N/A

**Table 3A**  
**WQ Stormwater Violations Guidance (OAR 340-012-0055)**

Div. 12 Cite.	Div. 12. Violation Language	Has or should have 1200-Z or 1200-A Coverage (Industrial)	Has or should have 1200-C or CA Coverage (Construction)
	carbonaceous chemical oxygen demand (CBOD), and total suspended solids (TSS), or by less than 10% for all other limitations, (B) the discharge is outside the permitted pH range by 1 pH unit or less, or (C) the discharge (except for reclaimed water) exceeds a bacteria limit by less than five times the limit;	<p>NOTE: Escalation of a numeric TBEL exceedance is based on any violation of Class I (0055(1)(k), Class II (0055(2)(a)) or Class III (0055(3)(b)).</p> <p>For violations of narrative TBELs, apply and cite Table 1 - 0053(2). For second occurrence, EEO.</p>	

Summary Table of NUMERIC TBEL -ENFORCEMENT RESPONSES

Classification*	1 <sup>st</sup> Numeric TBEL Violation in 36 months	2 <sup>nd</sup> Numeric TBEL Violation in 36 months	3 <sup>rd</sup> (+) Numeric TBEL Violation in 36 months
Class I – 0055(1)(k)	EEO	PEN	PEN
Class II – 0055(2)(a)	WL	PEN	PEN
Class III – 0055(3)(b)	WL	EEO	PEN

\*Based on extent of deviation from the permit limit

## **Table 3B**

### **WQ TMDL Violations Guidance (OAR 340-012-0055 and OAR 340-012-0053)**

#### **Introduction**

The guidance table below directs compliance staff on the appropriate enforcement response for *violations associated with the TMDL program*. DEQ compliance staff may identify these violations during nonpoint source TMDL implementation plan and report review. The violations subject to the guidance may be committed by persons, including Designated Management Agencies (DMA) other than the Oregon Department of Forestry or the Oregon Department of Agriculture, identified in a Water Quality Management Plan (WQMP) as responsible for developing and revising a nonpoint source sector-specific or source-specific TMDL Implementation Plan. See [OAR 340-042-0080](#).

The Division 12 classifications detailed below became effective on January 6, 2014 and are used as a basis for the enforcement guidance and to calculate penalties, but are not the proper way to cite a violation of law. For that purpose, use the relevant department order (TMDL, DEQ-approved Implementation Plan, or WQMP) that establishes the requirement. Many classifications in Division 012-0055 and 0053 that do not apply to TMDL violations have been removed from the table below.

DEQ compliance staff should not grant (and may not have the authority to grant) an extension of a deadline established in a TMDL, WQMP, or DEQ-Approved Implementation Plan. A Warning Letter with an Opportunity to Correct (WLOC), appropriately cites the violation and gives the responsible person or DMA additional time to correct the violation without civil penalty.

**Table 3B**  
**WQ TMDL Violations Guidance (OAR 340-012-0055 and OAR 340-012-0053)**

Div. 12 Cite.	Div 12. Violation Language	Designated Management Agency or Responsible Person
<b><i>Class II TMDL Violation</i></b>		
WQ 0055(2)(e)	Failing to <i>timely</i> submit or implement a Total Maximum Daily Load (TMDL) Implementation Plan, by a Designated Management Agency (DMA), as required by department order.	<p><b>If TMDL Implementation Plan is not submitted by deadline:</b>            Send WLOC (recommended timeframe to correct is 45 days) citing a violation of the order (TMDL, DEQ-approved Implementation Plan, or WQMP) establishing the implementation plan submittal deadline and referring to this Class II violation (OAR 340-012-0055(2)(e)).</p> <ul style="list-style-type: none"> <li>- <i>If an approvable Implementation Plan is received by the date specified in the WLOC, do nothing.</i></li> <li>- <i>If an Implementation Plan is received by the date specified in the WLOC but not approvable, then follow the guidance in the next section for plan not approvable below.</i></li> <li>- <i>If Implementation Plan is not received by date specified in WLOC, assume it is because the plan has not been done, send PEN and refer to OCE, citing condition of the TMDL that requires the preparation and submittal of an Implementation Plan as a Class I violation (OAR 340-012-0053(1)).</i></li> </ul> <p><b>If TMDL Implementation plan is submitted by deadline but is not approvable:</b>            Send WLOC (recommended timeframe to correct is 45 days) citing the Implementation Plan requirements that were omitted/insufficient and referring to this Class II violation (OAR 340-012-0055(2)(e)).</p> <ul style="list-style-type: none"> <li>- <i>If approvable Implementation Plan is received in response to WLOC, do nothing.</i></li> <li>- <i>If approvable Implementation Plan is not received by the date specified in the WLOC, send PEN and refer to OCE, citing the Implementation Plan requirements that were omitted/insufficient as a Class I violation (OAR 340-012-0053(1)).</i></li> </ul>

**Table 3B**  
**WQ TMDL Violations Guidance (OAR 340-012-0055 and OAR 340-012-0053)**

Div. 12 Cite.	Div 12. Violation Language	Designated Management Agency or Responsible Person
		<p><b>Failure to submit Five-Year Implementation Plan Update:</b>  <i>If Five-Year Implementation Plan Update is required by order and not submitted by deadline, send WLOC (recommended timeframe to correct is 45 days) citing a violation of the order establishing the deadline and referring to this Class II violation (OAR 340-012-0055(2)(e)).</i></p> <ul style="list-style-type: none"> <li>- <i>If approvable Five-Year Implementation Plan Update is received by date specified in the WLOC, do nothing.</i></li> <li>- <i>If a Five-Year Implementation Plan Update is received by the date specified in the WLOC but not approvable, send another WLOC (recommend timeframe to correct is 45 days), citing the Implementation Plan requirements that were omitted/insufficient as a Class I violation (OAR 340-012-0053(1)). If approvable Five-Year Implementation Plan Update is received by date specified in this second WLOC, do nothing. If approvable Five-Year Implementation Plan update is not received, send PEN and refer to OCE.</i></li> <li>- <i>If Five-Year Implementation Plan Update is not received by the date specified in the WLOC, send PEN and refer to OCE, citing the TMDL requirement to prepare a Five-Year Implementation Plan Update as a Class I violation (OAR 340-012-0053(1)).</i></li> </ul> <p><b>If a report (annual or five-year) indicates implementation is late (but was completed):</b>  Send WL citing a violation of the implementation deadline as a Class II violation (OAR 340-012-0055(2)(e)). Send PEN and refer upon third occurrence of late implementation within 36 months.</p> <p><b>If a report (annual or five-year) indicates implementation <i>did not occur</i>,</b> follow the guidance for the Class I violation of a department order at OAR 340-012-0053(1) for “Failing to <u>implement</u> a requirement of the TMDL or DEQ-approved Implementation Plan.”</p>

**Table 3B**  
**WQ TMDL Violations Guidance (OAR 340-012-0055 and OAR 340-012-0053)**

Div. 12 Cite.	Div 12. Violation Language	Designated Management Agency or Responsible Person
<i><b>Class I TMDL Violation</b></i>		
WQ 0053(1)	<p>Violating a requirement or condition of a commission or department order.</p> <p>NOTE: TMDLs, DEQ-approved Implementation Plans, or WQMPs are department orders.</p>	<p><b>Failing to report on annual or five-year implementation plan progress:</b>  <i>If report not received by due date in department order</i>, send WLOC (recommend timeframe to correct is 30 days) citing a violation of the department order (e.g., the TMDL, the DEQ-approved Implementation Plan, Water Quality Management Plan, or DEQ plan approval letter) establishing the reporting deadline as a Class I violation (OAR 340-012-0053(1)). Send PEN and refer upon third occurrence of late reporting within 36 months.</p> <ul style="list-style-type: none"> <li>- <i>If report is received by the date specified in the WLOC</i>, do nothing.</li> <li>- <i>If report is not received by date in WLOC</i>, assume there is no implementation. Send PEN and refer to OCE citing a violation of the department order requiring the implementation as a Class I violation (OAR 340-012-0053(1)).</li> </ul> <p><b>If report is received late and no WLOC was sent:</b>            Send WL, citing the department order that established the reporting deadline as a Class I violation (OAR 340-012-0053(1)). Send PEN and refer upon third occurrence of late implementation within 36 months.</p> <p><b>Failing to submit a complete report:</b>  <i>If report submitted is incomplete</i>, Send WLOC (recommend timeframe to correct is 30 days), citing the reporting requirements of the department order that were omitted or insufficient as a Class I violation (OAR 340-012-0053(1)). For repeated occurrences of incomplete reporting, send PEN and refer upon third occurrence in 36 months.</p> <ul style="list-style-type: none"> <li>- <i>If complete report received in response to WLOC</i>, do nothing.</li> <li>- <i>If complete report received but indicates late implementation</i>, Send WL citing the department order that establishes the implementation deadline as a Class I violation (OAR</li> </ul>



**Table 3B**  
**WQ TMDL Violations Guidance (OAR 340-012-0055 and OAR 340-012-0053)**

<b>Div. 12 Cite.</b>	<b>Div 12. Violation Language</b>	<b>Designated Management Agency or Responsible Person</b>
		<p>340-012-0053(1). Send PEN and refer upon third occurrence of late implementation within 36 months.</p> <p>- <i>If complete report not received (did not submit or incomplete) by deadline in WLOC, assume the report is incomplete because the actions were not taken. Send PEN and refer to OCE citing the elements of the Implementation Plan that were not implemented as a Class I violation (OAR 340-012-0053(1)).</i></p> <p><b>Failing to implement a requirement of the TMDL or DEQ-approved Implementation Plan:</b></p> <p>Send PEN and refer to OCE citing the TMDL condition and department order that requires implementation of the Implementation Plan as a Class I violation (OAR 340-012-0053(1)).</p>

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 of the *Enforcement Guidance* for further directions on that process.

Contact OCE for any questions about applying this guidance.

**All Expedited Enforcement Offers must meet the following requirements:**

OAR 340-012-0170(2)(c) – In determining whether to make an EEO, DEQ must consider the amount of the economic benefit gained by the alleged violator as a result of the noncompliance; whether the alleged violator has been the subject of a formal enforcement action or been issued a warning letter or pre-enforcement notice for the same or similar violations; whether the alleged violation is isolated or ongoing; and the mental state of the alleged violator.

OAR 340-012-0170(2)(d) – DEQ will not make an EEO to settle a Class I violation that has been repeated within the previous three years or to settle a violation that would be a major magnitude violation under OAR 340-012-0130(3) regardless of whether a selected magnitude under 340-012-0135 applies.

If in doubt about a violator’s eligibility for an EEO, please check with your Environmental Law Specialist in the Office of Compliance and Enforcement.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

**NPV Responses:**

DEQ is required to give an advance warning and opportunity to correct (a Notice of Permit Violation) before issuing a penalty for Water Pollution Control Facilities permit violations unless an exception applies. The guidance table indicates which violations may be subject to the NPV requirement. In addition to the exceptions below, see the Enforcement Guidance.

- a. The condition violated relates to underground injection control. Check the UIC database to see if the WPCF onsite permit is listed.
- b. The condition violated is also required by rule or statute (e.g., a WPCF permit condition prohibiting discharge to state waters).
- c. The violation is intentional, meaning the violator acted with a conscious objective to cause the result of the conduct, whether or not the violator intended to break the law (e.g., a permittee acts intentionally if it continues to operate without a certified operator, even if it is having difficulty obtaining the services of a certified operator.)
- d. The violation would not normally occur for five consecutive days. (E.g., a POTW with a WPCF that land applies out of season would not be entitled to an NPV for the violations because the discharge would not normally continue for five days; a POTW with a WPCF that violates its effluent limitations because it is operating beyond capacity would be entitled to an NPV because that violation would normally continue for more than five days).
- e. The permittee received a prior NPV or any formal enforcement action within the preceding 36 months, for that permit, including renewal and modified permits.

After evaluating the current violations using the guidance table and the above exceptions, take whichever of the following actions is appropriate:

1. If the guidance directs a PEN or EEO for any permit violation OR the guidance directs an NPV response for any permit violation but one of the above exceptions applies, send a PEN (or EEO if the Guidance directs it) for all violations.
2. If the guidance does not direct a PEN or EEO for any violation AND the guidance directs an NPV response which does not fit into one of the exceptions above, send a WL-NPV.
3. If the guidance only directs sending a WL for all violations, send a WL.

Further information about NPVs can be found in the Enforcement Guidance. For additional assistance, contact the Environmental Law Specialist representing your program.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

***CLASS 1 ONSITE WASTEWATER TREATMENT SYSTEM VIOLATIONS***

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
OS 0060(1)(a)	Performing sewage disposal services without a current license.	<p>If first Onsite violation in the past 3 years, send EEO. If EEO is not accepted, refer case.</p> <p>If repeated this violation in past 3 years, send PEN and refer case.</p>
OS 0060(1)(b)	Installing or causing to be installed an onsite wastewater treatment system or any part thereof, or repairing or causing to be repaired any part thereof, without first obtaining a permit.	<p>If first Onsite violation in the past 3 years, send EEO.</p> <p>If first Onsite violation in past 3 years and violation caused by resident owner/occupant, and the violation does not result in significant environmental harm*, send WL with opportunity to correct. If unable to gain compliance with WL, send EEO. If EEO is not accepted, refer case.</p> <p>If repeated this violation in past 3 years, or if violation resulted in significant environmental harm*, send PEN and refer case.</p> <p>*Violation could be considered to have resulted in significant environmental harm if sewage was on the ground surface where it could come in contact with the public or if sewage was discharged into public waters.</p>
OS 0060(1)(c)	Disposing of septic tank, holding tank, chemical toilet, privy or other treatment facility contents in a manner or location not authorized by DEQ.	<p>If first Onsite violation in past 3 years and violation caused by resident owner/occupant, and the violation does not result in significant environmental harm**, send WL.</p> <p>If violation caused by licensed pumper, send EEO. If EEO is not accepted, refer case.</p> <p>If repeat violation in past 3 years, or if violation resulted in significant environmental harm*, send PEN and refer case.</p> <p>**Violation could be considered to have resulted in significant environmental harm if sewage was on the ground surface where it could come in contact with the public or if sewage was discharged into public waters or if the disposed material creates noxious odors or attracts vectors.</p>
OS 0060(1)(d)	Owning, operating or using an onsite wastewater treatment system that is	If violation is not intentional or the result of recklessness***, and violator submits a completed permit application within 3 days after the discharge is discovered, and prompt

Table 4

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Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

	<p>discharging sewage or effluent to the ground surface or into waters of the state.</p>	<p>and proper steps are taken to prevent discharge of sewage onto the ground or into public waters, send WL with opportunity to correct.</p> <p>If unable to gain compliance with WL, or if violation is intentional or the result of recklessness***, or if violator fails to implement and maintain prompt and proper steps to prevent discharge of sewage on to the ground or into public waters, send PEN and refer case.</p> <p>If violator applies for permit before DEQ is aware of the violation and the violator takes prompt and proper steps to prevent discharge of sewage onto the ground or into public waters, do not send WL, PEN or EEO.</p> <p>***Violation could be considered intentional or the result of recklessness if it was caused by the owner digging up the system, constructing a building on the system without any permits, or intentionally destroying the system.</p>
OS 0060(1)(e)	<p>Failing to comply with statute, rule, license, permit or order requirements regarding notification of a spill or upset condition, which results in a non-permitted discharge to public waters.</p>	<p>If beyond the reasonable control of the permit holder, send WL with opportunity to correct. If unable to gain compliance with WL, send EEO. If EEO is not accepted, refer case.</p> <p>If within reasonable control of permit holder, or if unable to gain compliance with WL, send PEN and refer case.</p>
<b><i>CLASS 2 ONSITE WASTEWATER TREATMENT SYSTEM VIOLATIONS</i></b>		
<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
OS 0060(2)(a)	<p>Failing to meet the requirements for satisfactory completion within 30 days after written notification or posting of a Correction Notice at the site.</p>	<p>Send WL with opportunity to correct to permit holder. WL should state that the certificate of satisfactory completion (CSC) will be denied if corrections are not made within 30 days of the date of the WL.</p> <p>If unable to gain compliance with WL, send letter denying the CSC. The denial letter should include:</p> <p>a. Statement that the permit holder may appeal the denial in accordance with ORS</p>

Table 4

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Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

		183.310 through 183.550. b. Without the CSC, the system is unapproved and its use will constitute a further violation of environmental regulations and will result in further enforcement action.
OS 0060(2)(b)	Operating or using a nonwater-carried waste disposal facility without first obtaining a letter of authorization or permit.	If first Onsite violation in past 5 years, send WL with opportunity to correct. WL should state that a complete and approvable application must be filed within 30 days of the date of the WL to avoid further enforcement.  If unable to gain compliance with WL, or if repeat violation in past 5 years, send EEO. If EEO is not accepted, refer case.
OS 0060(2)(c)	Operating or using an onsite wastewater treatment system or part thereof without first obtaining a Certificate of Satisfactory Completion or WPCF permit.	If first Onsite violation in past 5 year,s send WL. WL should state the CSC must be obtained or a complete and approvable WPCF permit application must be submitted within 30 days of the date of the WL to avoid further enforcement.  If unable to gain compliance with WL, or if repeated this violation in past 5 years, send EEO. If EEO is not accepted, refer case.  If the permit holder failed to renew a permit before the expiration date and continued to operate without a permit when one was required, send WL with opportunity to correct. If unable to gain compliance with WL, send PEN and refer case.
OS 0060(2)(d)	Advertising or representing oneself as being in the business of performing sewage disposal services without a current license.	If first Onsite violation in past 3 years, send EEO. If EEO is not accepted, refer case.  If repeated this violation in past 3 years, send PEN and refer case.
OS 0060(2)(e)	Placing into service, reconnecting to or changing the use of an onsite wastewater treatment system in a manner that increases the projected	If first Onsite violation in past 5 years, send WL. WL should state that a complete and approvable application must be submitted within 30 days of the date of the WL to avoid further enforcement.

