

2018

*City of Columbus  
Enforcement Response Plan  
(ERP)*



# Contents

<b>ENFORCEMENT RESPONSE GUIDE (ERP)</b> .....	<b>2</b>
<b>INTRODUCTION</b> .....	<b>2</b>
<b>FUNCTIONS OF GUIDE</b> .....	<b>4</b>
<b>CRITERIA TO DECIDE TYPE OF VIOLATION</b> .....	<b>5</b>
<b>TYPES OF RESPONSES</b> .....	<b>8</b>
<b>TABLE 5.1 CONSTRUCTION STORMWATER VIOLATIONS</b> .....	<b>18</b>
<b>TABLE 6.1 ENFORCEMENT RESPONSES</b> .....	<b>19</b>
<b>GLOSSARY OF TERMS</b> .....	<b>20</b>

# ***ENFORCEMENT RESPONSE GUIDE (ERP)***

## **INTRODUCTION**

*Under the terms of the Code of Federal Regulation 40 CFR Part 122.34(b)(4)(ii), the City of Columbus is required to develop and implement adequate enforcement authority for construction activity that takes place within the boundaries of the Municipal Separate Storm Sewer System (MS4). The purpose of this Enforcement Response Plan is to communicate how the enforcement tools available to the City will be used to achieve compliance. The Enforcement Response Plan also specifies criteria by which City personnel can determine the enforcement action most appropriate to instances of non-compliance. This plan is a document of the City's procedure to be followed when a construction stormwater violation is discovered.*

*The procedures are developed with the following objectives in mind:*

- The City is responsible for enforcing the Nebraska Department of Environmental Quality Construction Stormwater Permit.*
- Prevent pollutants from entering the MS4 and causing environmental harm.*
- Ensure that violators return to compliance in a timely manner.*
- Communicate definitions for non-compliance.*
- Penalize non-compliant construction site operators for violations.*
- Provide equitable and consistent enforcement actions to the extent possible.*
- Deter non-compliance through education and compliance assistance first and, if necessary, penalties second.*
- Recover costs incurred by the City due to construction site operator non-compliance.*

*Nothing in this plan shall affect the City of Columbus's authority to bring enforcement actions for violations pursuant to any portion of the Municipal Code.*

ACRONYMS

***The following acronyms shall have the following meaning:***

*AF: Administrative Fine*

*AO: Administrative Order*

*CAT: City Attorney*

*CAD: City Administrator*

*ESC: Erosion and Sediment Control*

*JA: Judicial Action*

*MS4: Municipal Separate Storm Sewer System*

*NPDES: National Pollutant Discharge Elimination System*

*NOI: Notice of Intent*

*NOV: Notice of Violation*

*PC: Personal Contact or Phone Conversation*

*STOP: Stop Work Order*

*SWPM: Storm Water Program Manager*

*SWPPP: Storm Water Pollution Prevention Plan*

## **FUNCTIONS OF GUIDE**

### **This guide serves two main functions:**

- *Establish appropriate enforcement action based on the nature and severity of the violation.*
- *Promote consistent and timely use of enforcement remedies.*

### **The enforcement process consists of three basic steps:**

- *Identify the violation*
- *Determine if the violation is significant or non-significant.*
- *Select the appropriate response.*

**Criteria to decide the type of Violation:** *Explains how to determine whether a violation is significant or non-significant.*

**Types of Responses:** *Outlines the type of response.*

### **Enforcement Responsibilities:**

- *Violations and Range of Actions:* *Describes the type of violations and ranges of enforcement actions for each.*
- *Time frame for Enforcement Actions:* *Summarizes the time frames associated with various aspects of violations and enforcement actions.*

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## **CRITERIA TO DECIDE TYPE OF VIOLATION**

*The enforcement process begins by identifying a construction site operator's violation. Once a violation is identified it must be determined whether the violation should be considered significant or non-significant. Next, the most appropriate response is determined. Each violation must be documented even if the decision is to take no action. Documentation must explain why such action was/was not taken.*

*To determine if a violation is significant or non-significant the following criteria must be considered:*

