

ADMINISTRATOR'S MEMORANDUM
(SUPERSEDES WELL DRILLING NO. 6 DATED NOVEMBER 20, 2007)

To: Water Compliance Bureau and Regional Offices

Well Drillers Memorandum #6

From: Mat Weaver, Deputy Director



Date: August 10, 2020

RE: Ground Water Protection Enforcement Guidance and Procedures Regarding Well Construction, Well Driller Licensing, Injection Wells and Wells for Geothermal Resources

BACKGROUND

Purpose

This memorandum establishes the Idaho Department of Water Resources' ("Department") guidance for investigating and resolving unlawful violations associated with the improper construction of water wells and geothermal wells, and non-compliance with well construction, well driller licensing and underground injection control rules and statutes. 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 provisions of Title 42, Chapters 2, 16, 39, and 40 Idaho Code, related to the permitting, construction, and operation of wells, when a violation is suspected, alleged, discovered, or confirmed. This memorandum describes standard practices and procedures for conducting and documenting investigations associated with violations and the subsequent documentation and tracking of related remedial actions.

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 §§ 42-235, 42-237a, 42-237g, 42-238, 42-1601 thru 42-1605, 42-1701(5), 42-1701B, 42-3903 thru 42-3916, and 42-4003 thru 42-4013.
- Idaho Administrative Procedures Act ("IDAPA") 37.01.01 (Rules of Procedure), IDAPA 37.03.09 (Well Construction Standards Rules), IDAPA 37.03.10 (Well Driller Licensing Rules), IDAPA 37.03.04 (Drilling for Geothermal Resources Rules), and IDAPA 37.03.03 (Rules and Minimum Standards for the Construction and Use of Injection Wells).

Application

This memorandum shall be used by all staff when investigating and correcting violations associated with well construction, driller licensing, construction and operation of geothermal resource wells and the construction and use of injection wells including:

- modifying or constructing a well without a valid well construction permit;
- failing to comply with conditions of approval associated with a permit or other authorization;
- constructing a well or operating a drill rig without a proper Idaho well driller or operator license;

- failing to supervise operators during well construction;
- failing to submit an accurate well driller's report within 30 days of well completion;
- failing to comply with well construction standards, well driller licensing rules, underground injection control rules, or geothermal resources rules.
- constructing or operating an injection well without a valid permit or failing to comply with the injection well permit conditions; or
- constructing or operating a geothermal resource well without a valid permit or failing to comply with permit conditions.

Authority

Authority for the director or designated staff to commence administrative enforcement actions is prescribed under Idaho Code §§ 42-235, 42-238(13), 42-1605, 42-1701B(1), 42-3916 and 42-4010.

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 or 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 well construction laws and rules. Many complaints originate as verbal reports from the public. After receiving a verbal complaint, staff should determine if the complaint relates to a matter 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 investigations before initiating enforcement actions. Staff should use the 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 or the Department 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 Well Construction 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 well construction violations by staff, a Department contractor, or another public agency;
- time-stamped photographs or video with appropriate narration; and
- written statements from individuals who have observed the activity (written statements should include the name, address, and signature of the witness).

Staff should also collect evidence other than actual observations of unauthorized activity if it supports the finding of a violation. This evidence may include well driller reports, driller field notes, and well use information. Before initiating formal enforcement action, the investigator must determine whether the evidence supports the conclusion that a violation has occurred. In some cases, staff must observe the unauthorized activity or have a statement from the driller or operator admitting that a violation occurred.

Staff must collect and record GPS information or legal description(s) (PLS information) for the well location. Staff should describe the violation in detail and include any supporting documentation such as field measurements, down-hole video, well report data or statements of admission by the driller or responsible party.

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. 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 ground water resources of the state for the benefit of public health and welfare, and for protection of the environment. 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 well drillers, operators, well owners, pump installers, water users, and the general public 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 permit conditions. Additionally, continuing education for licensed drillers and class II operators is required as a condition of licensure to drill in Idaho. Continuing education topics and direction from staff should provide clear direction or instructions on how a violation can be avoided or corrected. Staff should direct drillers, operators, well owners, and others 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 to document all activities for future reference and staff should try and adhere to the following:

- Verbal warnings: 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, if applicable, and upload the PNOV to the enforcement database. A written warning or a PNOV may call for the suspension of start card privileges. When staff include the suspension of start card privileges in a written warning or PNOV it **must** be documented in writing and uploaded 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 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 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 landowners (extent or number of complaints or inquiries);
- the risk to public safety or health;
- the economic advantage gained by non-compliance;
- the extent of the alleged violator’s previous knowledge or understanding that the work was not in compliance with applicable law or rules;
- the 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
- the 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 NOV's, 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;
- cease and desist provision (if applicable);
- specific location information where the alleged violation occurred (generally PLS info, county, and address when available);
- identification of the specific well including metal tag number if 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
- notice 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; and
- misdemeanor citation or criminal complaint – reference Idaho Code § 42-235, 42-237g, 42-238(13), 42-1601(1), and 42-1605(2), 42-3919 and 42-4010(f).

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

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 well driller 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, contractor, operator, or lessee. Depending on the parties responsible for the violation, it may be appropriate to issue an NOV jointly to the driller and the property owner, contractor, operator, or lessee. When a well driller or operator is the responsible party, it is appropriate to include the respective well drilling firm and principal driller on the NOV as jointly responsible.

