

ADMINISTRATOR'S MEMORANDUM

To: Water Compliance Bureau and Regional Offices

Stream Channel Alteration No. 14

From: Mat Weaver, Deputy Director 

Date: August 10, 2020

RE: Enforcement Guidance and Procedures to Address the Unauthorized Alteration of Streams

BACKGROUND

Purpose

This memorandum establishes the Idaho Department of Water Resources' ("Department") guidance for investigating and resolving stream channel alterations conducted without a valid permit or required authorization ("violation" or "unauthorized activity"). The Department may initiate administrative enforcement actions for unauthorized activities and for failure to comply with certain conditions of approval, administrative orders, and administrative rules.

This memorandum shall be used by Department staff who investigate and enforce the provisions of Title 42, Chapter 38, Idaho Code ("Stream Channel Protection Act"), when a violation is suspected, alleged, discovered, or confirmed. This memorandum describes standard practices and procedures for conducting and documenting investigations associated with unauthorized activities and the subsequent documentation and tracking of related remedial action.

Nothing in this memorandum is intended to discourage staff from investigating a suspected violation either independently or in response to an outside complaint.

References

- Idaho Code §§ 42-1701(5), 42-1701B, and 42-3801 thru 42-3812
- Idaho Administrative Procedures Act ("IDAPA") 37.01.01 (Rules of Procedure) and IDAPA 37.03.07 (Stream Channel Alteration Rules)

Application

This memorandum shall be used by all staff when investigating and correcting violations associated with stream channel alteration laws and regulations. Investigations and remedial actions must be consistent with applicable laws and rules governing the alteration of stream channels, including:

- altering channels of streams without a valid stream channel alteration permit or emergency waiver by the director;
- failing to comply with conditions of approval associated with a permit or authorization; or
- failing to comply with the Stream Channel Alteration Rules.

Authority

Authority for the director or designated staff to investigate the unauthorized alteration of stream channels and commence administrative enforcement actions is prescribed under Idaho Code §§ 42-1701(5), 42-1701B(1), 42-3809, 43-3810, and 42-3812.

Under Idaho Code § 42-1701B, the Department (on behalf of the director) may commence administrative enforcement actions through a Notice of Violation ("NOV") and resolve such violations through a Consent Order and Agreement ("COA"). The COA will specify any civil penalty and other terms and conditions to which the parties have agreed. Additionally, the Department may initiate civil enforcement actions through the Attorney General or, in rare cases, file a criminal complaint.

INVESTIGATING AND DOCUMENTING COMPLAINTS AND VIOLATIONS

Documenting Complaints

The Department sometimes receives complaints alleging a violation of Idaho's Stream Channel Protection Act. Many complaints originate as verbal reports from the public or other governmental agencies. After receiving a verbal complaint, staff should determine if the complaint relates to matters over which the Department has jurisdiction. A matter is jurisdictional if the Department has the power, right, or authority to interpret and apply the law to the facts of the alleged complaint. If the alleged violation is jurisdictional, staff should request a written summary of the complaint, including sufficient information to determine if they should initiate an investigation. The Department may provide a standardized complaint form to assist the public in providing all necessary information.

Staff should collect related evidence and document their investigation before initiating enforcement actions. Staff *should* use the Department's enforcement database to inventory and archive written complaints, but they may exercise discretion in determining which complaints rise to the level of requiring database documentation. However, staff **must** use the database to inventory and archive confirmed violations that result in a subsequent enforcement action.

Entry upon Private Land

Idaho Code § 42-1701(5) authorizes the director or staff to make "reasonable entry" upon lands to investigate or survey water use, or for other purposes necessary to carry out the duties imposed on the director by law.

Staff should exercise discretion under these authorities, and whenever practical, contact the landowner or an authorized representative of the landowner before going on private lands.

Staff should avoid threatening or confrontational situations and solicit assistance from local law enforcement when necessary.