Table 4

OS – 5

7/9/14

Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

	daily sewage flow into the system without first obtaining an authorization notice, construction permit, alteration permit, repair permit or WPCF permit.	If unable to gain compliance with WL, or if repeat violation in past 5 years, send EEO. If EEO is not accepted, refer case.
OS 0060(2)(f)	Failing to connect all plumbing fixtures to, or failing to discharge wastewater or sewage into, a department-approved system, unless failure results in sewage discharging to the ground surface or to waters of the state.	<p>If first Onsite violation in past 5 years, send WL. WL should state:</p> <ol style="list-style-type: none"> <li>a. Documentation that all plumbing fixtures have been connected and all wastewater is being discharged in to department-approved system must be submitted within 30 days of the WL to avoid further enforcement.</li> <li>b. Violator must obtain any required plumbing permits.</li> </ol> <p>If unable to gain compliance with WL, or if repeat violation in past 5 years, send EEO. If EEO is not accepted, refer case.</p>
OS 0060(2)(g)	Allowing, by a licensed sewage disposal business, an uncertified installer to supervise or be responsible for the construction or installation of a system or part thereof.	<p>If first Onsite violation in past 5 years, send WL. WL should state that if, in the future, an employee that is not a certified system installer supervises the construction or installation of a system, the violation will be referred for formal enforcement.</p> <p>If repeated this violation in past 5 years, send EEO. If EEO is not accepted, refer case.</p>
OS 0060(2)(h)	Failing to submit an annual maintenance report, by a service provider of alternative treatment technologies.	<p>If first Onsite violation in past 5 years, send WL to certified maintenance provider and send a copy of the WL to the system owner. If system owner is the maintenance provider, send WL to system owner. WL should state that the annual report must be submitted within 30 days of the date of WL to avoid further enforcement. If system owner is maintenance provider, WL should also state:</p> <ol style="list-style-type: none"> <li>a. Proper maintenance of their ATT system is necessary to avoid failure.</li> <li>b. If the system fails, repair of the system is likely to be expensive and could also result in enforcement action.</li> <li>c. System owner must meet training and certification requirements for maintenance providers as per OAR 340-071-0650.</li> </ol> <p>If unable to gain compliance with WL, or if repeat violation in past 5 years, send EEO. If EEO is not accepted, refer case.</p>
OS 0060(2)(i)	Failing to report that a required operation and maintenance contract has	If first Onsite violation in past 5 years, send WL to certified maintenance provider stating that if, in the future, termination of an O&M agreement is not reported, the violation will

Table 4

OS – 6

7/9/14

Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

	been terminated, by a service provider of alternative treatment technologies.	be referred for formal enforcement.  If repeated this violation in past 5 years, send EEO. If EEO is not accepted, refer case.
OS 0060(2)(j)	Exceeding an effluent limit concentration in a WPCF permit for discharge to a soil absorption system.	If first or second violation within the last 5 years, send WL recommending technical assistance if there is no evidence of a failing system (surfacing sewage) and no environmental or public health harm.  If third violation of the same monitoring parameter within 5 years, send WL-NPV requiring certified maintenance provider evaluation and stating that an NPV may be issued if the violation recurs (if applicable according to NPV guidance above). If unable to gain compliance with WL-NPV, refer to OCE for NPV.  If NPV is not required according to the NPV guidance, send EEO. If EEO is not accepted, refer case.  Multiple violations of this rule on an individual discharge monitoring report will not be considered repeat violations for the purposes of this guidance.
OS 0060(2)(k)	Exceeding the maximum daily flow limits in a WPCF permit to an onsite system.	If first or second violation within the last 5 years, send WL recommending technical assistance if there is no evidence of a failing system (surfacing sewage) and no environmental or public health harm.  If third violation of the same monitoring parameter within 5 years, send WL-NPV requiring certified maintenance provider evaluation and stating that an NPV may be issued if the violation recurs (if applicable according to NPV guidance above). If unable to gain compliance with WL, refer to OCE for NPV.  If NPV is not required according to the NPV guidance, send EEO. If EEO is not accepted, refer case.  Multiple violations of this rule on an individual discharge monitoring report will not be considered repeat violations for the purposes of this guidance.
OS 0060(2)(l)	Failing to collect monitoring data	If first or second violation within the last 5 years, send WL recommending technical

Table 4

OS – 7

7/9/14

Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.



**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

	required in Schedule B of a WPCF permit.	<p>assistance if there is no evidence of a failing system (surfacing sewage) and no environmental or public health harm.</p> <p>If third violation of monitoring requirements within 5 years, send WL requiring certified maintenance provider evaluation. WL should require testing of all required Schedule B monitoring parameters that were not tested and submittal of results within 45 days.</p> <p>If unable to gain compliance with WL, send EEO. If EEO is not accepted, refer case.</p> <p>Multiple violations of this rule on an individual discharge monitoring report will not be considered repeat violations for the purposes of this guidance.</p>
OS 0060(2)(m)	Making unauthorized changes, modifications, repairs or alterations to a facility operating under a WPCF permit.	<p>If there is no evidence of a failing system (surfacing sewage) and no environmental or public health harm, send WL-NPV with opportunity to correct stating that an NPV may be issued if the violation is not corrected (if applicable according to NPV guidance above). If unable to gain compliance with WL, refer to OCE for NPV.</p> <p>If NPV is not required according to the NPV guidance, send EEO. If EEO is not accepted, refer case.</p> <p>“Facility” means the wastewater treatment system or any part thereof.</p>
OS 0060(2)(n)	Violating any management, monitoring or operational plan established pursuant to a WPCF permit unless otherwise classified.	<p>Send WL-NPV with opportunity to correct stating that an NPV may be issued if the violation is not corrected (if applicable according to NPV guidance above). If unable to gain compliance with WL-NPV, refer to OCE for NPV.</p> <p>If NPV is not required according to the NPV guidance, send EEO. If EEO is not accepted, refer case.</p>
OS 0060(2)(o)	Failing to timely submit a report or plan as required by rule, permit or license unless otherwise classified.	<p>Send WL-NPV with opportunity to correct stating that an NPV may be issued if the violation is not corrected (if applicable according to NPV guidance above). If unable to gain compliance with WL-NPV, refer to OCE for NPV.</p> <p>If NPV is not required according to the NPV guidance, send EEO. If EEO is not accepted, refer case.</p>

Table 4

OS – 8

7/9/14

Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.

**Table 4**  
**Onsite Wastewater Violations Guidance (OAR 340-012-0060)**

***CLASS 3 ONSITE WASTEWATER TREATMENT SYSTEM VIOLATIONS***

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b>OS 0060(3)(a)</b>	Failing to obtain an operation and maintenance contract from a certified service provider, by an owner of an alternative treatment technology, recirculating gravel filter or commercial sand filter.	<p>If first Onsite violation in past 5 years, send WL with opportunity to correct to system owner. WL should state:</p> <ul style="list-style-type: none"> <li>a. A complete and approvable service contract with a certified maintenance provider must be submitted within 30 days of the date of the WL to avoid further enforcement action. If system owner is maintenance provider, WL should also state:</li> <li>b. Proper maintenance of their ATT system is necessary to avoid failure.</li> <li>c. If the system fails, repair of the system is likely to be expensive and could also result in enforcement action.</li> </ul> <p>If unable to gain compliance with WL, or if repeat violation in past 5 years, send EEO. If EEO is not accepted, send PEN and refer case.</p>
<b>OS 0060(3)(b)</b>	Placing an existing onsite wastewater treatment system into service or changing the dwelling or type of commercial facility, without first obtaining an authorization notice, where the design flow of the system is not exceeded.	<p>If first Onsite violation in past 5 years, send WL with opportunity to correct. WL should state that a complete and approvable application must be submitted within 30 days of the date of the WL to avoid further enforcement.</p> <p>If unable to gain compliance with WL, or if repeat violation in past 5 years, send EEO. If EEO is not accepted, refer case.</p>

Note: Alternative compliance timelines for WLs can be used if DEQ or the agent determines that the listed timeline is overly burdensome, unreasonable, impracticable or otherwise inappropriate.



**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions.

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 of the Enforcement Guidance for further directions on that process.

**IMPORTANT NOTES:**

Read the general guidance for field staff first. Then apply the specific guidance below for solid waste management violations. Always consult with OCE regarding any questions or gray areas.

**Notes on repeated violations:** Violations are considered repeated if they recur within 36 months or 3 years. Except for repeated Class 3 violations, always send a PEN if the same violation is repeated within three years, or if a violation is not corrected by deadline in WLOC (or extended deadline, if appropriate); and if an NPV is not required. Send Warning Letters for all Class 3 violations unless other violations require a PEN.

**Low risk of public health impact or harm to the environment:** Examples of low risk include:

- Low risk of vector harborage or vector food source (birds, flies, mammals such as rats or mice, etc.)
- No direct potential pathway to surface or ground water
- Low risk of fire
- Low risk of generating methane or landfill gas build up from solid waste improperly managed
- Low risk of contamination or spills to the ground
- No fee for accepting waste

**Notices of Permit Violation (NPV):** You must issue a Notice of Permit Violation (NPV) for violations of a permit prior to a PEN unless any one of the following applies:

- 1) It is a municipal Subtitle D permit; or
- 2) The requirement in the permit condition is also required by rule or statute (but not the general rule in OAR 340-093-0050(6)(b)); or

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

- 3) The violation relates to hazardous waste (e.g. a permit condition prohibiting acceptance of HW); or
- 4) The violation is intentional, meaning the violator acted with a conscious objective to cause the result of the conduct, whether or not the violator intended to break the law (e.g., permittee accepted hazardous or other prohibited waste, and it was not hidden or otherwise passed the screening procedures); or
- 5) The permittee received a prior NPV or any formal enforcement action within the preceding 36 months, for that permit.

Further information about NPVs can be found in the general guidance.

**Deviation from this Guidance:** You must receive approval from your manager, RDA, and the OCE manager on one of the following:

- *Penalty Justification Memo* (to issue a penalty by drafting a PEN when the Guidance dictates issuance of a WL under exceptional circumstances; e.g., significant economic benefit, employee or public safety risk, threat of environmental harm, or actual environmental harm).
- *No-Penalty Justification Memo* (to issue a WL when the Guidance dictates a PEN due to extreme and unforeseeable events beyond the control of the violator which prevented compliance; e.g., extreme act of nature, negligence on the part of the government, vandalism by a third party).

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
<b><i>CLASS I SOLID WASTE MANAGEMENT VIOLATIONS</i></b>		
SW 0065(1)(a)	Establishing or operating a disposal site without first obtaining a registration or permit;	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk, send PEN.
SW 0065(1)(b)	Accepting solid waste for disposal in a permitted solid waste unit or facility that has been expanded in area or capacity without first submitting plans to DEQ and obtaining department approval;	If NPV is not required:  Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk, send PEN.
SW 0065(1)(c)	Disposing of or authorizing the disposal of a solid waste at a location not permitted by DEQ to receive that solid waste;	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk (examples given in the Important Notes above) send PEN.
SW 0065(1)(d)	Violating a lagoon freeboard limit that results in the overflow of a sewage sludge or leachate lagoon;	Follow NPV guidance in Important Notes above. If one of the exceptions applies, send PEN and refer unless the violation could not have been reasonably anticipated or prevented,* then send WL.  *For example, a facility purchases and maintains high quality equipment, with no reason to know any parts would fail, but there is a mechanical failure.
SW 0065(1)(e)	Accepting for treatment, storage, or disposal at a solid waste disposal site, without approval from DEQ, waste defined as hazardous waste, waste from another state which is hazardous	Follow NPV guidance in Important Notes above. If one of the exceptions applies, send PEN and refer unless the violation could not have been reasonably anticipated or prevented,* then send WL.

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
	under the laws of that state, or wastes prohibited from disposal by statute, rule, permit, or order;	*For example, the material was hidden within another material by a generator and unknowingly missed by the landfill's approved acceptance screening protocol
SW 0065(1)(f)	Failing to properly construct, maintain or operate in good functional condition, groundwater, surface water, gas or leachate collection, containment, treatment, disposal or monitoring facilities in accordance with the facility permit, department approved plans, or department rules;	Send PEN and refer unless the violation could not have been reasonably anticipated or prevented,* then send WL.  *For example, a facility purchases and maintains high quality equipment, with no reason to know any parts would fail, but there is a mechanical failure due to manufacturer defects.
SW 0065(1)(g)	Failing to collect, analyze or report groundwater, surface water or leachate quality data in accordance with the facility permit, the facility environmental monitoring plan, or department rules;	Follow NPV guidance in Important Notes above. If one of the exceptions applies, send WL. Refer to Important Notes on page 1 to determine when to send a PEN.
SW 0065(1)(h)	Mixing for disposal or disposing of recyclable material that has been properly prepared and source separated for recycling;	Follow NPV guidance in Important Notes above. Send WL or WL with opportunity to correct if either of the following conditions apply: <ul style="list-style-type: none"> <li>1) The violation could not have been reasonably anticipated or prevented; or</li> <li>2) The violator demonstrates that there is no feasible market based alternative to disposal.</li> </ul> Send PEN and refer if neither of the above conditions apply or if the violator received a WL for the same violation within the last 36 months.  *For disposing of source separated material that is <i>not</i> properly prepared, in violation of OAR 340-090-0090(3), classify the violation as Class II under OAR 340-012-0053(2) and follow the guidance in Table 1.

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
SW 0065(1)(i)	Failing to establish or maintain financial assurance as required by statute, rule, permit or order; or	Follow NPV guidance in Important Notes above. If one of the exceptions applies, send WL. Refer to Important Notes on page 1 to determine when to send a PEN.)
SW 0065(1)(j)	Failing to comply with the terms of a permit terminated due to a failure to submit a timely application for renewal.	Follow NPV guidance in Important Notes above. If one of the exceptions applies, send PEN unless low risk of public health impact or low risk of environmental harm (see examples in the Important Notes above), then send a WL.
0065(1)(k)	Operating a composting facility in a manner that causes a discharge to surface water of pollutants, leachate or stormwater when that discharge is not authorized by an NPDES permit	Send PEN unless the violation was beyond reasonable control. Then send WL.  Refer to Important Notes on Page 1.
<b><i>CLASS II SOLID WASTE MANAGEMENT VIOLATIONS</i></b>		
SW 0065(2)(a)	Failing to accurately report the amount of solid waste disposed, by a permitted disposal site or a metropolitan service district;	Send WL with opportunity to correct if the inaccuracies were minor or appear due to reasonable mistake. Then send PEN.  Send a PEN if the violation masked another violation or caused risk of public health impact or harm to the environment (see examples in under the important notes beginning this guidance).
SW 0065(2)(b)	Failing to timely or accurately report the weight and type of material recovered or processed from the solid waste stream;	Send WL, unless the violation caused risk of public health impact or harm to the environment (see examples in under the important notes beginning this guidance).



**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
SW 0065(2)(c)	Failing to comply with landfill cover requirements, including but not limited to daily, intermediate or final covers or limitation of working face size;	Send PEN if landfill final cover and working face do not comply with DEQ-approved plans and requirements. Send WL if landfill is not meeting daily or interim cover or any other cover requirement, other than final cover.
SW 0065(2)(d)	Operating a Household Hazardous Waste (HHW) collection event or temporary site without first obtaining department approval, or without complying with an approved plan for a HHW collection event; or	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk, send PEN.
SW 0065(2)(e)	Receiving or managing waste in violation of or without a department approved Special Waste Management Plan.	Send PEN and refer unless the violation could not have been reasonably anticipated or prevented*; then send WL.  *For example, the material was hidden within another material by a generator and unknowingly missed by the landfill's approved acceptance screening protocol. See Important Notes on page 1.
SW 0065(2)(f)	Unless otherwise specifically classified, operating a compost facility in a manner that fails to comply with a facility's registration, permit, DEQ-approved plans or DEQ rules	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk, send PEN.
<b><i>CLASS III SOLID WASTE MANAGEMENT VIOLATIONS</i></b>		
SW 0065(3)(a)	Failing to post required signs;	Send WL.
SW 0065(3)(b)	Failing to control litter;	Send WL.
SW 0065(3)(c)	Failing to notify DEQ of any name or address change; or	Send WL.
SW 0065(3)(d)	Violating any labeling requirement under ORS 459A.675 -.685.	Send WL.