### **Magnitude:**

*Generally, a minor isolated instance of non-compliance can be considered non-significant and dealt with by informal responses, such as a Personal Contact or Phone Conversation (PC) or Notice of Violation (NOV).*

*However, some isolated incidents may cause damage to the MS4 and/or the health and welfare of the public and city personnel. Situations like these would be significant and necessitate a formal enforcement action such as a Stop Work Order (STOP) or an Administrative Order (AO).*

### **Duration:**

*The construction site operator will be subject to escalated enforcement actions if violations, regardless of severity, continue over prolonged periods of time. Chronic violations and/or failures to comply with administrative orders will be considered significant violations and may result in enforcement actions including, but not limited to, termination of permits, fines and/or court orders.*

**Effect on the Environment:**

*One objective of Chapter 54 of the municipal code, is to prevent pollutants from entering the MS4 and/or entering a receiving waterbody and causing environmental harm. Environmental harm will be presumed whenever a construction site directly discharges pollutants into an adjacent receiving waterbody or fails to implement BMPs that prevent sediment from leaving the site and entering the City's MS4. These violations will be considered significant.*

*At a minimum, responses to these circumstances require issuance of an Administrative Order (AO) and possible issuance of Administrative Fines (AF).*

**Compliance History of the Operator:**

*The construction operator's compliance history will be an important factor in determining the appropriate remedy to apply. The city has the authority to issue informal notices for the less severe violation if the violator has a good compliance history.*

*Recurring violations by a construction operator may indicate that their treatment system is inadequate or that the operator has taken a casual approach to operating and maintaining its treatment system.*

*Chronic compliance problems such as late reports, lack of treatment controls or other missing program elements indicate a disdainful attitude and the possibility of future significant violations.*

**Good Faith of the Operator:**

*'Good Faith' is defined as the operator's honest intention to remedy its non-compliance evidenced by actions which give support to this intention. Good faith shall be demonstrated by cooperation and completion of corrective measures in a timely manner. Compliance with a previous enforcement order is not in itself necessarily good faith.*

*The construction site operator's good faith in correcting its noncompliance is a factor in determining which enforcement response is suitable. However, good faith does not eliminate the construction site operator from enforcement action. For example, if the City must pay to install necessary Erosion and Sediment Control (ESC) measures, it should recover its costs regardless of prior good faith. Once the severity of the violation is determined, it will then be necessary to initiate the proper response.*



## **TYPES OF RESPONSES**

### **There are three types of enforcement responses:**

- 1) Informal - May be a telephone contact, personal contact, or a Notice of Violation (NOV) when violations are non-significant or when the construction site operator is cooperative in resolving the problem.
- 2) Formal - May be an Administrative Order (AO) or Administrative Fine (AF) when the construction site operator does not promptly undertake Corrective Actions (CA) or has recurring violations.
- 3) Judicial - Civil or criminal prosecution when a violation is significant and/or the construction site operator is uncooperative.

*The enforcement response selected must be appropriate to the violation. For example, telephone calls are appropriate for late reports or BMPs that need maintenance, but failure to receive approval for construction activity or failing to install BMPs would require a more immediate and stringent response. Knowledge of requirements and intent to cause violation by the construction site operator should be considered when determining the severity of the action to be taken.*

## **Informal**

*The City will pursue compliance assistance through multiple, informal methods whenever reasonable. These methods are appropriate for situations where education is needed, violations do not pose a significant danger to human health or the environment, or the City believes that compliance can be achieved by measures described below. Use of informal measures often establishes the documentation trail necessary for formal enforcement action and should therefore be sufficient to support the burden of proof.*

- **Telephone/Personal Notification**

*Telephone contact or personal contact with the construction site operator may be chosen to obtain information and resolve isolated or infrequent violations. The contact will take place within **24 hours** of determining a violation. Prompt responses will demonstrate to the construction site operator that the city is serious about enforcing construction program requirements. It also helps to deter future violations. At a minimum, the conversation shall be documented with the following information: date/time call placed; the person contacted, and the substance of the conversation.*