Evidence Necessary to Substantiate Alteration of Stream Channel Violations

When investigating an alleged violation, staff must assemble evidence and document observations with the assumption that the Department will rely on their work product to establish its legal case in court. Staff must carefully collect, analyze, and document evidence to support a specific conclusion.

Evidence may include, but is not limited to, the following:

- the observations and documentation of stream channel alteration violations by staff or another public agency;
- time-stamped photographs or video with appropriate narration;
- written statements from individuals who observed the activity (written statements should include the name, address, and signature of the witness); or
- aerial photos or maps depicting the extent of the alteration.

Other evidence that supports the finding of an illegal alteration may include past site inspections or relevant site specific documentation collected by the Department or other public agencies, the presence of heavy equipment in or around the channel, and observed channel damage such as gravel scalping, channelization, excavation, vegetation removal, dumped rock, culvert installation, or changes in water flow.

Before initiating formal enforcement action, staff must determine whether the evidence supports the conclusion that the alteration of a stream channel occurred without the required authorization or in a manner inconsistent with an authorized permit. In some cases, staff must observe the unauthorized activity.

Staff must collect and record GPS information or legal description(s) (PLS information) for the alteration location. Staff should describe the alteration that has occurred in detail and take measurements of the impacted area, including volume estimates of material disposed or removed. Staff can measure the impacted

stream channel by using a measuring tape or wheel, a range finder, or a GPS device. When a physical measurement is not possible, staff can estimate the extent of the alteration by using aerial photography, if the estimate is accompanied by sufficient supporting calculations or information.

Investigations (in the field or otherwise) should result in the completion of a report that summarizes the findings and conclusions of the investigation and recommends a specific response. When appropriate, staff can use standard Department field report forms including a “punch list” to assist with collecting necessary information and evidence. Field notes should be dated, organized, and readable as the Department may use the documents as evidence in court.

ENFORCEMENT PROCEDURES

The Department’s primary goal with any enforcement procedure is to ensure compliance with Idaho laws, orders, rules, and permit conditions to protect the stream channels of the state and their environments for the benefit of public health and welfare, and for protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. Enforcement procedures range from simple educational guidance to formal administrative enforcement actions that may carry remedial or disciplinary measures designed to correct violations and deter future unlawful behavior.

Education and Awareness

Staff should encourage voluntary compliance through education of landowners, land managers, contractors water users to avoid a violation or to correct an existing violation. Education may include providing information and instruction to those who may not be aware of statutory requirements, associated rules or specific conditions for altering stream channels. Staff should provide clear direction or instructions (verbally and in writing) on how a violation can be avoided or corrected. Staff should direct users to the Department website and other available publications or resources.

Warning or Pending Notice of Violation

Sometimes staff may achieve compliance and resolve a complaint or unauthorized activity without issuing an NOV. Examples of this include issuing a documented warning, or Pending Notice of Violation (“PNOV”). However, just because an NOV was not issued, does not mean documentation isn’t still necessary. It is important for staff to document all activities for future reference and they should adhere to the following:

- Verbal warning: Staff should document the issuance of a verbal warning or instruction to cease and desist by preparing a descriptive memorandum or investigation report and uploading it to the enforcement database.
- Written warnings or PNOVs: When preparing a PNOV, staff should include a “cease and desist” provision and always upload the PNOV to the enforcement database.

When a violation is evident and an NOV is issued, staff **must** upload all related information and documentation to the Department’s enforcement database.

Administrative Enforcement Action and Other Enforcement Options

Staff may initiate administrative enforcement actions for violations of Idaho Code § 42-3809 (altering a stream without a permit or non-compliance with conditions of a permit) that are confirmed by inspection, methodical investigation, and thorough documentation. In such instances, staff should present the enforcement action to the culpable party as a Department-issued NOV.

Determining an Enforcement Response or Action

Department responses to confirmed violations must be consistent with applicable laws, rules and this memorandum. Responses should be representative of the severity or scope of the unauthorized activity or violation.