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

ORS Citation and Violation Language	Div. 12 Violation Language	Guidance Language
<b>CLASS I E-Cycles Violations</b>		
<b>459.247(1)(f)</b> Disposing of a covered electronic device (CED) at a location not permitted by the department to receive CEDs for disposal after January 1, 2010.	0065(1)(c) Disposing of or authorizing the disposal of a solid waste at a location not permitted by the department to receive that solid waste.	Send WL if there is low or no risk of public health impact or environmental harm (see examples in under the important notes beginning this guidance). If not low risk, send PEN.
<b>459.247(1)(f)</b> Knowingly accepting a CED for disposal at a solid waste disposal site after January 1, 2010.  <b>NOTE: per 459.247(5)(a):</b> “Each disposal site operator shall establish and implement, in accordance with any permit requirements established by the Department of Environmental Quality, a program reasonably designed to prevent acceptance of covered electronic devices for disposal. If an operator operates the disposal site in conformity with the program, the operator is presumed to have complied with the provisions of this section that prohibit knowingly accepting covered electronic devices for disposal.”	0065(1)(e) Accepting for disposal, without approval from the department, wastes prohibited from disposal by statute, rule, permit, or order.	Send PEN if the disposal facility operator did not follow their Department-approved program designed to prevent acceptance of CEDs for disposal.  Otherwise send WL.
<b>CLASS II E-Cycles Violations</b>		

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

<b>459.315 (1) (a)</b> Manufacturer registration fails to include list of all brands manufactured, sold, imported, including those being offered for sale.	0053(2) Violating any otherwise unclassified requirement	See Default Guidance in Table 1 for 0053(2)
<b>459A.315 (b), (c), and 459A.320(6)</b> At time of annual registration manufacturer fails to state whether they are participating in contractor program or doing their own program, or fails to provide any other information required by the department.	0053(2) Violating any otherwise unclassified requirement	See Default Guidance in Table 1 for 0053(2)
<b>459A.310(3)</b> Manufacturer sells or offers for sale CEDs that are not properly labeled and are not listed in plan properly filed with the Department	0053(2) Violating any otherwise unclassified requirement	Send WL if DEQ has not previously notified manufacturer in writing of applicable requirements.  Otherwise, send PEN.
<b>459.247(5)(a)</b> Failing to establish and implement a program designed to prevent acceptance of CED(s) by a disposal site.	0053(2) Violating any otherwise unclassified requirement	See Default Guidance in Table 1 for 0053(2)
<b>459A.315(1)</b> Manufacturer selling or offering for sale CEDs in Oregon fails to register with Department before January 1 each year.	0053(2) Violating any otherwise unclassified requirement.	See Default Guidance in Table 1 for 0053(2)
<b>459A.315(3)</b> Manufacturers who do not manufacture, sell, or import CEDs and who are not registered and whose products show up in the recycling	0053(2) Violating any otherwise unclassified requirement.	See Default Guidance in Table 1 for 0053(2)

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

stream fail to register and pay a fee within 30 days of Department notice.		
<b>459A.320(1)</b> Manufacturers not using contractor fail to submit a plan by July 1 each year for the next calendar year.	0053(2) Violating any otherwise unclassified requirement.	Send WL if DEQ has not previously notified manufacturer in writing of applicable requirements.  Otherwise, send PEN.
<b>459A.320(2)</b> Plan submitted under 459A.320(1) fails to meet the requirements outlined.	0053(2) Violating any otherwise unclassified requirement.	See Default Guidance in Table 1 for 0053(2)
<b>459A.320(3)(c)</b> Manufacturer fails to implement plan, including defined collection service standards, no fees to generator, environmentally sound management requirements, advertising and promotion.	0053(2) Violating any otherwise unclassified requirement.	See Default Guidance in Table 1 for 0053(2)
<b>459A.320(3)(e)</b> Manufacturer implementing a manufacturer plan fails to provide by March 1 a report describing how the plan was implemented the previous calendar year.	0053(2) Violating any otherwise unclassified request.	See Default Guidance in Table 1 for 0053(2)
<b>459A.320(7)</b> Manufacturer with less than 5% return share fails to use contractor program or join other manufacturers in plan.	0053(2) Violating any otherwise unclassified requirement.	See Default Guidance in Table 1 for 0053(2)
<b>459A.320(3)(d) (beginning in 2010) and</b>	0065(2)(b) Failing to timely or accurately report the weight and type of	Send WL upon first violation if report was submitted timely but was incomplete.

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

<p><b>459A.340(4)(e)</b> Manufacturer fails to conduct and report statistically significant sampling of returns, including: List of all brands identified during sampling or count; and total weight of CEDs identified for each brand during the sampling or count; and total weight of CEDs, including orphan devices, collected from covered entities in the state during the previous calendar year.</p>	<p>material recovered or processed from the solid waste stream;</p>	<p>Send PEN if:</p> <ul style="list-style-type: none"> <li>(1) no report was submitted; or</li> <li>(2) defects were not corrected by date stated in WL; or</li> <li>(3) DEQ issued the responsible party a WL or PEN for a prior occurrence of this violation within the last 3 years.</li> </ul>
<p><b>459A.320(2)(b) and 459A.340(4)(b)</b> Manufacturers/state contractor fails to provide/utilize environmentally sound management practices.</p>	<p>0053(2) Violating any otherwise unclassified requirement.</p>	<p>See Default Guidance in Table 1 for 0053(2)</p>
<p><b>459A.330(1)</b> Manufacturer or collector charges a fee for the collection, transportation, or recycling of CED(s). (Note exception: premium service can be charged for under 459A.330(2))</p>	<p>0053(2) Violating any otherwise unclassified requirement.</p>	<p>Send PEN</p>
<p><b>459A.335(1)</b> Retailer sells a CED that is not: labeled with a permanently affixed brand; the brand is not listed on the Department’s website; or the manufacturer responsible for that brand is not listed as in compliance on DEQ’s website</p>	<p>0053(2) Violating any otherwise unclassified requirement.</p>	<p>Send WL upon first and second violations within 36 months or three years.</p> <p>Send PEN and refer upon third violation within 36 months or three years.</p>

**Table 5**  
**Solid Waste Management Violations Guidance (OAR 340-012-0065)**  
**including a table of specific guidance for e-cycles violations**

<p><b>459A.335(2)</b> Retailer fails to provide consumer, at time of sale, information on recycling of CEDs</p>	<p>0053(2) Violating any otherwise unclassified requirement.</p>	<p>See Default Guidance in Table 1 for 0053(2)</p>
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## **Table 6**

### **Waste Tire Management Violations Guidance (OAR 340-012-0066)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions.

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 of the Enforcement Guidance for further directions on that process.

Contact OCE for any questions about applying this guidance

#### **IMPORTANT NOTES:**

Read the general guidance for field staff first. Then apply the specific guidance below for waste tire waste management violations. Always consult with OCE regarding any questions or gray areas.

Violations are considered repeated if they recur within 36 months or 3 years. When citing a repeated Class 3 violation, issue a WL unless other violations are also cited.

Always send a PEN under these circumstances:

- 1) If the same violation is repeated within three years; or
- 2) If a violation is not corrected by deadline in WLOC (or extended deadline, if appropriate), and
- 3) An NPV is not required.

If you have a permit violation you must issue a Notice of Permit Violation (NPV) prior to a PEN unless any one of the following applies:

- 1) The requirement in the permit condition is also required by rule or statute; or
- 2) The violation relates to hazardous waste (e.g. a permit condition prohibiting acceptance of HW); or
- 3) The violation is intentional, meaning the violator acted with a conscious objective to cause the result of the conduct, whether or not the violator intended to break the law (e.g., permittee accepted hazardous or other prohibited waste, and it was not hidden or otherwise passed the screening procedures); or
- 4) The permittee received a prior NPV or any formal enforcement action within the preceding 36 months, for that permit.

Further information about NPVs can be found in the general guidance

**Table 6**  
**Waste Tire Management Violations Guidance (OAR 340-012-0066)**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
<b><i>CLASS I Waste Tire Management Violations</i></b>		
WT 0066(1)(a)	Establishing or operating a waste tire storage site without first obtaining a permit	Send WL if low risk of public health impact and low risk of environmental harm – for example:  -Low risk of vector harborage (mosquitoes, birds, flies, mammals such as rats or mice, etc.) -Low risk of fire -Stored indoors -Meeting storage standards -No potential pathway for contamination to surface or ground water  If not low risk, or criteria in Important Notes about repeat violations on p. 1 apply, send PEN.
WT 0066(1)(b)	Disposing of waste tires or tire-derived products at an unauthorized site	Send WL if low risk of public health impact and low risk of environmental (see above examples)  If not low risk, or criteria in Important Notes about repeat violations on p. 1 apply, send PEN.
WT 0066(1)(c)	Violating the fire safety requirements of a waste tire storage site permit	Send WL unless there was a fire or one of the criteria in Important Notes about repeat violations or NPVs on p. 1 apply.
WT 0066(1)(d)	Hauling waste tires without first obtaining a waste tire carrier permit	Send a WL unless hauling tires results in illegal disposal or one of the criteria in Important Notes about repeat violations on p. 1 apply. Then send PEN.
WT 0066(1)(e)	Failing to establish or maintain financial assurance as required by statute, rule, permit or order	Send WL unless Important Notes about repeat violations or NPVs on page 1 apply.
<b><i>CLASS II Waste Tire Management Violations</i></b>		
WT 0066(2)(a)	Failing to maintain written records of	Send WL unless criteria in Important Notes about repeat



**Table 6**  
**Waste Tire Management Violations Guidance (OAR 340-012-0066)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
	waste tire generation, storage, collection, transportation, or disposal	violations or NPVs on page 1 apply.
<b><i>CLASS III Waste Tire Management Violations</i></b>		
WT 0066(3)(a)	Failing to keep required records on use of vehicles	Send WL unless criteria in Important Notes about repeat violations or NPVs on page 1 apply.
WT 0066(3)(b)	Failing to post required signs	Send WL unless criteria in Important Notes about repeat violations or NPVs on page 1 apply.
WT 0066(3)(c)	Hiring or otherwise using an unpermitted waste tire carrier to transport waste tires	Send WL unless criteria in Important Notes about repeat violations or NPVs on page 1 apply.
WT 0066(3)(d)	Hauling waste tires in a vehicle not identified in a waste tire carrier permit or failing to display required decals as described in a permittee's waste tire carrier permit	Send WL unless criteria in Important Notes about repeat violations or NPVs on page 1 apply.

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See 6.3.3. for further directions on that process.

Contact OCE for any questions about application of this guidance.

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><u>CLASS 1 VIOLATIONS</u></b>		
UST 0067(1)(a)	Failing to investigate or confirm a suspected release;	Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.  Or send a WL or WL with opportunity to correct if the facility meets all of the following: <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</li> </ul>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility within 36 months</b>, send PEN and refer.</p>
UST 0067(1)(b)	Failing to establish or maintain the required financial responsibility mechanism;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>If the person has a <b>repeated violation of the same requirement within 36 months</b>, send PEN and refer.</p>
UST 0067(1)(c)	Failing to obtain the appropriate general permit registration certificate before installing or operating an UST;	<p>If the owner or permittee is operating after the operating certificate has been revoked by DEQ, send PEN. Otherwise follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>If the person has a <b>repeated violation of the same requirement at the same facility within 36 months</b>, send PEN and refer.</p>
UST 0067(1)(d)	Failing to install spill and overflow protection equipment that will prevent a release or failing to demonstrate to the department that the equipment is properly functioning;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p><b>Or</b> send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</li> </ul>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection, and  g. the UST system was installed after December 22, 1998 but not by the current owner or permittee.</p> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
UST 0067(1)(e)	Failing to install, operate or maintain a method or combination of methods for release detection such that the method can detect a release from any portion of the UST system;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.  Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection,</li> <li>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection, and</li> <li>g. the UST system was installed after December 22, 1998 but not by the current owner or permittee.</li> </ul> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
UST 0067(1)(f)	Failing to protect from corrosion any part of an UST system that routinely contains a regulated substance;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p><b>Or</b> send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection,</li> <li>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection, and</li> <li>g. the UST system was installed after December 22, 1998 but not by the current owner or permittee.</li> </ul> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
UST 0067(1)(g)	Failing to permanently decommission an UST system;	Send PEN and refer.
UST 0067(1)(h)	Failing to obtain approval from the department before installing or operating vapor or groundwater monitoring wells as part of a release detection method;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p><b>Or</b> send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> </ul>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</p> <p>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</p> <p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
UST 0067(1)(i)	Installing, repairing, replacing or modifying an UST system in violation of any rule adopted by the department;	<p><u>For owners and permittees:</u></p> <p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <p>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</p> <p>b. the permittee timely submitted an installation or modification application,</p> <p>c. the facility has a current valid FR mechanism,</p> <p>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</p> <p>e. the permittee has completed the required Class A or B operator training prior to the inspection,</p> <p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p><u>For service providers:</u></p> <p>If permittee or tank owner would receive a FC of \$300 or more or formal enforcement for the violation, send PEN.            If permittee or tank owner received a FC of less than \$300 or a WL for the violation, send WL.</p> <p>If the service provider has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p> <p>Note: Because of the nearly endless number of scenarios this rule can encompass, there are many potential violations that can be cited as a field citation. Criteria/scenarios field citation is described in “UST Field Citation” program guidance.</p>
UST 0067(1)(j)	Failing to conduct testing or monitoring, or to keep records where the failure constitutes a significant operational compliance violation;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Send a WL or WL with opportunity to correct if the facility:</p> <p>Did not meet the testing compliance deadline of October 1, 2020 for spill prevention devices, overfill devices, or sump tightness, but testing was completed before DEQ’s UST compliance inspection that occurred before October 1, 2023.</p> <p>OR meets all of the following:</p> <ol style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> </ol>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</p> <p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the person fails to comply with the WL/OC or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
UST 0067(1)(k)	Providing, offering or supervising tank services without the appropriate license;	<p>Send WL if all of the following conditions are met:</p> <p>a. the service provider previously held a license which has been expired for less than 6 months on the date of the violation, and</p> <p>b. the services provided were conducted in accordance with DEQ regulations.</p> <p>Otherwise, send PEN.</p> <p>If the person has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
UST 0067(1)(l)	Failing to assess the excavation zone of a decommissioned or abandoned UST when directed to do so by the department;	Send PEN and refer.
<b><u>CLASS 2 VIOLATIONS</u></b>		
UST 0067(2)(a)	Continuing to use a method or methods of release detection after period allowed by rule has expired;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <p>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</p> <p>b. the permittee timely submitted an installation or modification application,</p>



**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>c. the facility has a current valid FR mechanism,  d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,  e. the permittee has completed the required Class A or B operator training prior to the inspection, and  f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
UST 0067(2)(b)	Failing to have a trained UST system operator for an UST facility after March 1, 2004;	<p>Follow “UST Field Citation” program guidance to either issue a Field Citation or send a PEN.</p> <p>If the person has a <b>repeated violation of the same requirement at the same facility within 36 months</b>, send PEN and refer.</p>
UST 0067(2)(c)	Failing to apply for a modified general permit registration certificate;	<p>Failure to submit an application:  If the violation is discovered by an inspector during an inspection and other violations will be cited on a Field Citation, then cite the violation on that Field Citation without penalty, otherwise issue a WLOC requiring submittal of the modification application within 30 days.  If the violation is discovered by UST HQ, send a WLOC, requiring submittal of the modification application within 30 days. If the person fails to comply with Field Citation/WLOC, send PEN and refer.</p> <p>Submitting a late application:  If the violation is discovered by an inspector during an inspection and other violations will be cited on a Field Citation, then cite the</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>violation on that Field Citation without penalty, otherwise issue a WL. If the violation is discovered by UST HQ, send a WL.</p> <p>If the person has previously failed to timely submit a modification application at another facility <b>within the last 36 months, immediately</b> send PEN and refer.</p>
UST 0067(2)(d)	Failing to have an operation certificate for each compartment of a multi-chambered or multi-compartment UST when at least one compartment or chamber has an operation certificate.	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</li> <li>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</li> </ul> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
UST 0067(2)(e)	Installing, repairing, replacing or modifying an UST or UST equipment without providing the required notifications;	<p><u>For owners and permittees:</u></p> <p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</li> <li>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection; and</li> <li>g. the notice is not related to an installation by the current owner or permittee.</li> </ul> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p> <p><u>For service providers:</u> “B” response – send a WL.</p> <p>If the service provider has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
UST 0067(2)(f)	Failing to decommission an UST in compliance with the statutes and rules adopted by the department, including, but not limited to, performance standards, procedures, notification, general permit registration and site assessment requirements;	<p><u>For owners and permittees:</u></p> <p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>If the owner or permittee has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p><u>For service providers:</u></p> <p>If permittee or tank owner would receive a FC of \$300 or more or formal enforcement for the violation, send PEN.            If permittee or tank owner received a FC of less than \$300 or a WL for the violation, send WL.</p> <p>If the service provider has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
UST 0067(2)(g)	Providing tank services at an UST facility that does not have the appropriate general permit registration certificate;	Send WL. If the person has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
UST 0067(2)(h)	Failing to obtain the identification number and operation certificate number before depositing a regulated substance into an UST, by a distributor;	Send WL. If the person has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
UST 0067(2)(i)	Failing, by a distributor, to maintain a record of all USTs into which it deposited a regulated substance;	Send WL. If the person has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
UST 067(2)(j)	Allowing tank services to be performed by a person not licensed by the department;	<p><u>For owners and permittees:</u></p> <p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.            Or send a WL if the facility meets all of the following:</p> <ol style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> </ol>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>e. the permittee has completed the required Class A or B operator training prior to the inspection,</p> <p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection, and</p> <p>g. the work performed was not an installation by the current owner or permittee.</p> <p>If the owner or permittee has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p> <p><u>For service providers:</u> send WL.</p> <p>If the service provider has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
UST 0067(2)(k)	Failing to submit checklists or reports for UST installation, modification or suspected release confirmation activities;	<p><u>For owners and permittees:</u></p> <p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <p>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</p> <p>b. the permittee timely submitted an installation or modification application,</p> <p>c. the facility has a current valid FR mechanism,</p> <p>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</p> <p>e. the permittee has completed the required Class A or B operator training prior to the inspection,</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection, and  g. the checklist is not related to an installation performed by the current owner or permittee.</p> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p> <p><u>For service providers:</u></p> <p>If permittee or tank owner would receive a FC of \$300 or more or formal enforcement for the violation send PEN.  If permittee or tank owner received a FC of less than \$300 or a WL for the violation, send WL.</p> <p>If the service provider has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
UST 0067(2)(1)	Failing to complete an integrity assessment before adding corrosion protection;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.  Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> </ul>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
		<p>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</p> <p>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</p> <p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the owner or permittee fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p> <p>For service providers: Send WL.            If the service provider has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
UST 0067(2)(m)	Failing by an owner or permittee to pass the appropriate national examination before performing tank services;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Or send a WL if the facility meets all of the following:</p> <p>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</p> <p>b. the permittee timely submitted an installation or modification application,</p> <p>c. the facility has a current valid FR mechanism,</p> <p>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</p> <p>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</p> <p>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</p> <p>If the person has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
UST 0067(2)(n)	Failing to provide the identification number or operation certificate number to persons depositing a regulated substance into an UST;	<p>Follow "UST Field Citation" program guidance to either issue a Field Citation or send a PEN.</p> <p>Or send a WL if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</li> <li>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</li> </ul> <p>If the person has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>
<b>CLASS 3 VIOLATIONS</b>		
UST 0067(3)(a)	Failing by a person who sells an UST to notify the new owner or permittee of the department's general permit registration requirements.	<p>Follow "UST Field Citation" program guidance to issue a Field Citation.</p> <p>If the person has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>