- Refusal of Municipal Inspections

*Required inspections such as those associated with a building permit or other approved activity may be refused by the City Inspector when any the following conditions exist:*

- *The construction site does not have a posted Notice of Intent (NOI),*
- *Perimeter controls are not installed or are dysfunctional.*
- *Evidence of discharged sediment or other pollutants exists outside the Construction area.*

*At a minimum, if the inspection is refused by the City Inspector they will notify the Project Manager of the situation and will document the following information:*

- *Date/time inspection refused.*
- *The party notified on-site.*
- *The substance of the conversation including what specific actions must be taken before the inspection can be conducted.*

- Notice of Violation (NOV)

*The Notice of Violation (NOV) is an official communication from the City to the non-compliant construction site operator which informs the party that a violation has occurred. It is issued for relatively minor or infrequent violations of the ordinance standards and requirements.*

*The Notice of Violation (NOV) will provide the construction site operator with an opportunity to correct noncompliance on their own initiative rather than according to a schedule of actions determined by the City. It is a prompt response to violations and documents the initial attempts of the City to resolve the noncompliance.*

*The Notice of Violation (NOV) shall contain the following information:*

- *The specific violation that has occurred*
- *Specific actions required to return to compliance.*
- *Warning that further enforcement action may be taken for failure to comply.*

Notice of Violation (NOV) continued

- *Notice of Violation (NOV) shall be sent via certified mail/return receipt or hand delivered and signed by a representative of the construction site operator within three (3) working days after discovery of the violation.*
- Stop Work Order (STOP)

*The Stop Work Order (STOP) is a notice posted by the City on the construction site which informs the operator that a violation is ongoing and no work is allowed to continue until it is resolved. It is the last tool available to the City before formal enforcement proceedings are taken. The Stop Work Order (STOP) is posted for failure to respond to a Notice of Violation (NOV) or for relatively moderate/significant violations of the ordinance, standards or requirements that require immediate action.*

*The Stop Work Order (STOP) will require the construction site operator to contact the Project Manager to explain what must be completed before work is allowed to continue. The Stop Work Order (STOP) may not be removed by anyone other than a designated representative of the City.*

*The Stop Work Order (STOP) shall contain the following information:*

- *The ordinance that has been violated.*
- *Contact information of the Project Manager.*
- *Date by which the Project Manager must be contacted.*
- *Warning that failure to comply will result in formal enforcement actions.*

## **Formal**

*When required to address willful non-compliance by a construction site operator or immediate threats to human health and the environment, the formal procedures described below may be taken to resolve construction stormwater non-compliance.*

### ➤ **Administrative Order**

*An administrative order will be a formal order issued by the City to the construction site operator in noncompliance. It will direct the construction site operator to undertake corrective measures or cease specified activities.*

*Consent orders will be issued when the construction site operator has significant discharge violations or failed to comply with other enforcement responses. In some cases judicial proceedings may be more appropriate.*

*There are four types of administrative orders:*

- *Compliance orders - A compliance order directs the operator to restore compliance by a specified date. The order will document the noncompliance and state required actions to be completed by the operator and the dates by which the actions must be completed to eliminate the noncompliance.*
  - *The city will track the operator's performance to ensure that the operator is making acceptable progress. This will be accomplished by requiring the construction site operator to submit progress reports, conduct monitoring requirements, perform additional site inspections, etc. as necessary to verify compliance is achieved.*
  - *Issuance of a compliance schedule does not necessarily relieve the operator of having to meet its existing erosion and sediment control commitments, nor protect the operator from having additional fines levied for other violations during the compliance schedule period.*

- Consent Order - The consent order will permit the flexibility of a negotiated settlement between the City and the construction site operator. The order will be comprised of compliance schedules, stipulated fines, or other provisions as deemed necessary, and signatures of City and operator representatives.

*The consent order will be used when the operator assumes responsibility for its noncompliance and is willing, in good faith, to correct its cause. The order should address all identified and potential deficiencies in the owner's compliance status. The order shall not be an admission of liability or a plea of guilty. Additional enforcement actions may be pursued if the operator does not comply with all aspects of the consent order.*

- Cease and Desist Order - A cease and desist order shall be used in situations where the non-compliant operator's discharge could result in significant environmental harm or impact human health, safety or welfare.