When staff issue an NOV directly to a driller or a party other than the owner, the landowner of record should receive a copy of the NOV.

If the 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 violation of 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, 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

NOVs 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. When preparing an NOV, staff may consider the recommended penalties and examples in Attachment 1.

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., repair, decommissioning or replacement of the well). 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:

- well repairs necessary to meet the minimum well construction standards;
- proper well decommissioning;
- delay or deny the renewal of a driller license; and
- suspension of start card privileges.

Suspension of a Driller's License—The Department has the authority to suspend, revoke, or refuse to renew a driller's license for failure to comply with the provisions of Idaho Code §§ 42-238(11) or 42-28(12). Grounds for suspension, revocation, or refusal to renew a driller's license include:

- failure to maintain a current well log at the drilling site that documents pertinent information regarding well construction or abandonment activities;

- failure to submit a properly prepared and signed well driller's report to the Department within 30 days following completion of a well;
- failure to construct a well consistent with minimum well construction standards; and
- falsification of a well driller's report provided to the Department.

Terms of Suspension—Suspension of a driller's license can remain in effect until the driller has submitted the late or missing well reports, the driller has repaired or reconstructed the well such that it meets the minimum well construction standards, the driller has properly abandoned the well, or the driller has corrected the falsified well driller's report(s). If the action against the driller's license is determined to be warranted, the Department will issue an NOV describing the cause for suspension, revocation, or non-renewal of the driller's license and the terms and conditions for reinstatement. Prior to the driller's license being suspended, revoked, or not renewed, the driller will be entitled to a hearing before the director, as detailed in Idaho Code § 42-238(14). A driller whose license has been suspended or revoked may apply for reinstatement no sooner than the report(s) are properly corrected and on file with the Department and other well construction violations are resolved. If the director, who may consult with the Driller's Advisory Committee, determined that the compliance history of the driller included significant violations of the well construction laws or rules, including well construction standards, the director may deny the driller license application for a period of up to one year.

Compliance Conference

Upon request, the 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.

The required COA must specify the terms and conditions that the Department and the NOV recipient agree will resolve the NOV. 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 the NOV respondent or recipient.

Examples of COAs can be found in the enforcement database or from the Compliance Bureau Enforcement Coordinator or Ground Water Protection Section Manager.

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.

ATTACHMENT 1: MONETARY PENALTY RECOMMENDATIONS TO CONSIDER WHEN ISSUING AN NOV

When the Department seeks monetary penalties for violations, the NOV must include the dollar amount associated with each violation. Monetary penalties for violations pursuant to Idaho Code § 42-1701B can be assessed through the issuance of an NOV only. This attachment includes recommended penalties for common well construction and licensing violations.

Circumstances surrounding each violation are unique, so staff must consider all facts of the case when determining a proposed penalty. Staff may negotiate penalties during the compliance conference to a lesser dollar amount, but staff cannot increase penalties beyond what is required of the NOV.

To promote a prompt, fair, and consistent resolution of NOVs, implementation of the recommended penalties in this attachment is appropriate. However, nothing in this attachment prevents the Department from issuing an NOV that seeks a dollar amount higher than the recommended penalty, up to the maximum penalties pursuant to Idaho Code § 42-1701B(6) (a), if justified. Conversely, nothing in this attachment prevents the Department from achieving compliance with a party informally, without initiating enforcement actions and corresponding penalties.

Severity of Violation

Staff should assess the severity of a violation using guidance found on page 4 of the *Ground Water Protection Enforcement Guidance and Procedures* document when determining the monetary penalty proposed in the NOV. Staff shall determine, on a case-by-case basis, whether to include additional penalties such as the revocation, suspension, or refusal to renew a driller's license, or the suspension of a drillers start card privileges.

Repeat Violations

- Second violation (separate NOV) = Recommended Penalty X 2
- ≥Third Violation (separate NOV) = Recommended Penalty X 3 (maximum of \$10,000 per violation)

Common Violations

The following table lists some common violations (generally in order of decreasing severity) along with the recommended penalty.

Common GWP Violation (in order of decreasing severity)	Recommended Penalty
Constructing a well in a manner that creates an actual or imminent threat to public health and the ground water resource such as setbacks or specific water quality issues	\$5,000
Violation of any Cease and Desist Order	\$5,000
Drilling without a driller's license	\$5,000
Commingling, improper screen placement or no annular seal placed between separate aquifers	\$5,000
Failure to place the required annular seal as required by the well construction rules	\$2,500
Failure to submit or obtain a well permit prior to drilling	\$2,500
Modification of a well without obtaining a drilling permit	\$1,000
Failure to possess a permit at an active drill site	\$1,000
Sand production in excess of the allowable limits	\$1,000

Falsification of well driller's report	\$1,000/record
Failure to obtain a waiver (if necessary) prior to completing a well	\$500
Failure to replace a well seal when placing pit-less adaptor and/or pump system	\$500
Failure to maintain a daily well log at the drill site describing well construction details such as water bearing zones, lithologic changes and size and depths of casing or screen(s) used to complete the well	\$500
Failure to properly identify a well drilling rig with company name and company license number	\$500
Failure to have a driller's license or operator's permit card on site	\$500
Failure to properly attach the Department issued well ID tag to the well casing	\$500
Failure to submit a well driller's report within 30 days following completion of a well	\$250/report
Failure to obtain authorization prior to abandonment (decommissioning) of well	\$250