**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

**UMBRELLA VIOLATIONS GUIDANCE FOR USTs**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><u>CLASS 1 VIOLATIONS</u></b>		
0053(1)(a)	Violating a requirement or condition of a commission or department order, consent order, agreement, consent judgment (formerly called judicial consent decree) or compliance schedule contained in a permit;	Send PEN and refer.  Notes on violation of MAO requirements: The MAO may allow delay or deviation if outside the reasonable control of the person and the Department is notified in a timely manner. For enforcement of MAOs, see guidance for Penalty Demand Notices.
0053(1)(b)	Submitting false, inaccurate or incomplete information to the department where the submittal masked a violation, caused environmental harm, or caused the department to misinterpret any substantive fact;	Send PEN and refer if any of the following apply: (i) the violator knew or should have known that the information submitted was false, incomplete or inaccurate and the violator signed a certification that the information being submitted was true or accurate; (ii) the falsification masked a violation; (iii) the violation caused environmental harm; (iv) the violation caused the Department to issue a permit or license it would not have otherwise issued. Otherwise send WL if the violator was otherwise in compliance and did not know and would not reasonably have known the information submitted was false, inaccurate or incomplete.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement within 60 months</b> , send PEN and refer.
0053(1)(c)	Failing to provide access to premises or records as required by statute, permit, order, consent order, agreement or consent judgment (formerly called judicial consent decree), or	Send PEN and refer if the person denying access was informed by a Department representative that permitting access to the Department was required by statute, permit, or order. Otherwise, send WL.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement within 60 months</b> , send PEN and refer.
0053(1)(d)	Using fraud or deceit to obtain department approval, permit or license.	Send PEN and refer.
<b><u>CLASS 2 VIOLATIONS</u></b>		

**Table 7**  
**Underground Storage Tank (UST) Violations Guidance (OAR 340-012-0067)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
0053(2)(a)	Violating any otherwise unclassified requirement.	<p>Follow "UST Field Citation" program guidance by either issuing a Field Citation or send a PEN.</p> <p>Or send a WL or WL with opportunity to correct if the facility meets all of the following:</p> <ul style="list-style-type: none"> <li>a. the tank owner and permittee have not previously owned or operated another UST facility in Oregon,</li> <li>b. the permittee timely submitted an installation or modification application,</li> <li>c. the facility has a current valid FR mechanism,</li> <li>d. the permittee or owner requests an inspection within 90 days of being issued an operating certificate,</li> <li>e. the permittee has completed the required Class A or B operator training prior to the inspection, and</li> <li>f. the permittee and owner has owned or operated the facility for less than 6 months at the time of the inspection.</li> </ul> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement at the same facility</b> within 36 months, send PEN and refer.</p>

## **Table 8**

### **Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

The guidance table below includes Division 12 classification changes that became effective on January 1, 2022. Class I violations are generally those that (1) have a high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could be designated and listed on EPA’s watchlist as “significant non-compliers” (SNCs)).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit(s), or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 of the Enforcement Guidance for further directions on that process.

Contact OCE for any questions about applying this guidance.

#### **IMPORTANT NOTES:**

To determine whether to issue a Warning Letter (WL), Warning Letter with Opportunity to Correct (WLOC), Expedited Enforcement Offer (EEO), or Pre-Enforcement Notice (PEN), use the Guidance below; violations are considered repeated if they recur within 60 months (5 years). For example, if the same violation is repeated once within 5 years, it would be the “2<sup>nd</sup> time” as listed in Class II and III guidance below. When there are multiple violations from one investigation, issue one enforcement document covering all violations (e.g., do not send a WL for some violations and an EEO or PEN for others). Issue the enforcement document at the highest applicable level (e.g. if some violations would qualify for a WL but others found at the same inspection would qualify for a PEN, issue a PEN citing all the violations). When considering whether a violation is a “repeat,” consider all sites owned or operated by the same Respondent in Oregon. Additionally, a “repeat” violation must be the same regulatory citation (e.g., failing to label with the words “hazardous waste,” and failing to label with the waste code, are different regulations and one would not be a repeat of the other, even though both are classified under 0068(1)(b)).

#### **EEOs may NOT be issued if:**

- Any violation warrants a PEN under the Guidance (if so, ALL violations are documented in a PEN and referred for formal enforcement);
- The facility has a Class I violation that was repeated (meaning they received a WL, EEO, or PEN) within the last three years (36 months);
- Any violation had a significant adverse impact on human health or the environment;
- The facility is a TSD facility;
- The facility is designated as a SNC; or
- There are greater than five EEO qualifying violations, then use a PEN instead of an EEO.

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

When a WLOC is issued, but the violations are not corrected as directed, DEQ will issue a PEN.

NOTE: For any violation(s) of the adopted federal rules effective January 1, 2022, that would receive a PEN per the Guidance below, issue a WL/WLOC unless: other violations trigger a PEN or EEO, or the violation poses a significant risk to human health or the environment. This provision is in effect only through August 31, 2022. As of September 1, 2022, this note no longer applies.

**To deviate from this Guidance, you must receive approval from your manager, RDA, and the OCE manager on one of the following:**

- **Penalty Justification Memo** (to issue a penalty by drafting an EEO or PEN when the Guidance dictates issuance of a WL under exceptional circumstances; e.g., significant economic benefit, employee or public safety risk, the threat of environmental harm, or actual environmental harm).
- **No-Penalty Justification Memo** (to issue a WL when the Guidance dictates an EEO or PEN, or to issue an EEO when the Guidance dictates a PEN, due to extreme and unforeseeable events beyond the control of the violator which prevented compliance; e.g., extreme act of nature, negligence on the part of the government, vandalism by a third party).

Div. 12 Cite.	Violation Language	Guidance Language
<b><u>CLASS 1 HAZARDOUS WASTE VIOLATIONS</u></b>		
HW 0068(1)(a)	Failing to make or document a complete and accurate hazardous waste determination on a residue;	<p>In cases of violations in multiple categories (WL/WLOC or PEN), default to the highest level of enforcement.</p> <p><u>WL/WLOC:</u></p> <ul style="list-style-type: none"> <li>• 55 gallons (or 400 pounds) or less of non-acute hazardous waste;</li> <li>• &lt;2.2 lbs or one quart of acute hazardous waste;</li> <li>• If determination comes back as non-hazardous waste before enforcement document issued; or</li> <li>• If failed to document determination but managed in compliance with accurate determination as hazardous waste.</li> </ul> <p><u>PEN:</u></p> <ul style="list-style-type: none"> <li>• No HWD made on more than 55 gallons (400 lbs) of non-acute hazardous waste;</li> <li>• No HWD made for a period that exceeded one year; or</li> </ul>

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
		<ul style="list-style-type: none"> <li>All other failures to perform a HWD, or document a HWD for a hazardous waste not managed as HW (for anything not listed above).</li> </ul> <p>Send PEN for any failure to perform a HWD repeated within five years.</p>
HW 0068(1)(b)	Failing to meet Land Disposal Restriction (LDR) requirements when disposing of hazardous waste;	Send PEN and refer if the waste disposal does not meet LDR treatment standards and a regulated generator did not correct the violation before the waste was disposed. Otherwise, send WL.
HW 0068(1)(c)	Operating a hazardous waste treatment, storage, or disposal facility (TSD) without first obtaining a permit or without having interim status;	<p>Send PEN and refer if the facility takes offsite waste. Send PEN and refer if the facility exceeds onsite accumulation standards, unless the generator's site is clean, there are no spills or releases, hazardous waste is being properly managed, and no cleanup will be required. Otherwise, send WL.</p> <p>Note: if the generator is generally following management requirements but has some (not all) waste stored more than the allowable time period, use 0068(2)(d) or 0068(3)(a) instead.</p>
HW 0068(1)(d)	Treating, storing, or accumulating hazardous waste in a hazardous waste management unit, as defined by 40 CFR 260.10, that does not meet the unit design or unit integrity assessment criteria for the hazardous waste management unit;	Send PEN and refer. If the violation is for management of waste in secondary containment for tanks or containers, send PEN and refer only if the total capacity of all tanks or containers is at least 30 gallons; otherwise, send WL. Unit design and integrity requirements may be found in 40 CFR 265 & 264.
HW 0068(1)(e)	Accepting, transporting, or offering for transport hazardous waste without a uniform hazardous waste manifest;	<p>Send PEN and refer if no manifest</p> <p>(incomplete or inaccurate manifests are addressed under 0068(2)(f) (shipping HW on manifests that do not comply with DEQ rules)</p> <p>If the accepting designated facility submitted an un-manifested waste report, it would not be a violation.</p>

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
HW 0068(1)(f)	Transporting, or offering for transport, hazardous waste or hazardous waste pharmaceuticals to a facility not authorized or permitted to manage hazardous waste or hazardous waste pharmaceuticals;	Send PEN and refer if transported to an unauthorized or unpermitted facility  Otherwise, send WL.
HW 0068(1)(g)	Failing to comply with management requirements for ignitable, reactive, or incompatible hazardous waste;	Send PEN and refer, unless beyond the reasonable control of the owner or operator. Otherwise, send WL. Beyond reasonable control means unpredictable act of nature, sabotage, natural disaster, or in the case of emergency if the hazardous waste was moved as part of a spill plan or to insure plant safety. The following are not beyond reasonable control: <ul style="list-style-type: none"> <li>• Operational error;</li> <li>• Improperly designed facilities;</li> <li>• Lack of preventive maintenance;</li> <li>• Carelessness or improper operation; or</li> <li>• Failure to manage waste after an incident when there has been sufficient time to clean up and resume proper management of this type of waste</li> </ul>
HW 0068(1)(h)	Illegally treating or disposing of hazardous waste;	Send PEN
HW 0068(1)(i)	Failing to submit Land Disposal Restriction notifications;	Send PEN and refer if no notification  Send WL if the waste disposal complies with LDR treatment standards when disposed but notification is incomplete or they failed to keep a copy of the notification on site
HW 0068(1)(j)	Failing to have and maintain a closure plan or post-closure plan for a TSD facility, reverse distributor accumulating potentially creditable hazardous waste pharmaceuticals or evaluated hazardous waste pharmaceuticals or for each regulated hazardous waste management unit, as defined in 40 CFR 260.10, by the owner or operator of facility or unit;	Send PEN and refer if (1) TSD facility or reverse distributor has no plan or (2) TSD facility has a plan but it does not provide an accurate cost estimate for closure or post-closure work. Otherwise, send WL.

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
HW 0068(1)(k)	Failing to carry out closure or post-closure plan requirements, by an owner or operator of a TSD facility, such that the certification for completing closure or post-closure work is not submitted, or is incomplete, inaccurate, or non-compliant with the approved plans;	Send PEN and refer.
HW 0068(1)(l)	Failing to establish or maintain financial assurance or hazard liability requirements in 40 CFR 264.147 or 40 CFR 265.147, by an owner or operator of a TSD facility;	Send PEN and refer unless the violation resulted because the financial assurance was not adjusted for the current year inflation factor. Otherwise, send WL.
HW 0068(1)(m)	Failing to follow emergency procedures in a Contingency Plan or other emergency response requirements during an incident in which a hazardous waste or hazardous waste constituent is released to the environment or the incident presents a risk of harm to employees, emergency responders, or the public;	Send PEN and refer if an incident occurs and the facility did not follow emergency procedures in the contingency plan or other emergency procedures such as obtaining a plan. Otherwise, send WL.  Note: If no hazardous waste or hazardous waste constituent is released to the environment and the incident did not present a risk of harm to employees, emergency responders, or the public, then address under 68(2)(o), instead.
HW 0068(1)(n)	Failing to comply with export requirements in 40 CFR 262.52 for hazardous wastes, 40 C.F.R. 266.508(b) for non-creditable hazardous waste pharmaceuticals or evaluated hazardous waste pharmaceuticals, or 40 C.F.R. 266.509(d) for potentially creditable hazardous waste pharmaceuticals;	Send PEN and refer.
HW 0068(1)(o)	Failing to properly install a groundwater monitoring system in compliance with permit requirements, by an owner or operator of a TSD facility;	Send PEN and refer.
HW 0068(1)(p)	Failing to properly control volatile organic hazardous waste emissions, by a large-quantity hazardous waste generator or TSD facility, when such failure could result in harm to employees, the public, or the environment;	Send PEN and refer.
HW	Failing to inspect, operate, monitor, keep records, or	Send PEN and refer.