*A cease and desist order may be issued by telephone. A subsequent written order shall be served either in person or by registered mail to the construction site operator. If the operator fails to comply with the order, the City may pursue additional steps to halt the discharge, such as, seeking injunctive relief or blocking the invoking police power.*

- Show Cause Order - An order to show cause or directs the operator to appear before the City and explain why more severe enforcement actions should not be taken (e.g.: termination of service). A hearing will be conducted by a designated City representative (i.e. Attorney, City Council or Public Works Director, a hearing officer) or by a review board.

- *The hearing may be formal or informal and it may be open or closed to the public.*
- *The hearing shall determine if further action is warranted and, if so, its nature and extent.*

## **Fines**

*An administrative fine is a monetary penalty assessed by the City to the construction site operator for a violation of municipal code, policy and/or standards. The fine may be assessed at the City's discretion and the amount of the fine may be determined on an individual basis.*

*The fine is considered punitive in nature and is not related to any specific cost borne by the City. The amount of the fine should be proportional to the harm caused by the violation. The City shall also recover damages to its MS4 or for the cost of stabilizing a construction site as stated at Chapter 54, of the Municipal Code.*

## **Termination/Suspension**

*The City has the authority to revoke an approved development plan, building permit and/or other City-issued permit associated with an approved erosion and sediment control plan. These actions may be used against owners that fail to comply with previous administrative orders, or to prevent or stop discharges that are considered to pose an immediate or serious hazard or significant environmental damage.*

## **Judicial**

*A judicial action is a formal enforcement action that involves a court. The action may be civil litigation, criminal prosecution, or both.*

*Civil litigation will be used as an appropriate enforcement response to the following situations:*

- *Injunctive relief is necessary to halt or prevent activities or non-stormwater discharges that threatens human health, the environment or the MS4,*
- *Efforts to restore compliance through less formal actions have failed,*
- *The construction site operator fails to pay assessed fines,*
- *The City determines it needs to recover losses due to the construction site operator's noncompliance.*

The following describes three types of civil litigation:

- Consent Decrees: They are agreements between the City and the construction site operator reached after a lawsuit has been filed. To be binding, the decree must also be signed by the judge assigned to the case.
- Injunctions: They are court orders which direct parties to do something or refrain from doing something. The City may be forced to seek injunctive relief if the construction site operator refuses to comply with an administrative order or if delays in filing a civil suit would result in irreparable harm to the MS4 or receiving waterbody.
- Civil Suits: They may be necessary to recover costs borne by the City in responding to the operator's noncompliance.

### **Criminal Prosecution**

*Criminal prosecution is a formal process of charging individuals and organizations with violations of ordinance provisions that are punishable, upon conviction, by fines and/or imprisonment.*

*Criminal prosecution is an appropriate enforcement action when there is evidence of willful noncompliance and when criminal negligence or intent can be proven. Some examples of these are altering or falsifying reports, tampering with samples, unauthorized discharges, and violations of administrative orders.*

*The criminal enforcement process begins when the City has reason to believe crimes have been or will be committed. This information may be gathered during routine inspections or monitoring, /sampling activities or in the form of reports from employees or the public. Citations may be issued where it is determined the operator's efforts, or lack thereof, to obtain compliance through less formal actions have failed. If crimes are suspected or known, the Public Works Director shall notify the City Attorney for proper collection of evidence.*



## **Enforcement Responsibilities**

*When a construction site operator violation is suspected or discovered, the City Inspector shall be responsible for informal actions such as:*

- *Identifying and documenting the violation.*
- *Telephone notification.*
- *Notice of Violation letter.*
- *Sampling, monitoring and inspecting.*
- *Follow up actions.*

*All significant violations and the responses shall be reported to the Project Manager and/or the Public Works Director.*

*The Public Works Director and City Attorney will be copied on all formal Enforcement Responses. The Public Works Director will consult with the City Attorney and City Administrator in Judicial Actions.*