Staff should assess the severity or scope of a violation based on facts obtained through the investigation while considering the following:

- the size of the violation (length of disturbance or volume of disposed or removed materials);
- the level of public interest or concern about the violation, including local, state, federal or tribal agencies, members of the public, public interest groups, or private land owners (extent or number of complaints or inquires);
- the risk to public safety or health;
- the risk to private property;
- the impact to public resources (State Protected Rivers, Navigable Rivers, water quality, unique aquatic habitats, etc.);
- the potential hazard to navigation or recreation;
- the potential of injury to water users or land owners resulting from the violation;
- the extent of the alleged violator's previous knowledge or understanding that the work was not in compliance with applicable law or rules;
- an alleged violator's lack of response to a previous warning or PNOV;
- the willingness and cooperation of the alleged violator to correct the damage caused by the unauthorized work; and
- an alleged violator's history of previous violations.

Issuing an NOV

An NOV may follow a written PNOV, warning letter, or a previous NOV, upon confirmation of a violation. An NOV may be issued even when staff has not previously sent a warning or PNOV. Enforcement actions should be timely, well documented, and diligently pursued until the violation is corrected and resolved. Staff must upload all NOVs, including supporting documentation and evidence, to the Department's enforcement database.

Typically, staff should issue and send an NOV in letter form addressed to the individual(s) or entity determined to be responsible for the violation. The issuance of an NOV must be consistent with Idaho Code § 42-1701B(2).

The NOV should contain the following elements:

- enforcement case number from the enforcement database;
- a cease and desist provision;
- specific location information where the alleged violation occurred (generally PLS info, county and address when available);
- citation of specific rules or laws (statutes) violated and a brief description of each;
- any remedy and civil penalties the Department seeks pursuant to the NOV; and
- notification to the recipient that, if requested within 14 days of receipt of the NOV, they are entitled to a compliance conference.

Regional staff may coordinate administrative enforcement actions with state office Compliance Bureau staff. In some cases, regional staff or program managers may prefer that Compliance Bureau staff issue an NOV. This approach may expedite and facilitate compliance by allowing regional staff to maintain a positive and communicative relationship with local citizens. This approach should be considered upon the request of Regional Managers and Program Managers. Department-designated legal staff from the Attorney General's Office is also available to advise or assist staff with administrative or non-administrative enforcement actions.

The following are examples of non-administrative enforcement actions authorized by law:

- civil enforcement actions;
- court injunctions or orders;
- misdemeanor citation or criminal complaint – reference Idaho Code §§ 42-3809(1) and 42-3811; and
- uniform citation – reference Idaho Code § 42-3812.

Staff can find examples of NOV's in the enforcement database and obtain letter templates from the Stream Channel Protection Coordinator or the Compliance Bureau Enforcement Coordinator.

Violations on Privately Owned Land

To the extent practical, staff engaged in the initial investigation should make a reasonable effort to determine and document the party responsible for the violation. While the contractor may be the most common or obvious choice, in some cases, the person(s) or entity responsible for the violation may be the property owner, or a lessee. Depending on the parties responsible for the violation, it may be appropriate for the Department to issue an NOV jointly to the contractor and the property owner or lessee.

When staff issue an NOV directly to a contractor or a party other than the landowner, such as a lessee, the landowner of record should receive a copy of the NOV.

If staff cannot easily determine which party is responsible for the violation, a PNOV directed to the landowner may be a practical way of determining and documenting the person(s) or entity responsible for a violation.

Violations on Land Managed by a Local, State or Federal Agency (Public Land)

A thorough investigation is appropriate to determine the party responsible for or directly engaged in any unauthorized stream channel alteration on lands managed by a local, state, or federal agency. In some cases, the agency that owns or manages the land may not be aware that unauthorized activity has occurred or may not have direct control over a violation (such as a trespass issue). It is advisable to first contact the public agency that owns or manages the land to discuss the violation and solicit the land manager's cooperation in determining the responsible party. If staff determine that the agency that owns or manages the land is responsible for a violation, a formal enforcement action may be initiated and directed to the agency. Otherwise, it may be appropriate for staff to work jointly with the agency to identify the responsible party. Staff should copy the land manager or landowner of record on any NOV that is issued directly to a party or entity other than the manager or owner.