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
0068(1)(q)	maintain in compliance with a permit: hazardous waste landfill units, incineration equipment, Subpart X treatment equipment, hazardous waste treatment units, pollution abatement equipment for hazardous waste treatment or disposal, or hazardous waste monitoring equipment; or	
HW 0068(1)(r)	Failing to immediately clean up spills or releases or threatened spills or releases of hazardous waste or hazardous waste pharmaceuticals, by any person having ownership or control over hazardous waste.	Send PEN and refer.
HW 0068(1)(s)	Failing to submit an exception report for generators shipping hazardous waste, for healthcare facilities shipping non-creditable hazardous waste pharmaceuticals, or for reverse distributors shipping evaluated hazardous waste pharmaceuticals	For the first time in 5 years, send WL; For the second time in 5 years, send PEN and refer
HW 0068(1)(t)	Reuse in vehicles of defective airbag modules or defective airbag inflators subject to a recall	Send PEN and refer.
HW 0068(1)(u)	Failing to accurately determine generator status	For the first time in 5 years, send WL; For the second time in 5 years, send PEN and refer
HW 0068(1)(v)	Failing to notify or withdraw for healthcare facilities or reverse distributors	WLOC if operating in compliance with Subpart P rules but did not submit a notification.  Otherwise, send PEN and refer.
HW 0068(1)(w)	Failing to comply with the prohibition against sewerage hazardous waste pharmaceuticals	Send PEN and refer.
HW 0068(1)(x)	Transporting, or offering for transport, hazardous waste other than potentially creditable hazardous waste pharmaceuticals to a reverse distributor	Send PEN and refer.
HW 0068(1)(y)	Failing to submit an unauthorized waste report	For the first time in 5 years, send WL; For the second time in 5 years, send PEN and refer



**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
HW 0068(1)(z)	Accepting hazardous waste pharmaceuticals at a facility not authorized or permitted to manage the specific type of hazardous waste pharmaceuticals received	Send PEN and refer.
HW 0068(1)(aa)	Failing to provide confirmation to the healthcare facility or reverse distributor that shipment of potentially creditable hazardous waste pharmaceuticals has arrived at its destination and is under the control of the reverse distributor	For the first time in 5 years, send WL; For the second time in 5 years, send PEN and refer
<b><i>CLASS 2 HAZARDOUS WASTE VIOLATIONS</i></b>		
HW 0068(2)(a)	Failing to place an accumulation start date on a container used for accumulation or storage of hazardous waste or hazardous waste pharmaceuticals;	If more than 165 gallons of waste are involved send PEN and refer.  Otherwise, for the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(b)	Failing to label tanks or containers used for the accumulation or storage of hazardous waste with “hazardous waste,” hazards of the contents, waste codes, or “hazardous waste pharmaceutical”;	Capacity: Tanks less than 100 gallons, or containers equaling less than 110 gallons: <ul style="list-style-type: none"> <li>• For the first time in 5 years, send WL;</li> <li>• If repeated within 5 years and no other violations are cited, issue another WL;</li> <li>• If repeated within 5 years and other violations are cited, issue at the enforcement level of the other violations.</li> </ul> Capacity: Tanks of 100 gallons or more, or containers equaling 110 gallons or more: <ul style="list-style-type: none"> <li>• For the first time in 5 years, send WL;</li> <li>• For the second time in 5 years send EEO;</li> <li>• For the third time in 5 years, send PEN and refer</li> </ul>
HW 0068(2)(c)	Failing to post required emergency response information next to the telephone, by a small quantity generator;	For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
HW 0068(2)(d)	Accumulating hazardous waste, non-creditable hazardous waste pharmaceuticals, potentially creditable hazardous waste pharmaceuticals, or evaluated hazardous waste pharmaceuticals more than 30 days beyond the specified accumulation time frame;	If waste storage is greater than 90 days beyond the required storage time limit send PEN and refer  Otherwise: For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(e)	Failing to submit a manifest discrepancy report;	For the first time in 5 years, send WL; For the second or more times in 5 years send PEN and refer
HW 0068(2)(f)	Shipping hazardous waste on manifests that do not comply with department rules;	For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(g)	Failing to prevent the unknown or unauthorized entry of a person or livestock into the waste management area of a treatment, storage, or disposal facility or into a portion of a reverse distributor's facility where potentially creditable hazardous waste pharmaceuticals and evaluated hazardous waste pharmaceuticals are kept;	For the first time in 5 years, send WL; For the second or more times in 5 years send PEN and refer
HW 0068(2)(h)	Failing to conduct required inspections at hazardous waste generator or reverse distributor accumulation sites or at hazardous waste permitted storage areas;	For the first time in 5 years, send WL For the second time in 5 years send WL, or if more than five or more inspections total missed in a year since WL issued send EEO For the third time in 5 years, send PEN and refer
HW 0068(2)(i)	Failing to prepare a contingency plan;	If NO plan, send PEN  If the plan is inadequate:  1 <sup>st</sup> time, WL 2 <sup>nd</sup> time, EEO 3 <sup>rd</sup> time, PEN
HW 0068(2)(j)	Failing to follow the requirements of a groundwater monitoring program, unless otherwise unclassified;	Send WL, except send PEN and refer if groundwater data is not being collected according to the requirements of the permit.

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
HW 0068(2)(k)	Failing to maintain adequate aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination;	For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(l)	Generating, treating, storing, or disposing of hazardous waste, non-creditable hazardous waste pharmaceuticals, or evaluated hazardous waste pharmaceuticals, without complying with the Personnel Training requirements;	Send WL, except send PEN and refer if 1) violation was repeated within 5 years; 2) the hazardous waste management activity poses an imminent threat to worker's health or wellbeing, or 3) the lack of training led to numerous violations.
HW 0068(2)(m)	Failing to keep containers of hazardous waste, non-creditable hazardous waste pharmaceuticals, or evaluated hazardous waste pharmaceuticals closed, except when adding or removing wastes;	If 3 or more containers (with a combined total capacity greater than 15 gallons) or if more than 55 gallons of hazardous waste total or less than 1 quart of acutely hazardous waste send EEO  If 1 quart or greater of acutely hazardous waste send PEN and refer  Otherwise, if less than the amounts above: For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(n)	Failing to comply with the requirements for management of containers, including satellite accumulation, other than the requirements for ignitable, reactive, or incompatible waste, by a hazardous waste generator, storage facility, health care facility, or reverse distributor;	Note: this applies to container management violations not otherwise classified, and the ignitable, reactive, or incompatible waste requirements found in 265.176 and 177.  For the first time in 5 years, send WL; For the second time in 5 years send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(o)	Failing to comply with the preparedness, prevention, contingency plan, or emergency procedure requirements, unless otherwise classified;	If no risk of harm is identified as under 68(1)(m), then: For the first time in 5 years, send WL; For the second time in 5 years send EEO; For the third time in 5 years, send PEN and refer If risk of harm is identified, address under 68(1)(m), instead.
HW 0068(2)(p)	Failing to manage universal waste and waste pesticide residue in compliance with universal waste management	For the first time in 5 years, send WL; If repeated within 5 years and no other violations are cited, issue

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
	requirements or waste pesticide requirements;	another WL. If repeated within 5 years and other violations are cited, issue at the enforcement level of the other violations.
HW 0068(2)(q)	Failing to obtain a hazardous waste EPA identification number when required;	Send WL with opportunity to correct.
HW 0068(2)(r)	Failing to comply with 40 CFR 264 or 265 Subparts J, W, or DD standards, other than unit design or unit integrity assessment;	For the first time in 5 years, send WL; For the second time in 5 years send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(s)	Failing to comply with 40 CFR 264 or 265 Subparts AA, BB, or CC standards for hazardous waste generator and TSD facilities, unless otherwise classified, or	For the first time in 5 years, send WL; For the second time in 5 years send EEO; For the third time in 5 years, send PEN and refer
HW 0068(2)(t)	Failing to timely submit an annual report, by a hazardous waste generator, TSD facility, reverse distributor, or hazardous waste recycling facility.	Send WL for first year of not submitting and refer to regions for inspection. For second year of no submittal within 5 years, refer to regions for inspection and EEO. If repeat third year or again within five-year cycle, then refer to regions for inspection and PEN.
HW 0068(2)(u)	Failing to comply with recalled airbag recordkeeping, management, or disposal requirements, unless otherwise classified	WL: <ul style="list-style-type: none"> <li>• Airbags not containerized or labeled</li> <li>• Accumulating between 180-210 days, &lt; 250 airbags</li> </ul> EEO: <ul style="list-style-type: none"> <li>• Failing to maintain required records (and refer to ODOT)</li> <li>• Accumulating &gt; 210 days and &lt; 250 airbags</li> </ul> PEN: <ul style="list-style-type: none"> <li>• Disposal violations</li> <li>• Accumulating &gt; 180 days <b>and</b> &gt; <b>250</b> airbags at a time</li> </ul> If none of the above apply: For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer.

**Table 8**  
**Hazardous Waste Management and Disposal Violations Guidance (OAR 340-012-0068)**

<b>Div. 12 Cite.</b>	<b>Violation Language</b>	<b>Guidance Language</b>
HW 0068(2)(v)	Failing to timely notify DEQ of LQG closure	WL if no other violations; otherwise, EEO
HW 0068(2)(w)	Failing to comply with episodic generation conditions, not otherwise classified	For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer.
HW 0068(2)(x)	Failing to notify, keep records, or other requirements for consolidation of VSQG waste at LQG owned by the same person, by the LQG	For the first time in 5 years, send WL; For the second time in 5 years, send EEO; For the third time in 5 years, send PEN and refer.
<b><i>CLASS 3 HAZARDOUS WASTE VIOLATIONS</i></b>		
HW 0068(3)(a)	Accumulating hazardous waste, non-creditable hazardous waste pharmaceuticals, potentially creditable hazardous waste pharmaceuticals, or evaluated hazardous waste pharmaceuticals, up to thirty (30) days beyond the specified accumulation time frame;	For the first time in 5 years, send WL; If repeated within 5 years and no other violations are cited, issue another WL. If repeated within 5 years and other violations are cited, issue at the enforcement level of the other violations.
HW 0068(3)(b)	Failing to maintain on-site a copy of the one-time notification regarding hazardous waste that meets treatment standards by a hazardous waste generator; or	For the first time in 5 years, send WL; If repeated within 5 years and no other violations are cited, issue another WL. If repeated within 5 years and other violations are cited, issue at the enforcement level of the other violations.
HW 0068(3)(c)	Failing to submit a contingency plan to all police, fire, hospital, and local emergency responders.	For the first time in 5 years, send WL; If repeated within 5 years and no other violations are cited, issue another WL. If repeated within 5 years and other violations are cited, issue at the enforcement level of the other violations.

**Table 9**  
**Polychlorinated Biphenyl (PCB) Violations Guidance (OAR 340-012-0071)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

**Technical Assistance:** Staff will follow the Enforcement Guidance for all violations of any statute, rule, permit or order, identified through document review, inspection, complaint response\* or any other form of compliance monitoring action. However, limited immunity from enforcement (WLs, EEOs, PENs) can be offered pursuant to the terms of the IMD on Using Immunity from Enforcement in the Hazardous Waste Technical Assistance Program (available at <http://www.oregon.gov/deq/docs/imdhwimmunity.pdf>).

\* Until a decision is made for all programs on whether to offer immunity during complaint response, Hazardous Waste will respond in an enforcement mode to complaints at businesses with active hazardous waste enforcement, or designated as a Significant Non-Complier, or when the complaint appears to allege violations that would lead to a Pre-Enforcement Notification under the Enforcement Guidance and the regional manager concurs. Hazardous Waste may respond to all other Hazardous Waste complaints in the normal Technical Assistance mode (only following up with enforcement if there is reasonable cause to believe there exists a clear and immediate danger to public health and safety or to the environment) or per the regional manager’s guidance.

EPA does most of the enforcement in the PCB program.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><i>CLASS 1 PCB VIOLATIONS</i></b>		
PCB 0071(1)(a)	Treating, storing or disposing of PCBs anywhere other than a permitted PCB disposal facility or at a location authorized by DEQ; or	EPA has primary authority to enforce under TSCA. Discuss with your manager whether and how to refer to EPA.
PCB 0071(1)(b)	Establishing, constructing or operating a PCB disposal facility without first obtaining a permit or department authorization.	EPA has primary authority to enforce under TSCA. Discuss with your manager whether and how to refer to EPA.
<b><i>CLASS 2 PCB VIOLATIONS</i></b>		
PCB	Violating any other requirement related to the treatment, storage,	EPA has primary authority to enforce under TSCA. Discuss

**Table 9**  
**Polychlorinated Biphenyl (PCB) Violations Guidance (OAR 340-012-0071)**

0071(2)(a)	generation or disposal of PCBs is classified under OAR 340-012-0053.	with your manager whether and how to refer to EPA.
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## **Table 10**

### **Used Oil Management Violations Guidance (OAR 340-012-0072)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could be designated and listed on EPA's watchlist as "significant non-compliers" (SNCs)).

The Division 12 classification citations are not the "substantive" violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 of the Enforcement Guidance for further directions on that process.

Contact OCE for any questions about applying this guidance

#### **IMPORTANT NOTES:**

To determine whether to issue a WL, EEO, or PEN, use the Guidance below; violations are considered repeated if they recur within 60 months (5 years). E.g., if the same violation is repeated once within 5 years, it would be the "2<sup>nd</sup> time" as listed in the Class II and III guidance below. When citing a repeated Class 3 violation, issue a WL unless other violations are also cited; then review Guidance applying to issuance of multiple penalties.

#### **EEOs may NOT be issued if:**

- Any violation warrants a PEN under the Guidance (if so, ALL violations are documented in a PEN and referred for formal enforcement);
- The facility has a Class I violation that was repeated (meaning they received a WL or PEN) within the last three years (36 months);
- Any violation had a significant adverse impact on human health or the environment;
- The facility is a TSD;
- The facility is designated as a SNC; or
- There are greater than five EEO qualifying violations, then use a PEN instead of an EEO.

**Technical Assistance:** Staff will follow the Enforcement Guidance for all violations of any statute, rule, permit or order, identified through document review, inspection, complaint response\* or any other form of compliance monitoring action. However, limited immunity from enforcement (WLs, EEOs, PENs) can be offered pursuant to the terms of the IMD on Using Immunity from Enforcement in the Hazardous Waste Technical Assistance Program (available at <http://www.oregon.gov/deq/docs/imdhwimmunity.pdf>).



**Table 10**  
**Used Oil Management Violations Guidance (OAR 340-012-0072)**

\* Until a decision is made for all programs on whether to offer immunity during complaint response, Hazardous Waste will respond in an enforcement mode to complaints at businesses with active hazardous waste enforcement, or designated as a Significant Non-Complier, or when the complaint appears to allege violations that would lead to a Pre-Enforcement Notification under the Enforcement Guidance and the regional manager concurs. Hazardous Waste may respond to all other Hazardous Waste complaints in the normal Technical Assistance mode (only following up with enforcement if there is reasonable cause to believe there exists a clear and immediate danger to public health and safety or to the environment) or per the regional manager's guidance.

When a WL with Opportunity to Correct is issued, but the violations are not corrected as directed, DEQ will issue a PEN.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><u>CLASS 1 VIOLATIONS</u></b>		
Used Oil 0072(1)(a)	Using used oil as a dust suppressant, pesticide, or otherwise spreading used oil directly in the environment;	Send PEN and refer.
Used Oil 0072(1)(b)	Burning a used oil mixture where the used oil mixture has less than 5,000 Btu/pound;	Send PEN and refer.
Used Oil 0072(1)(c)	Offering for sale used oil as specification used oil fuel when the used oil does not meet used oil fuel specifications;	Send PEN and refer.
Used Oil 0072(1)(d)	Selling off-specification used oil fuel to a facility not meeting the definition of an industrial boiler or furnace;	Send PEN and refer.
Used Oil 0072(1)(e)	Burning off-specification used oil in a device that does not meet the definition of an industrial boiler or furnace and is not otherwise exempt;	Send PEN and refer.
Used Oil 0072(1)(f)	Failing to make an on-specification used oil fuel determination when required, by a used oil generator, transporter, burner or processor;	Send PEN and refer, except send WL if it is documented that the oil meets specification. Otherwise send WL.
Used Oil 0072(1)(g)	Storing or managing used oil in a surface impoundment;	Send PEN and refer.
Used Oil 0072(1)(h)	Failing to determine whether used oil exceeds the permissible halogen content, by a used oil	Send PEN and refer, except send WL if it is documented that all collection sites were conditionally exempt generators. Otherwise send WL.

**Table 10**  
**Used Oil Management Violations Guidance (OAR 340-012-0072)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
	transporter, burner or processor;	
Used Oil 0072(1)(i)	Failing to perform required closure on a used oil tank or container, by a used oil processor or re-refiner;	Send PEN and refer.
Used Oil 0072(1)(j)	Failing to maintain required secondary containment at used oil transfer facilities or by a processor, burner, or marketer of used oil, or	Send PEN and refer, except send WL if there are no signs that a release to the secondary containment system has occurred. Otherwise send WL.
Used Oil 0072(1)(k)	Failing to immediately clean up spills or releases or threatened spills or releases of used oil, by any person having ownership or control over the used oil.	Send PEN and refer if greater than reportable quantity released to the environment;  Send WL if greater than 1 quart released and less than the reportable quantity, or if threat of release of greater than the reportable quantity;  Send EEO if repeat of WL criteria.
<b><u>CLASS 2 VIOLATIONS</u></b>		
Used Oil 0072(2)(a)	Failing to obtain a one time written notification from a burner before shipping off-specification used oil fuel, by a used oil generator, transporter, processor or re-refiner;	1st time, WL 2 <sup>nd</sup> time, EEO 3 <sup>rd</sup> time, PEN
Used Oil 0072(2)(b)	Failing to develop, follow and maintain records of a written waste analysis plan, by a used oil processor;	Send PEN and refer if: (i) used oil on site exceeds the halogen limitations and documentation shows that the oil is not from CEG, (ii) used oil is off specification and being managed as if it is specification used oil, (iii) the processor fails to demonstrate whether used oil marketed as fuel meets spec fuel requirement, (iv) failure to maintain an Analysis Plan adequate to assess total halogen content in all accepted used oil, or (v) failure to implement analysis plan to assess all incoming used oil.  Otherwise: 1st time, WL 2 <sup>nd</sup> time, EEO 3 <sup>rd</sup> time PEN

**Table 10**  
**Used Oil Management Violations Guidance (OAR 340-012-0072)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
Used Oil 0072(2)(c)	Failing to close or cover a used oil tank or container;	<p>WL if failed to close or store under cover up to 55 gallons of used oil in tanks or containers.</p> <p>EEO if failed to close or store under cover greater than 55 gallons of used oil in tanks or containers.</p> <p>PEN for repeated violation of the EEO level and for second repeat at the WL level.</p>
Used Oil 0072(2)(d)	Failing to timely submit annual used oil handling reports by a used oil processor;	Send WL with opportunity to correct. Send PEN and refer if reports not submitted within period required by WL or if violation repeated.
Used Oil 0072(2)(e)	Failing to label each container or tank used for the accumulation or storage of used oil on site, unless otherwise classified;	<p>1<sup>st</sup> time, WL</p> <p>2<sup>nd</sup> time, EEO</p> <p>3<sup>rd</sup> time PEN</p>
Used Oil 0072(2)(f)	Failing to keep a written operating record at the facility, by used oil processor;	<p>Send PEN and refer if data entry records cannot be re-created.</p> <p>Otherwise:</p> <p>1<sup>st</sup> time, WL</p> <p>2<sup>nd</sup> time, EEO</p> <p>3<sup>rd</sup> time PEN</p>
Used Oil 0072(2)(g)	Failing to prepare and maintain an up-to-date preparedness and prevention plan, by a used oil processor; or	<p>Send PEN and refer if no plan exists.</p> <p>Otherwise:</p> <p>1<sup>st</sup> time, WL</p> <p>2<sup>nd</sup> time, EEO</p> <p>3<sup>rd</sup> time PEN</p>
Used Oil 0072(2)(h)	Transporting, processing, re-refining, burning or marketing used oil without first obtaining an EPA ID number.	<p>1<sup>st</sup> time, WL</p> <p>2<sup>nd</sup> time: PEN or PEN if multiple facilities under the control of the same operator</p>
<b><i>CLASS 3 VIOLATIONS</i></b>		
Used Oil 0072(3)(a)	Failing to label one container or tank in which used oil was accumulated on site, if five or more tanks or containers are present;	<p>1<sup>st</sup> time, WL</p> <p>If repeated and no other violations are cited, issue another WL.</p> <p>If repeated and other violations are cited, issue at the enforcement level of the other violations.</p>

**Table 10**  
**Used Oil Management Violations Guidance (OAR 340-012-0072)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
Used Oil 0072(3)(b)	Failing to label up to two containers used for the accumulation or storage of used oil on site; or	1 <sup>st</sup> time, WL If repeated and no other violations are cited, issue another WL. If repeated and other violations are cited, issue at the enforcement level of the other violations.
Used Oil 0072(3)(c)	Failing to label a tank having less than 100 gallon capacity when used for the accumulation or storage of used oil on site.	1 <sup>st</sup> time, WL If repeated and no other violations are cited, issue another WL. If repeated and other violations are cited, issue at the enforcement level of the other violations.