## **Violations and Range of Actions**

*The Table 5.1 identifies the most common violations and indicates the potential circumstances associated with each violation. The Recommended Enforcement Response Plan, under a typical situation, is described in three levels of urgency.*

*Level 1 – Administrative issues with relatively low environmental risk and an infrequent record of violation by the construction site operator should cause the following enforcement sequence: Personal Contact -> Refusal of Municipal Inspections -> Notice of Violation -> Stop Work Order -> Administrative Order -> Termination/Suspension -> Judicial Action*

*Level 2 – Record keeping and site conditions that pose a relatively moderate/significant environmental risk to discharge pollutants into the MS4 or adjacent receiving waterbody should cause the following enforcement sequence: Personal Contact and Refusal of Municipal Inspections -> Notice of Violation -> Stop Work Order -> Administrative Order -> Termination/Suspension -> Judicial Action with Administrative Fees*

*Level 3 – Any immediate threat to human health and environment or demonstrated willful noncompliance by a construction site operator should cause the following enforcement sequence: Personal Contact -> Notice of Violation -> Termination/Suspension -> Stop Work Order -> Administrative Order with Administrative Fees -> Judicial Action with Administrative Fees.*

**Table 5.1 Construction Stormwater Violations**

<b>NONCOMPLIANCE</b>	<b>CIRCUMSTANCES OF VIOLATION</b>	<b>RECOMMENDED ENFORCEMENT RESPONSE PLAN</b>
<i>Failure to Prepare or Maintain a Storm Water Pollution Prevention Plan or Required Records</i>	<i>Operator is unaware of requirements to complete and maintain a SWPPP.</i>	<i>Level 1</i>
	<i>Operator is aware but does not follow requirements to prepare and maintain a SWPPP.</i>	<i>Level 2</i>
<i>Failure to Install, Maintain or Properly Select Best Management Practices per Approved Plan</i>	<i>Good faith effort has been demonstrated to select, install, and</i>	<i>Level 1</i>
	<i>Operator has disregarded responsibilities to select, install, and maintain BMPs</i>	<i>Level 2</i>
<i>Conducting Covered Activity without Approval of Erosion and Sediment Control Plan</i>	<i>Operator is unaware of requirements to obtain approval for land disturbance activities.</i>	<i>Level 2</i>
	<i>Operator is aware of requirements to obtain approval for land disturbance activities but has not or has refused.</i>	<i>Level 3</i>
<i>Failure to Perform Inspections or Submit Required/Requested Reports and/or documents</i>	<i>Infrequent occurrences</i>	<i>Level 1</i>
	<i>Frequent or routine occurrences</i>	<i>Level 2</i>
<i>Pollution Discharge to MS4, Contamination or Degradation of State Waters</i>	<i>Sediment or pollutants have left the perimeter of the construction improper management of BMPs, but have caused little to no environmental damage</i>	<i>Level 2</i>
	<i>Significant accumulation of sediment or pollutants in the MS4 or receiving waterbody that result from improper BMPs.</i>	<i>Level 3</i>
<i>Documented Pattern of Systematic Violations of Storm Water Regulations and/or Permit Requirements</i>	<i>The City will consider violations on a by project basis and an operator basis determining awareness and good faith efforts.</i>	<i>Level 3</i>

Time Frames for Enforcement Actions

Every violation must be evaluated to determine the appropriate enforcement response. Initial enforcement responses involving contact with the construction site operator and requesting information or corrective or preventative action will occur within in a timely manner. If the operator shows "good faith" in correcting the violation the City can avoid formal enforcement procedures.

Table 6.1 lists the enforcement responses, the maximum response time, and the person responsible to pursue or be informed of the action taken.