Proposed and Agreed to Civil Penalties

NOV's must identify any civil penalty the Department is seeking in response to a violation. The penalties proposed should be consistent with Idaho Code § 42-1701B (6) (a) and (b), which describe a civil penalty based upon the willfulness of the violation, the economic value obtained by the violator, and the damage to public resources, not to exceed \$10,000 per violation or \$150 per day for a continuing violation, whichever is greater.

Idaho Code § 42-1701B (6) (b) also states penalties shall not be assessed for a violation that has occurred more than twelve months before issuance of the NOV. Furthermore, no civil or administrative proceedings may be brought to recover for a violation more than two years after the director had knowledge of the violation in accordance with § 42-3809 (2).

The Department and the NOV recipient may reduce the penalties proposed in an NOV at or following a compliance conference. The Department may reduce the civil penalty proposed by an NOV or may suspend a portion of the proposed penalty for a specified period, contingent upon a required level of performance or other desired outcome (e.g., restoration of the altered stream channel). In contemplating a reduced or suspended penalty, staff should consider the NOV recipient's history of compliance. Repeat violators should not be extended as much latitude as first-time violators. Staff should also consider the Department's time and expense resulting from an enforcement action when negotiating a reduced or suspended penalty.

Additional Remedies Associated with an NOV

The Department may seek remedies or specified action by the NOV recipient in addition to monetary penalties, such as:

- mitigation of damages; and
- restoration of the stream channel to as near its original condition as possible.

Compliance Conference

Upon request, an NOV recipient shall be entitled to a compliance conference with the Department. A compliance conference is a meeting between the Department and the NOV recipient to discuss the facts of the matter at hand and ideally reach an agreement to correct a violation and resolve the NOV. Each case may present a unique set of facts that staff should consider when evaluating the severity of the violation. Staff should use the compliance conference to develop or identify specific terms and conditions to resolve the violation and include those conditions in the COA. The terms of the COA may address any remedial requirements and civil penalties presented in the NOV, or other terms and conditions agreed between the Department and the NOV recipient. Staff may present a draft COA to the NOV recipient for review and signature when a verbal agreement is reached at the compliance conference. Preliminary meetings that are part of the initial investigation and occur before an NOV are not a compliance conference and staff should not reference them as such. However, staff should document preliminary meetings and upload them to the enforcement database.

Consent Order and Agreement

An NOV must be resolved through a COA. Terms included in a COA generally result from a compliance conference or documented correspondence between the Department and the NOV recipient preceding the compliance conference.

The required COA must specify the terms and conditions that the Department and the NOV recipient agree will resolve the administrative enforcement action (NOV). A COA must characterize the complete agreement between the Department and the NOV recipient. A COA must contain the following elements:

- *findings of fact or background* information qualifying the violation;
- *conclusions of law or applicable law* establishing the legal basis for the action;
- *order or terms of agreement and order* containing the terms and any required remedy; and
- deadlines for compliance with the terms.

Staff must prepare the COA for signature by the Department and consent of the NOV respondent or recipient.

Examples of COAs can be found in the enforcement database and templates are available through the Stream Channel Protection Coordinator or the Compliance Bureau Enforcement Coordinator.

If the Department is unable to resolve the NOV with a COA, staff may refer the NOV to the Attorney General's office for filing a complaint in district court in accordance with Idaho Code § 42-1701B(4). Likewise, if the NOV recipient does not comply with the terms of a signed COA and the Department is unsuccessful in enforcing the terms of the COA, the Department may refer the case to the Attorney General's office for civil enforcement action.