**Table 11**  
**Environmental Cleanup Violations Guidance (OAR 340-012-0073)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 in the Enforcement Guidance for further directions on that process.

Contact the ELS assigned to your program for any questions about applying this guidance.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><u>UNCLASSIFIED VIOLATIONS</u></b>		
EC 0073(1)(a)	Violating any otherwise unclassified environmental cleanup-related requirements are addressed under OAR 340-012-0053.	Use Table 1 for default violations under OAR 340-012-0053(1). Except for 0053(1)(a) – the following guidance applies: send PEN and refer if there was environmental harm or the violation was done willfully or the violator received a previous WL for the same violation in the previous 5 years.  Send WL if the violation was due to “good cause;” or if violation involves a non-substantive requirement such as submitting a report; or if violation did not exacerbate the existing environmental problem.
<b><u>CLASS 2 VIOLATIONS</u></b>		
EC 0073(2)(a)	Failing to provide information under ORS 465.250.	Send WL, with requirement that DEQ receive a response within 30 days, if DEQ has proof that the person or entity received the request (DEQ has green card), the time for response in the information request has passed, and the person or entity has not contacted DEQ to extend the time for response. Send PEN and refer if person or entity does not respond to WL or make other arrangements within period specified in the WL.

**Table 11**  
**Environmental Cleanup Violations Guidance (OAR 340-012-0073)**

**Table 12**  
**Leaking Underground Storage Tank Cleanup (LUST) Violations Guidance (OAR 340-012-0074)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><i>CLASS 1 LUST VIOLATIONS</i></b>		
LUST 0074(1)(a)	Failing to report a confirmed release from an UST;	<p><b>For owners/permittees:</b>            PEN and referral unless a third party (besides a contractor that the owner/permittee hired) discovers the release but fails to inform them. Once they have knowledge from the third party, the owner/permittee must report the release within 24 hours.</p> <p><b>For service providers:</b></p> <ol style="list-style-type: none"> <li>1. If they are doing work (regardless of what it is) on behalf of the owner or permittee, PEN and refer.</li> <li>2. If they are doing work on behalf of a 3<sup>rd</sup> party and that work does not require a DEQ Service Provider license, WL.</li> </ol> <p>If the person has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer</p>
LUST 0074(1)(b)	Failing to initiate or complete the investigation or cleanup, or to perform required monitoring, of a release from an UST;	<p>Because the regulations allow DEQ to set the timeframes for when work must be completed, when DEQ picks up a file that has not had active DEQ oversight for a <b>significant</b> period of time, the project manager will send a letter to the responsible party, setting forth the timeframes in which the responsible party must complete the investigation and cleanup. If the responsible party fails to perform the work within these timeframes, send WL with opportunity to correct.</p> <p>If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.</p>
LUST 0074(1)(c)	Failing to conduct free product removal;	Send PEN and refer.
LUST 0074(1)(d)	Failing to properly manage petroleum contaminated soil;	Send PEN and refer, if testing shows soil is contaminated above risk levels. Otherwise, send WL or WL with opportunity to correct.

**Table 12**  
**Leaking Underground Storage Tank Cleanup (LUST) Violations Guidance (OAR 340-012-0074)**

Div. 12 Cite.	Div. 12 Violation Language	Guidance Language
		If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
LUST 0074(1)(e)	Failing to mitigate fire, explosion or vapor hazards;	Send PEN and refer.
<b><i>CLASS 2 LUST VIOLATIONS</i></b>		
LUST 0074(2)(a)	Failing to report a suspected release from an UST;	Send WL.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
LUST 0074(2)(b)	Failing to timely submit reports or other documentation from the investigation or cleanup of a release from an UST; or	Send WL or WL with opportunity to correct.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
LUST 0074(2)(c)	Failing to timely submit a corrective action plan or submitting an incomplete corrective action plan.	Send WL or WL with opportunity to correct.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.



**Table 13**  
**Heating Oil Tank (HOT) Violations Guidance (OAR 340-012-0079)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions.

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

**Notes on specific violations:**

The classifications for “submitting false, inaccurate or incomplete information . . . “ (-0053(1)(b)), “failing to provide access . . . “ (-0053(1)(c)), and “using fraud or deceit to obtain DEQ approval, permit, certification, or license” (-0053(1)(d) only apply if that conduct is illegal according to program statutes, rule, permit, or order.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See 6.3.3. for further directions on that process.

Contact OCE for any questions about applying this guidance.

Div. 12 Cite	Div. 12 Violation Language	Guidance Language
<b><i>CLASS I HEATING OIL TANK VIOLATIONS</i></b>		
HOT 0079(1)(a)	Failing to report a release from a HOT when the failure is discovered by the department;	Send PEN and refer contractors or in any case where the failure resulted in major harm to human health or the environment; otherwise send WL for heating oil tank owners.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(1)(b)	Failing to initiate and complete the investigation or cleanup of a release from a HOT;	Send PEN and refer for contractors or in any case where the failure resulted in major harm to human health or the environment; otherwise send WL with opportunity to correct for heating oil tank owners.  If the person fails to comply with the WL or has a <b>repeated violation of</b>

**Table 13**  
**Heating Oil Tank (HOT) Violations Guidance (OAR 340-012-0079)**

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		<b>the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(1)(c)	Failing to initiate and complete free product removal;	Send PEN and refer for contractors or in any case where the failure resulted in major harm to human health or the environment; otherwise send WL with opportunity to correct for heating oil tank owners.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(1)(d)	Failing to certify that heating oil tank services were conducted in compliance with all applicable regulations, by a service provider;	Send PEN and refer.
HOT 0079(1)(e)	Failing, by a responsible party or service provider, to conduct corrective action after the department rejects a certified report;	Send PEN and refer for contractors or in any case where the failure resulted in major harm to human health or the environment; otherwise send WL with opportunity to correct for heating oil tank owners.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(1)(f)	Providing or supervising HOT services without first obtaining the appropriate license.	Send WL if all of the following conditions are met: a. the service provider previously held a license which has been expired for less than 6 months on the date of the violation, and b. the services provided were conducted in accordance with DEQ regulations.  If the person does not the criteria above or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
<b><i>CLASS 2 HEATING OIL TANK VIOLATIONS</i></b>		
HOT 0079(2)(a)	Failing to submit a corrective action plan (CAP);	Send WL or WL with opportunity to correct.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(2)(b)	Failing to properly decommission a heating oil tank;	Send WL or WL with opportunity to correct.

**Table 13**  
**Heating Oil Tank (HOT) Violations Guidance (OAR 340-012-0079)**

<b>Div. 12 Cite</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
		If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(2)(c)	Failing to hold and continuously maintain insurance as required by OAR 340-163-0050;	Send WL or WL with opportunity to correct.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(2)(d)	Failing to have a supervisor present when performing HOT services;	Send WL.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.
HOT 0079(2)(e)	Failing to timely report a release from a HOT when the failure is reported to the department by the responsible person or the service provider;	Send WL.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 24 months, send PEN and refer.
HOT 0079(2)(f)	Offering to provide heating oil tank services without first obtaining the appropriate service provider license.	Send WL.  If the person fails to comply with the WL or has a <b>repeated violation of the same requirement</b> within 60 months, send PEN and refer.

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 in the *Enforcement Guidance* for further directions on that process.

Contact the ELS assigned to your program for any questions about applying this guidance.

<b>Statutory or Div. 142 Citation</b>	<b>Div. 12 Cite</b>	<b>Violation Language</b>	<b>Guidance Language</b>
<b><i>Class I Violations</i></b>			
ORS 466.645	Sp 0081(1)(a)	Failing to immediately clean up spills or releases or threatened spills or releases of oil or hazardous materials, by any person having ownership or control over the oil or hazardous materials;	<p>If the spill exceeds the reportable quantity* below or the spill resulted in or was likely to result in significant adverse impact on human health, safety, or the environment, send a PEN and refer, unless no cleanup was necessary or the reason for failure to immediately clean up a spill was beyond the reasonable control** of the responsible party (RP).</p> <p>If the spill is under the reportable quantity* below and did not result in or was not likely to result in significant adverse impact on human health or the environment, send EEO, unless no cleanup was necessary or the reason for failure to immediately clean up a spill is beyond the reasonable control** of the RP. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.</p>

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

<b>Statutory or Div. 142 Citation</b>	<b>Div. 12 Cite</b>	<b>Violation Language</b>	<b>Guidance Language</b>
			<p>* For the purpose of this violation, a spill exceeds the reportable quantity amount if it is a spill of more than 42 gallons of petroleum product to land or a spill of petroleum product to waters of the state that causes a sheen, sludge or emulsion, or an amount above the reportable quantity for a hazardous material as determined by the USEPA’s List of Lists.</p> <p>** “Beyond reasonable control”<sup>1</sup> is broadly defined at the end of this Table. As applied to the failure to clean up, beyond reasonable control means situations in which immediate cleanup was not reasonably possible because of extenuating circumstances. These circumstances include delays caused by death or incapacitation of the vehicle operator, necessary delays caused when it is not immediately safe for the RP to begin cleanup, or where they have been directed by the fire department or other responsible officials to delay cleanup. If the reason for failure to immediately clean up a spill is determined to be beyond the reasonable control of the RP, an EEO or PEN should not be sent unless there are additional violations, which require a WL, EEO or PEN in their guidance.</p>
<p>ORS 466.635 OAR 340-142-0040(1)</p>	<p>Sp 0081(1)(b)</p>	<p>Failing to immediately notify the Oregon Emergency Response System (OERS) of the type, quantity and location of a spill of oil or hazardous material, and corrective and cleanup actions taken and proposed to be taken if the amount of oil or</p>	<p>If the violation significantly hampered the spill response or the spill resulted in or was likely to result in significant adverse impact on human health, safety, or the environment, send a PEN and refer, unless the violation was beyond the reasonable control of the RP.</p> <p>If the violation did not significantly hamper the spill response, send an EEO, unless the violation was beyond the reasonable control of the RP. Do not send an EEO if the RP was previously cited for this violation within the last 3 years.</p> <p>If the failure to immediately report was beyond the reasonable</p>

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

<b>Statutory or Div. 142 Citation</b>	<b>Div. 12 Cite</b>	<b>Violation Language</b>	<b>Guidance Language</b>
		<p>hazardous material released exceeds the reportable quantity or will exceed the reportable quantity within 24 hours;</p>	<p>control of the RP, staff may send a discretionary SIL or no letter at all but after the first incidence the failure must be entered into the emergency response database.</p> <p>For RPs who have verified knowledge of Oregon reporting requirements, such as RPs who have spill contingency plans regulated facilities and commercial vessels, send a PEN and refer.</p> <p>* “Beyond reasonable control” is broadly defined at the end of this Table. As applied to the failure to report, beyond reasonable control means situations in which immediate notification was not possible because of extenuating circumstances. For spills resulting from a private vehicle accident, assume the notification was beyond the private individual’s reasonable control because the individual lacked knowledge of the requirement or means to report, unless knowledge can be shown in some other way such as a prior spill or specialized training. For other spills, circumstances constituting beyond reasonable control include delays caused by death or incapacitation of the vehicle operator in the accident causing the spill. Inability to report a spill due to lack of communication devices or cell phone service may also be considered. If failure to report a spill is determined to be beyond the reasonable control of the RP, an EEO should not be sent unless there are additional violations, which require a WL, EEO or PEN in their guidance.</p> <p>Note: A violation for failure to immediately report has not occurred if the RP reported the spill immediately after they found out about it. An OERS report alone may be enough depending on the information it includes about the timeliness of the reporting.</p>

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

Statutory or Div. 142 Citation	Div. 12 Cite	Violation Language	Guidance Language
			Note: There is no reportable quantity amount for this violation; instead the duty to report is based on the reportable quantity for each hazardous material.
ORS 466.640 AND ORS 468B.025(1)(a) or ORS 468B.050(1)(a) or ORS 468B.305 (oil spill from ship or facility)	Sp 0081(1)(c)	Spilling or releasing any oil or hazardous materials which enters waters of the state;	<p>Send a PEN and refer if the spill to waters of the state exceeds 42 gallons of petroleum product or the reportable quantity of a hazardous material, or results in or is likely to result in significant adverse impact on human health or the environment, unless the reason for the spill or release was “beyond the reasonable control”* of the RP.</p> <p>For this violation, consider the type of RP. Regardless of the amount spilled, if the RP was a recreational user, boater or motor vehicle or vessel operator not engaged in the transport of oil or hazardous materials, or a residential property owner or occupant, may send EEO after consulting with manager. However, if the RP was a regulated facility, commercial motor vehicle operator, vessel operator or pipeline engaged in the manufacture, storage or transport of petroleum product or hazardous materials, send a PEN and refer.</p> <p>Otherwise, if the spill of petroleum product was 42 gallons or less or caused a sheen, sludge or emulsion or was less than the reportable quantity of a hazardous material and did not result in or was not likely to result in significant adverse impact on human health or the environment, send an EEO; or if the spill was beyond reasonable control may send discretionary SIL. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.</p> <p>For a spill of a small volume of unrecoverable product (e.g., sheen) that did not result in or was not likely to result in significant</p>

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

Statutory or Div. 142 Citation	Div. 12 Cite	Violation Language	Guidance Language
			<p>adverse impact on human health or the environment, may send SIL or WL.</p> <p>* “Beyond reasonable control” is broadly defined at the end of this Table. As applied to the spill or release violation, inspectors should also consider whether or not an accident which causes a spill was caused by a third party. In vehicle spills, inspectors should fully assess the situation (<i>e.g.</i>, an RP who contributes to an accident by speeding and could have avoided accident if complying with speed limit cannot say the accident was beyond the reasonable control just because a 3rd party also contributed by changing lanes without signaling). A police citation (<i>e.g.</i>, for negligence) is not necessary for an inspector to conclude that an accident was within the RP’s reasonable control.</p>
OAR 340-142-0030	Sp 0081(1)(d)	Failing to activate alarms, warn people in the immediate area, contain the oil or hazardous material or notify appropriate local emergency personnel;	If the violation resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0030(1)(a)	Sp 0081(1)(e)	Failing to immediately implement a required plan; or	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
ORS 466.645 OAR 340-	Sp 0081(1)(f)	Failing to take immediate preventative, repair, corrective or	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the



**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

<b>Statutory or Div. 142 Citation</b>	<b>Div. 12 Cite</b>	<b>Violation Language</b>	<b>Guidance Language</b>
142-0030		containment action in the event of a threatened spill or release.	environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
<b><i>Class II Violations</i></b>			
OAR 340-142-0090	Sp 0081(2)(a)	Failing to submit a complete and detailed written report to DEQ of a spill of oil or hazardous material;	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0100	Sp 0081(2)(b)	Failing to use the required sampling procedures and analytical testing protocols for oil and hazardous materials spills or releases;	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0130	Sp 0081(2)(c)	Failing to coordinate with DEQ during the emergency response to a spill after being notified of DEQ's jurisdiction;	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0040	Sp 0081(2)(d)	Failing to immediately report spills or releases within containment areas when reportable quantities are exceeded	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

<b>Statutory or Div. 142 Citation</b>	<b>Div. 12 Cite</b>	<b>Violation Language</b>	<b>Guidance Language</b>
		and exemptions are not met under OAR 340-142-0040;	years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0130(1)	Sp 0081(2)(e)	Failing to immediately manage any spill or release of oil or hazardous materials consistent with the National Incident Management System (NIMS);	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0080	Sp 0081(2)(f)	Improperly or without approval of DEQ, treating, diluting or disposing of spill, or spill-related waters or wastes; or	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
OAR 340-142-0070	Sp 0081(2)(g)	Using chemicals to disperse, coagulate or otherwise treat a spill or release of oil or hazardous materials without prior department approval.	If the violation significantly hampered the spill response or resulted in a significant threat or was likely to result in a significant adverse impact to human health or safety or the environment, send a PEN and refer. Otherwise, send an EEO. If the RP was previously cited for this violation within the last 3 years, send a PEN and refer instead of issuing an EEO.
<b><i>CLASS III VIOLATIONS</i></b>			
OAR 340-142-0120	Sp 0081(3)(a)	Failing to provide maintenance and inspections records of the storage and transfer facilities to DEQ upon request; or	Refer according to Regional SOSC, Program Manager, and DA discretion, unless other violations are referred or eligible for EEO.