**Table 6.1 Enforcement Responses**

<i>RESPONSE</i>	<i>TIME FRAME</i>	<i>RESPONSIBILITY</i>
<i>Telephone/personal contact</i>	<i>Within 24 hours of inspection</i>	<i>Development Services Inspector, SWPM</i>
<i>Refusal of Municipal Inspections</i>	<i>Immediate</i>	<i>Development Services Inspector, SWPM</i>
<i>Notice of Violation</i>	<i>Within 3 days of inspection</i>	<i>SWPM</i>
<i>Stop Work Order</i>	<i>After a NOV and prior to AO or AF whenever possible</i>	<i>SWPM, Public Works Director</i>
<i>Administrative Order - Compliance Order - Consent Order - Cease and Desist Order - Show Cause Hearing</i>	<i>Within 60 days of violation</i>	<i>SWPM, Public Works Director, City Attorney, City Administrator</i>
<i>Administrative Fine</i>	<i>Within 60 days of violation</i>	<i>SWPM, Public Works Director, City Attorney, City Administrator</i>
<i>Termination/Suspension</i>	<i>Within 30 days of violation</i>	<i>SWPM, Public Works Director, City Attorney, City Administrator</i>
<i>Judicial Actions</i>	<i>Case by Case</i>	<i>Project Manager</i>

## GLOSSARY OF TERMS

**Administrative Fine** - A punitive monetary charge unrelated to actual treatment costs assessed by **the** City rather than a court.

**Administrative Order** - A document which orders the violator to perform a specific act or refrain from an act. For example, the order may require operators to attend a show cause meeting, cease and desist discharging, or undertake activities pursuant to a compliance schedule.

**Cease and Desist Order** - An administrative order directing an industrial operator to immediately halt illegal or unauthorized discharges.

**Civil Litigation** - A lawsuit filed in a civil court. If the court rules that the defendant construction site operator violated the law the court may impose civil penalties, injunctions or other equitable remedies and/or cost recovery.

**Civil Penalty** - A punitive monetary award granted by a court to the City against a non-compliant construction site operator.

**Compliance Order** - An administrative order directing a non-compliant construction site operation to achieve or restore compliance by a date specified in the order.

**Compliance Schedule** - A schedule of required activities necessary for a construction site operator to achieve compliance with all stormwater program requirements.

**Consent Decree** - A court supervised settlement agreement, the violation of which may be considered contempt of court.

**Consent Order** - An administrative order embodying a legally enforceable agreement between the City and the non-compliant construction site operator designed to restore the operator to compliance status.

**Criminal Prosecution** - A criminal charge brought by the City against an accused violator. The alleged criminal action may be a misdemeanor or a felony and is defined as willful, negligent, knowing, and/or intentional violations. Upon conviction, punishment may include a monetary penalty, imprisonment, or both.

**Fine** - A punitive monetary charge for a violation of the law. Often used synonymously with "penalty", although the term "fine" generally implies the use of administrative rather than civil (judicial) procedures.

**Good Faith Effort or Progress** - Prompt and vigorous pollution control measures undertaken by the discharger which shows that extraordinary efforts (not a 'business-as-usual' approach) have been made to achieve compliance.

**Injunctive Relief** - A court order which restrains or compels action by the construction site operator.

**Judicial Action** - An enforcement action that involves a court. (The action may either be civil or criminal in nature)

**Legal Authority** - The source of the City's jurisdiction and regulatory powers.

**Notice of Violation (NOV)** - A City document notifying a construction site operator that it has violated stormwater standards and requirements. Generally used when the violation is relatively minor and the City expects the violation to be corrected within a short period of time.

**Penalty** - A monetary or other punitive measure usually associated with a court action. For purposes of this Enforcement Policy, the term is used synonymously with fine.

**Plea Bargain** - An agreement between the prosecuting attorney and a criminal defendant whereby the defendant pleads guilty to a lesser charge and/or a reduction of sentence in exchange for cooperation in investigating or prosecuting the crime (e.g., waiving a trial).

**Show Cause Order** - An administrative order directing a non-compliant operator to appear before the City, explain its noncompliance, and show cause why more severe enforcement actions against the operator should not go forward.

**Stop Work Order (STOP)** - A notification posted by the City on the construction site of non-compliance warning the non-compliant operator that work is not allowed to continue until the terms of the Notice of Violation have been fulfilled. The Stop Work Order (STOP) precedes formal enforcement action by the City.

**Suspension of Service** - A temporary stoppage of the non-compliant operator's services necessary to proceed with the project until specific conditions are met.