**Table 14**  
**Oil and Hazardous Material Spill and Release Violation Guidance (OAR 340-012-0081)**

<b>Statutory or Div. 142 Citation</b>	<b>Div. 12 Cite</b>	<b>Violation Language</b>	<b>Guidance Language</b>
OAR 340-142-0120	Sp 0081(3)(b)	Failing, by a vessel owner or operator, to make maintenance and inspection records, and oil transfer procedures available to DEQ upon request.	Refer according to Regional SOOSC, Program Manager, and DA discretion, unless other violations are referred or eligible for EEO.

Footnote (1): “***Beyond reasonable control***” – There is no easy black-and-white definition for the key word "reasonable." Evaluate the fact-specific situation to determine whether the violator could have reasonably prevented the violation. Consider the *probability* that the violation would occur and the *gravity* of the violation if it did occur. Reasonable people take more care to prevent more probable violations and those that would have more grave consequences. If the RP was reasonably expected to have a maintenance or audit program (*e.g.*, subject to SPCC) to address the root cause of the spill, then the release or spill was not beyond the RP’s reasonable control. If the RP was cited for a negligent or a more serious driving violation, then the release or spill was not beyond the RP’s reasonable control

**Table 15**  
**Contingency Planning Violations Guidance (OAR 340-012-0082)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See 6.3.3 for further directions on that process.

Contact OCE for any questions about applying this guidance.

Unless otherwise specified below, send PEN and refer if a violation is repeated, or if third Class I or Class II violation of any contingency planning rule within three years.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<b><u>CLASS I VIOLATIONS</u></b>		
CP 0082(1)(a)	Failing to immediately implement the oil spill prevention and emergency response contingency plan or other applicable contingency plan, after discovering a spill;	If there was no environmental harm, send EEO. Otherwise, send PEN and refer.
CP 0082(1)(b)	Operating an onshore or offshore facility without an approved or conditionally approved oil spill prevention and emergency response contingency plan;	Send PEN and refer if the owner or operator have been notified in writing or orally by DEQ in advance of operating that such plan is required; otherwise send WL.
CP 0082(1)(c)	Entering into the waters of the state, by a covered vessel without an approved or conditionally approved oil spill prevention and emergency response contingency plan or purchased coverage under an umbrella oil spill prevention and emergency response	Send PEN and refer if the operator is notified either in writing or orally by DEQ or a third person in advance of entry of the requirement or failure to correct the violation within 24 hours of entry; otherwise send WL.

**Table 15**  
**Contingency Planning Violations Guidance (OAR 340-012-0082)**

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
	contingency plan;	
CP 0082(1)(d)	Failing to implement prevention measures identified in the facility or covered vessel spill prevention plan that directly results in a spill;	If there was no environmental harm, send EEO. Otherwise, send PEN and refer.
CP 0082(1)(e)	Failing to maintain equipment, personnel and training at levels described in an approved or conditionally approved oil spill prevention and emergency response contingency plan;	If first violation, send EEO. If violation is repeated within three years, send PEN and refer.
CP 0082(1)(f)	Failing to establish and maintain financial assurance as required by statute, rule or order; or	Send WL with opportunity to correct. Send PEN and refer, if fail to correct violation within 7 days of the WL.

**Table 15**  
**Contingency Planning Violations Guidance (OAR 340-012-0082)**

CP 0082(1)(g)	Failing by the owner or operator of an oil terminal facility, or covered vessel, to take all appropriate measures to prevent spills or overfilling during transfer of petroleum or hazardous material products.	If spill reached waters of the state or spill to land was greater than 42 gallons, send PEN and refer. Otherwise, send EEO.
<b><i>CLASS 2 VIOLATIONS</i></b>		
CP 0082(2)(a)	Failing to submit an oil spill prevention and emergency response contingency plan to DEQ at least 90 calendar days before beginning operations in Oregon, by any onshore or offshore facility or covered vessel;	Send WL with opportunity to correct that requests the submittal of a plan. Send PEN and refer if the plan holder fails to submit a plan as required by the WL.
CP 0082(2)(b)	Failing to have available on site a simplified field document summarizing key notification and action elements of a required vessel or facility contingency plan;	Send WL. Send PEN and refer if violation is repeated within three years, or if third Class I or Class II violation of a contingency planning rule within five years.
CP 0082(2)(c)	Failing, by a plan holder, to submit and implement required changes to a required vessel or facility contingency plan following conditional approval;	Send WL with opportunity to correct within 30 days. Send PEN and refer if not corrected as required by WL, or if violation is repeated within three years or if third Class I or Class II violation of a contingency planning rule within five years.
CP 0082(2)(d)	Failing, by a covered vessel or facility contingency plan holder, to submit the required vessel or facility contingency plan for re-approval at least ninety (90) days before the expiration date of the required vessel or facility contingency plan;	Send WL with opportunity to correct. If not corrected within time specified in WL, send EEO with compliance order. If EEO not accepted or compliance order not satisfied, send PEN and refer.
CP 0082(2)(e)	Failing to submit spill prevention strategies as required; or	Send WL with opportunity to correct by submitting strategies as required; Send PEN and refer if the plan holder fails to submit strategies as required by the WL.

**Table 15**  
**Contingency Planning Violations Guidance (OAR 340-012-0082)**

CP 0082(2)(f)	Failing to obtain department approval of the management or disposal of spilled oil or hazardous materials, or materials contaminated with oil or hazardous material, that are generated during spill response.	Send WL with opportunity to correct, unless there is environmental damage, then send PEN and refer. If not corrected within time specified in WL, send PEN and refer.
<b><i>CLASS 3 VIOLATIONS</i></b>		
CP 0082(3)(a)	Failing to provide maintenance and inspections records of the storage and transfer facilities to DEQ upon request;	Send PEN and refer on first occurrence if DEQ is investigating a spill; if referred with other violations; or at the discretion of the Division or Regional Administrator.  Otherwise send WL.
CP 0082(3)(b)	Failing, by a vessel owner or operator, to make maintenance and inspection records and oil transfer procedures available to DEQ upon request;	Send PEN and refer on first occurrence if DEQ is investigating a spill; if referred with other violations; or at the discretion of the Division or Regional Administrator.  Otherwise send WL.
CP 0082(3)(c)	Failing to have at least one copy of the required vessel or facility contingency plan in a central location accessible at any time by the incident commander or spill response manager;	Send a WL. If violation is repeated within three years, send PEN and refer. Otherwise, send PEN and refer at the discretion of the Division or Regional Administrator, unless referred with other violations.
CP 0082(3)(d)	Failing to have the covered vessel field document available to all appropriate personnel in a conspicuous and accessible location;	Send a WL. If violation is repeated within three years, send PEN and refer. Otherwise, send PEN and refer at the discretion of the Division or Regional Administrator, unless referred with other violations.
CP 0082(3)(e)	Failing to notify the department within 24 hours of any significant changes that could affect implementation of a required vessel or facility contingency plan; or	Send a WL. If violation is repeated within three years, send PEN and refer. Otherwise, send PEN and refer at the discretion of the Division or Regional Administrator, unless referred with other violations.
CP 0082(3)(f)	Failing to distribute amended page(s) of the plan changes to the department within thirty (30) calendar days of the amendment.	Send a WL. Otherwise, send PEN and refer at the discretion of the Division or Regional Administrator, unless referred with other violations.

**Table 16**  
**Ballast Water Management Violations Guidance (OAR 340-012-0083)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See 6.3 for further directions on that process.

Contact OCE for any questions about applying this guidance.

**EEOs may NOT be offered if:**

- Any violation warrants a PEN under the Guidance (if so, ALL violations are documented in one PEN and are referred for formal enforcement);
- The responsible party or vessel has a Class I violation that was repeated (i.e., they received a WL, PEN, or EEO) within the last three years;
- If any violation had a significant adverse impact on human health or the environment; or
- The violator obtained a significant economic benefit as a result of the violation.

<b>Div. 12 Cite.</b>	<b>Div. 12 Violation Language</b>	<b>Guidance Language</b>
<i><u>CLASS 1 VIOLATIONS</u></i>		
Ballast Water 0083(1)(a)	Discharging ballast water in violation of OAR 340-143-0010;	For discharges involving an improper ballast water exchange (BWE) in violation of OAR 340-143-0010(2)(b): Send WL if all the following conditions are met: <ul style="list-style-type: none"> <li>- The Salinity Values of all ballast water tanks sampled are greater than 30 parts per thousand (ppt) and</li> <li>- The BWE was greater than 80% of the exchange rate (for empty-refill method) or greater than 250% (for flow-thru method), and</li> <li>- The BWE was conducted more than 175 nautical miles (nm) from shore</li> </ul>



**Table 16**  
**Ballast Water Management Violations Guidance (OAR 340-012-0083)**

		<p>at a depth of 1000 meters (m) (for an open sea BWE) or more than 45nm from shore at a depth of 400m (for a coastal ocean exchange).</p> <p>Send EEO if any of the following conditions are met:</p> <ul style="list-style-type: none"> <li>- The Salinity Values of any ballast water tanks sampled are less than 30 ppt but greater than 20ppt, or</li> <li>- The BWE was greater than 80% of the exchange rate (for empty-refill method) or greater than 250% (for flow-thru method), or</li> <li>- The BWE was conducted more than 75nm from shore at a depth of 1000m for an open sea BWE - or more than 30nm from shore at a depth of 400m for a coastal ocean exchange.</li> </ul> <p>Otherwise send PEN.</p> <p>For discharges of ballast water treated in a manner inconsistent with OAR 340-143-0050 and in violation of OAR 340-143-0010(2)(f):</p> <p>Send EEO if either:</p> <ul style="list-style-type: none"> <li>- The failure to follow manufacturer specifications or documented standard operating procedures for treatment system use and maintenance had no more or posed no more than a de minimis adverse impact on human health or the environment, or</li> <li>- The failure to provide sufficient verification or documentation of treatment system operational use and/or maintenance had no more or posed no more than a de minimis adverse impact on human health or the environment.</li> </ul> <p>Otherwise send PEN</p> <p>For discharges made after the vessel declared a safety exemption but before the department approved the discharge in violation of OAR 340-143-0010(2)(g):</p> <p>Send EEO if:</p> <ul style="list-style-type: none"> <li>- The vessel operator has provided sufficient evidence to support the justification for a safety exemption.</li> </ul> <p>Otherwise send PEN.</p> <p>For all other discharges of ballast water without authorization in violation of</p>
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**Table 16**  
**Ballast Water Management Violations Guidance (OAR 340-012-0083)**

		<p>OAR 340-143-0010:  Send EEO if all of the following conditions are met:</p> <ul style="list-style-type: none"> <li>- There is no indication of actual or potential environmental harm, and</li> <li>- It's the first violation of a ballast water rule or statute in the past 3 years;</li> </ul> <p>and</p> <p>Otherwise send PEN.</p>
0083(1)(b)	Failing to report ballast water management information required by OAR 340-143-0020 or OAR 340-143-0040(2) to DEQ;	<p>Send EEO if all of the following conditions are met:</p> <ul style="list-style-type: none"> <li>- The vessel representative submits a complete and accurate report within 48 hours after DEQ provides notice of the violation,</li> <li>- The vessel representative submits the report prior to any ballast water discharge, and</li> <li>- It is the first violation of a ballast water statute in the past 3 years.</li> </ul> <p>Otherwise send PEN.</p>
0083(1)(c)	Failing to develop and maintain a vessel-specific ballast water management plan in accordance with OAR 340-143-0020(5); or	<p>Send WL if:</p> <ul style="list-style-type: none"> <li>- The vessel has a ballast water management plan,</li> <li>- The vessel's ballast water management plan's noncompliance with 33 CFR 151.2025 does not pose more than a de minimis effect on human health or the environment, and</li> <li>- This is the first violation of a ballast water rule or statute in the past 3 years.</li> </ul> <p>Send EEO if:</p> <ul style="list-style-type: none"> <li>- The vessel has a ballast water management plan, and</li> <li>- The vessel's ballast water management plan's noncompliance with 33 CFR 151.2025 does not pose more than a de minimis effect on human health and the environment.</li> </ul> <p>Otherwise send PEN.</p>
0083(1)(d)	Failing to make a ballast water log or record book available in accordance with OAR 340-143-	<p>Send EEO if:</p> <ul style="list-style-type: none"> <li>- The vessel provides a ballast water log or record book that lacks</li> </ul>

**Table 16**  
**Ballast Water Management Violations Guidance (OAR 340-012-0083)**

	0020(6)(b).	<p>essential elements of the required content or reports significantly inaccurate information.</p> <p>Send PEN if:</p> <ul style="list-style-type: none"> <li>- The vessel does not produce a ballast water log or record book.</li> </ul> <p>Otherwise, for all other instances of insufficient ballast water log or record books, apply enforcement guidance for OAR 340-012-0083(2)(b).</p>
<b><u>CLASS 2 VIOLATIONS</u></b>		
Ballast Water 0083(2)(a)	Failing to report ballast water management information to the department at least 24 hours before entering waters of the state in accordance with OAR 340-143-0020(1);	<p>Send WL if all the following conditions are met:</p> <ul style="list-style-type: none"> <li>- A complete and accurate report is submitted within 48 hours after DEQ provides notice of the violation to the vessel representative,</li> <li>- The report is submitted prior to any ballast water discharge, and</li> <li>- This is the first violation of a ballast water rule or statute in the past 3 years.</li> </ul> <p>Send EEO if a complete and accurate report is submitted within 48 hours after DEQ provides notice of the violation to the vessel representative.</p> <p>Otherwise send PEN.</p>
Ballast Water 0083(2)(b)	Failing to maintain a complete ballast water log or record book in accordance with OAR 340-143-0020(6).	<p>Send WL if all the following conditions are met:</p> <ul style="list-style-type: none"> <li>- The required logbook information and details absent from the logbook is readily available and can be verified from other sources, and</li> <li>- This is the first violation of a ballast water rule or statute in the past 3 years.</li> </ul> <p>Send EEO if:</p> <ul style="list-style-type: none"> <li>- The required logbook information and details absent from the logbook is readily available and can be verified from other sources.</li> </ul> <p>Otherwise, for instances of log books that lack essential elements or report significantly inaccurate information, apply enforcement guidance for OAR 340-012-0083(1)(d) .</p>

**Table 16**  
**Ballast Water Management Violations Guidance (OAR 340-012-0083)**

## **Table 17**

### **Dry Cleaning Violations Guidance (OAR 340-012-0097)**

The guidance table below includes Division 12 classification changes that became effective on January 6, 2014. Class I violations are generally those that (1) have high probability for significant, direct environmental harm, (2) involve reporting requirements that could conceal other violations, especially when the information cannot be reconstructed, or (3) are necessary to maintain federal delegation decisions (typically these violations could result in “significant non-compliance” (SNC) or “high priority violator” (HPV).

The Division 12 classification citations are not the “substantive” violations, that is, a person does not violate Division 12 rules. When citing a violation, use the appropriate program statutes, rules, permit, or order. Some classification listings divide a single violation into separate classifications according to environmental impact or other considerations. Other listings group similar violations.

Deviation from the Guidance in the Table – Deviation must be approved by the manager, Regional Division Administrator, and OCE Manager. See Section 6.3.3 of the Enforcement Guidance for further directions on that process.

Contact OCE for any questions about applying this guidance.

#### **IMPORTANT NOTES:**

**Read the general guidance for field staff first.** To determine whether to issue a WL, EEO, or PEN, use the Guidance below; violations are considered repeated if they recur within 60 months (5 years). E.g., if the same violation is repeated once within 5 years, it would be the “2<sup>nd</sup> time.”

**Always send a PEN under these circumstances:**

- 1) If the same violation is repeated within three years; or**
- 2) If a violation is not corrected by deadline in WLOC (or extended deadline, if appropriate)**

**EEOs may NOT be issued if:**

- Any violation warrants a PEN under the Guidance (if so, ALL violations are documented in a PEN and referred for formal enforcement);
- The facility has a Class I violation that was repeated within the last three years; or
- Any violation had a significant adverse impact on human health or the environment.

**Table 17**  
**Dry Cleaning Violations Guidance (OAR 340-012-0097)**

Citation(s)	Requirement	Class	Div. 12 Class Citations: OAR 340-012-0097 = DC 0054 = AQ; 0068 = HW	Guidance
468A.045(b) OAR 340-216-0020(1)	Must have ACDP to operate	2	54(2)(a)	Send PEN and refer unless the drycleaner had no actual or constructive knowledge of the need to have a permit. If the company has other facilities in Oregon or other states that have permits, the company should have known. If the company had previously not needed a permit but had been warned that future growth or expansion may result in the need to have a permit, the company should have known. Otherwise send WL.
ACDP 9.5	Permit must be on site	2	54(2)(b)	1 <sup>st</sup> time, WL 2 <sup>nd</sup> time, EEQ 3 <sup>rd</sup> time, PEN and refer
40 CFR 63.322(c) ACDP 3.1.b	Close machine door when not in use	2	53(2) and 54(2)(b)	1 <sup>st</sup> time, EEO
40 CFR 63.324(e) ACDP 5.3 and 5.4	Keep operating manuals and design specifications for each machine and emission control device on site and make available upon request	2	54(2)(b)	1 <sup>st</sup> time, WL 2 <sup>nd</sup> time, EEO 3 <sup>rd</sup> time, PEN and refer
40 CFR 63.322(d) ACDP 3.1.a	Operate and maintain per manufacturer's specifications and recommendations	2	54(2)(b)	1 <sup>st</sup> time, EEO

**Table 17**  
**Dry Cleaning Violations Guidance (OAR 340-012-0097)**

Citation(s)	Requirement	Class	Div. 12 Class Citations: OAR 340-012-0097 = DC 0054 = AQ; 0068 = HW	Guidance
40 CFR 63.322(j) ACDP 3.1.d OAR 340-124-0040(1)(a)(B)	PCE and PCE waste containers covered, no leaks Dry cleaner rules include hazardous waste accumulated in secondary containment	2	97(2) (a) and 54(2)(b)	1 <sup>st</sup> time, EEO, unless release  PEN and refer if release
40 CFR 63.322(k) ACDP 3.4	Weekly inspections of system for leaks	1	54(1)(j)	PEN and refer if violation caused release (including PERC leaks to indoor air detected during inspection), and/or repeated violation. EEO if no release.
40 CFR 63.322(m) ACDP 3.5	Leak repair (w/in 24 hours, or order parts w/in 2 days and install w/in 5 days)	2	54(2)(b)	Vapor leak: 1 <sup>st</sup> time, EEO Liquid leak: PEN
40 CFR 63.322(n) ACDP 3.6	Timing of repairs if values of ref. condenser or carbon adsorb. exceed requirements	2	54(2)(b)	1 <sup>st</sup> time, WL, unless release. Send PEN and refer if release and/or repeated
40 CFR 63.323(a)(1) ACDP 4.1	Monitor condenser temps (weekly)	1	54(1)(j)	1 <sup>st</sup> time, EEO
OAR 340-124-0040(6) ORS 465.505(1)(h)	Closed, direct-coupled delivery of perc to machine (applies to operator and supplier)	1	97(1)(h) – supplier 97(2)(i) – operator	PEN and refer
OAR 340-124-0040(1)(e) OAR 340-102-0011(2)	Document no HW generation (failure to do HW determination, if claiming no HW generation)	1	68(1)(a)	WL if universal waste or 1st-time violation for non-PERC DCs. Otherwise, 1 <sup>st</sup> time, EEO
OAR 340-124-0040(1)(a)(A) ORS 465.505(1)(a)	HW management/disposal (excluding wastewater)	1	97(1)(f) – illegally treating or disposing	PEN and refer
OAR 340-124-0040(1)(g)	No HW disposal in sewer, septic tank, drain, waters of the state (includes DC wastewater – duplicative of 0040(2)(a) and 465.505(1)(b))	1	97(1)(f)	PEN and refer

**Table 17**  
**Dry Cleaning Violations Guidance (OAR 340-012-0097)**

Citation(s)	Requirement	Class	Div. 12 Class Citations: OAR 340-012-0097 = DC 0054 = AQ; 0068 = HW	Guidance
OAR 340-124-0040(1)(f)	HW must be stored and disposed in labeled container - not in dumpster/trash, on ground, or anywhere else	1	if disposed of on ground or in trash, illegal disposal under 97(1)(f) or 68(1)(h); if otherwise, 97(2)(a)	PEN and refer
OAR 340-124-0040(1)(h)	Remove solvent and residue and disconnect utilities from DC machine w/in 45 days of ceasing DC machine operations	2	97(2)(e)	Send WL, unless causes a release, then PEN and refer
OAR 340-124-0040(1)(a)(B)	HW containers must be closed, labeled, and dated	2	97(2)(a)	Send WL for failure to date or label  EEO for open container  PEN and refer if release and/or repeated
OAR 340-124-0040(1)(a)(C)	Ship HW offsite w/in 1 year of placing in container (1 year exemptions may be issued)	2	97(2)(b)	1 <sup>st</sup> time WL unless release EEO if release and/or repeat
OAR 340-124-0040(3)(b)	Secondary containment must be inspected for leaks and maintained leak-free	2	53(2)	1 <sup>st</sup> time, EEO unless leaking PEN if leaking and/or repeat
OAR 340-124-0040(3)(a), (c), and (e), (f), (g) ORS 465.505(1)(g)	Adequate containment under machine, stored solvent, HW, and WWTU	1 or 2	97(1)(b) except for containment under WWTU and HW storage containers, then 53(2)	WL for 1 <sup>st</sup> time if containment is present but inadequate. EEO if no containment present under stored solvent, HW, or WWTU. PEN and refer if not present under machine
OAR 340-124-0040(3)(d)	Outdoor storage of hazardous waste – secure and covered	2	53(2)	1 <sup>st</sup> time, EEO, unless release PEN and refer if release and/or repeated



**Table 17**  
**Dry Cleaning Violations Guidance (OAR 340-012-0097)**

Citation(s)	Requirement	Class	Div. 12 Class Citations: OAR 340-012-0097 = DC 0054 = AQ; 0068 = HW	Guidance
OAR 340-124-0040(2)(a) ORS 465.505(1)(b)	No DC wastewater (defined as from solvent/water separation process of DC machine) discharge to sewer, septic, boiler, waters of the state	1	97(1)(a)	PEN and refer
OAR 340-124-0040(2)(b)	DC wastewater management (closed, labeled container, and disposed of and counted as HW, unless treated in WWTU)	2	97(2)(a)	1 <sup>st</sup> time, EEO, unless release PEN and refer if release and/or repeat
OAR 340-124-0040(2)(c)	WWTU compliance – required components (several violations within (A-E))	2	53(2)	1 <sup>st</sup> time, EEO unless release PEN and refer if release and/or repeat
OAR 340-124-0040(2)(c)(D)	WWTU operational and maintenance manual kept onsite	2	53(2)	1st time, WL 2nd time, EEO 3rd time, PEN
40 CFR 63.322(i) ACDP 3.1.c	Drain cartridge filters in sealed containers > 24 hours	2	53(2)	1st time, WL 2nd time, EEO 3rd time or if release, PEN and refer
OAR 340-124-0040(1)(a)(F) OAR 340-124-0040(5)(a)	Post OERS information	2	97(2)(c)	1st time, WL 2nd time, EEO 3rd time or if results in response delay, PEN
OAR 340-124-0040(5)(b) and (c) ORS 465.505(4)	Report solvent spills > 1 lb (approximately 1 cup if perc) outside of secondary containment to OERS (same as (5)(c) – should cite (5)(b) and (c) together)	1	97(1)(c)	PEN and refer

**Table 17**  
**Dry Cleaning Violations Guidance (OAR 340-012-0097)**

Citation(s)	Requirement	Class	Div. 12 Class Citations: OAR 340-012-0097 = DC 0054 = AQ; 0068 = HW	Guidance
OAR 340-124-0040(5)(d)	Take emergency action for releases > 1 lb	1	97(1)(d) (timely repair cause of release w/in containment system) and (e) (immediately clean up/repair release outside containment)	PEN and refer
40 CFR 63.324(d)	Keep perc purchase receipts or log onsite for 5 years, and make available upon request	2	53(2)	1st time, WL 2nd time, EEO 3rd time, PEN and refer
40 CFR 63.324(d)(3) ACDP 5.1.a and 5.4	Log leak inspections and keep onsite for 5 years, and make available upon request	2	54(2)(b)	1st time, WL 2nd time, EEO 3rd time, PEN and refer
40 CFR 63.324(d)(4) ACDP 5.1.b and 5.4	Log repair records and keep onsite for 5 years, and make available upon request	2	54(2)(b)	1st time, WL 2nd time, EEO 3rd time, PEN and refer
40 CFR 63.324(d)(5) ACDP 5.1.d and 5.4	Log refrigerated condenser monitoring temp. results and keep onsite for 5 years, and make available upon request	2	54(2)(b)	1st time, WL 2nd time, EEO 3rd time, PEN and refer
OAR 340-124-0040(1)(a)(E)	Retain HW shipping records onsite 3 years	2	54(2)(b)	WL - if they can produce records PEN and refer if repeated or cannot produce records
ACDP 5.2 and 5.4	Log written and phone complaints re: air pollution concerns, and DC's responsive actions, keep onsite for 5 years, and make available upon request	2	54(2)(b)	WL - if they can produce records Otherwise PEN and refer
ACDP 6.1	Submit ACDP annual report (due March 1)	2	54(2)(f)	1st time, WL 2nd time, EEO 3rd time, PEN and refer

**Table 17**  
**Dry Cleaning Violations Guidance (OAR 340-012-0097)**

Citation(s)	Requirement	Class	Div. 12 Class Citations: OAR 340-012-0097 = DC 0054 = AQ; 0068 = HW	Guidance
OAR 340-124-0040(4)(a) ORS 465.505(3)	Dry Cleaner Annual Report and Fee Return Form	2	97(2)(f) and 54(2)(f)	1st time, WL 2nd time, EEO 3rd time, PEN and refer
OAR 340-124-0040(4)(b) ORS 465.505(3)	Dry Store Annual Report	2	97(2)(f)	1st time, WL 2nd time, EEO 3rd time, PEN and refer
OAR 340-124-0050(1)-(8) ACDP 6.2, 6.3, 6.4, 8.2	Notification of change, closure, opening w/in 60 days (for new facility, 7 days under ACDP/60 days under 124)	2 or 3	97(3)(a) or 54(2)(b) (for ACDP-required notices)	1st time, WL 2nd time, EEO 3rd time, PEN and refer

**Table 18**  
**401 Water Quality Certification (WQC) Guidance**  
**All violations of a 401 WQC are Class I violations pursuant to OAR 340-012-0053(1)(a)**

<b>Div 12. Cite</b>	<b>Div 12. Violation Language</b>	<b>401 Conditions</b>	<b>Guidance (if violation was within “reasonable control” of operator)<sup>1</sup></b>
0053(1)(a)	Violating a requirement or condition of a department order <sup>2</sup>	Not notifying DEQ prior to starting work, if required in the 401 WQC	Send WL.  If operator received previous WL or WLO for violating a requirement or condition of a 401 WQC within the past 60 months, then send PEN and refer.
		Not having a copy of the 401 WQC on the job site	Send WL and provide a copy of the 401 WQC to the operator.  If operator received previous WL or WLO for violating a requirement or condition of a 401 WQC within the past 60 months, then send PEN and refer.
		Failing to submit a report (except for a monitoring report) or plan as required by the 401 WQC	Send WLO. If report or plan is not submitted within the time requested in WLO, send PEN and refer.  If operator received previous WL or WLO for violating a requirement or condition of a 401 WQC within the past 60 months, then send PEN and refer.
		Failing to timely submit a report as required by the 401 WQC (i.e. report was submitted late)	Send WL.

<sup>1</sup> Violations that are “beyond the reasonable control” of the operator may be exempt from the application of this enforcement guidance. “Beyond reasonable Control” means the violations resulted from: (i) an act of war, sabotage, or vandalism; (ii) an extreme act of nature; (iii) negligence on the part of local, state or federal government; (iv) an act or omission of a 3rd party (not including an agent of violator) without regard to whether any such act or omission was or was not negligent; or (v) the violation could not have been reasonably anticipated or prevented. An example of a violation which was not reasonably anticipated or preventable: Equipment that is not accessible for inspection malfunctions, and it has been subject to a reasonable maintenance program and there are reasonable alarm/backup systems in place. In the case of vandalism, it must have been reasonably unforeseeable and non-preventable. If a violation is found to be “beyond the reasonable control” of the operator staff should document the circumstances at issue in a letter.

<sup>2</sup> A 401 water quality certification is considered a “department order.” See ORS 468.140(3)(b)(B).

**Table 18**  
**401 Water Quality Certification (WQC) Guidance**  
**All violations of a 401 WQC are Class I violations pursuant to OAR 340-012-0053(1)(a)**

			If operator received previous WL, WLO, or PEN for violating a requirement or condition of a 401 WQC within the past 60 months, then send PEN and refer.
		Failing to collect any monitoring data (including turbidity, dredged material or post dredge surface monitoring) in accordance with the 401 WQC <sup>3</sup>	Issue EEO and order any sampling that is still required to be taken.  If operator received previous EEO or PEN for a violation of a 401 WQC monitoring requirement within the past 60 months, then send PEN and refer.
		Not stopping work when required to do so by the 401 WQC	Send PEN and refer.
		Not completing or maintaining stormwater infrastructure as described in the stormwater management plan;	Send WLO. If not corrected within time specified, send PEN and refer.  If operator received previous WL, WLO, or PEN for violating a requirement or condition of a 401 WQC within the past 60 months, then send PEN and refer.
		Not maintaining an adequate supply of materials onsite (e.g., straw matting/bales, geotextiles, booms, diapers, other absorbent materials) to contain spills and to contain deleterious materials during a weather event; or	Send WLO. If not corrected within time specified, send PEN and refer.  If operator received previous WL, WLO, or PEN for violating a

<sup>3</sup> Failing to collect monitoring data in accordance with the 401 WQC includes failing to perform required sampling, failing to perform monitoring per the requirements of the 401 WQC (e.g. at the specified location, at the correct depths, in the specified frequencies, using correct methods etc), failing to record sampling in logs, submitting an incomplete monitoring report, failing to conduct monitoring or sampling in accordance with required quality control and assurance procedures, etc. If we do not receive a required monitoring report or if we receive an incomplete monitoring report we assume it is because monitoring was not performed.

**Table 18**

**401 Water Quality Certification (WQC) Guidance**

**All violations of a 401 WQC are Class I violations pursuant to OAR 340-012-0053(1)(a)**

		<p>Failing to have suitable containment (e.g. diapers) on stationary power equipment (drilling equipment, cranes, generators) to prevent leaks; or</p> <p>Not using adequate control to prevent discharges of spills or deleterious materials to surface or ground water</p>	<p>requirement or condition of a 401 WQC within the past 60 months, then send PEN and refer.</p> <p>(If a spill has occurred follow the guidance in Table 14, Oil and Hazardous Materials Spills Guidance).</p>
		<p>Failing to implement required best management practices (BMPs) (i.e. no BMP was in place), not specifically described elsewhere in this guidance (e.g. isolation or BMPs for turbidity minimization, dredging, piling removal, erosion control, rip rap placement, drilling, demolition, etc.)</p>	<p>If any of the following apply, send PEN and refer:</p> <ul style="list-style-type: none"> <li>a. There is evidence of discharge of wastes to waters of the state; or</li> <li>b. Permittee has received a WL or WLO or a PEN in the past 60 months for violating this condition.</li> </ul> <p>Otherwise, send WLO. If not corrected within time specified, send PEN and refer.</p>
		<p>Failing to <i>fully</i> implement required BMPs (i.e. an attempt to implement the BMP was made but it was not complete, required maintenance and/or done poorly), not specifically described elsewhere in this guidance (e.g. isolation or BMPs for turbidity minimization, dredging, piling removal, erosion control, rip rap placement, drilling, demolition, etc.)</p>	<p>If any of the following apply, send PEN and refer:</p> <ul style="list-style-type: none"> <li>a. There is evidence of discharge of wastes to waters of the state; or</li> <li>b. Permittee has received a WL or WLO or a PEN in the past 60 months for violating this condition.</li> </ul> <p>Otherwise, send WLO. If not corrected within time specified, send EEO.</p>

**Table 18**

**401 Water Quality Certification (WQC) Guidance**

**All violations of a 401 WQC are Class I violations pursuant to OAR 340-012-0053(1)(a)**

		Not ceasing operations and taking immediate corrective measures if the project operations cause a water quality problem that results in distressed or dying fish  Not collecting fish samples and specimens if the project operations cause a water quality problem that results in distressed or dying fish	Send PEN and refer. Coordinate with USACE, NMFS, and ODFW.
		Working outside of the fish window without authorization; or Obstructing fish passage without authorization	Coordinate with ODFW, NMFS, Corps and DSL. If DSL or the USACE does not take the lead in enforcement, send PEN and refer.
		Not successfully restoring areas that the project disturbed unless that area has been accounted for in planned mitigation actions	Refer to DSL