

# BES Enforcement Program Administrative Rules

## ENB – 4.15

July 2019



ENVIRONMENTAL SERVICES  
CITY OF PORTLAND

working for clean rivers

<b>TABLE OF CONTENTS</b>	<b>Page</b>
<b>1. Applicability</b>	<b>2</b>
<b>2. Purpose</b>	<b>2</b>
<b>3. Definitions</b>	<b>3</b>
<b>4. Regulatory Authority</b>	<b>4</b>
<b>5. Violation Investigations</b>	<b>4</b>
<b>6. Violation Classification</b>	<b>5</b>
<b>7. Enforcement Tools</b>	<b>5</b>
<b>8. Penalties and Cost Recovery</b>	<b>6</b>
<b>9. Administrative Review</b>	<b>8</b>

*These are the administrative rules for the Bureau of Environmental Services Enforcement Program.*

## **1. Applicability**

These rules describe Bureau of Environmental Services (BES) procedures for assessing violations of Portland City Code (PCC) provisions, administrative rules and permits related to the following:

- A. Stormwater Management Manual [Portland Policy Document (PPD) item ENB-4.01];
- B. Sanitary Discharge and Pretreatment Program Administrative Rules (PPD item ENB-4.03);
- C. Sewer Development Services Program (PPD item ENB-4.07);
- D. Erosion and Sediment Control Manual (PPD item ENB-4.10);
- E. Septage Hauler Program (PPD item ENB-4.12);
- F. Administrative Rules for Discharges to the City Storm Sewer and Drainage System (PPD item ENB-4.13);
- G. Sewer and Drainage Facilities Design Manual (PPD item ENB-4.14);
- H. BES Public Works Enforcement Program Administrative Rules (PPD item ENB-4.22);
- I. Extra Strength Charge Program Administrative Rules (PPD item ENB-4.25);
- J. Fats, Oils and Grease Removal Program Administrative Rules (PPD item ENB-4.26);
- K. BES Title 10 Discharge Enforcement Program Administrative Rules (PPD item ENB-4.30);
- L. Maintenance Inspection Program Administrative Rules (PPD item ENB-4.31);
- M. BES Sub-Meter Program Administrative Rules (PPD item ENB-4.32);
- N. Source Control Manual (PPD item ENB-4.34); and
- O. Administrative Rules for Monitoring Access Structures (PPD item ENB-4.35).

## **2. Purpose**

These rules establish BES's decision-making criteria for assessing violations and penalties and the process for appealing enforcement actions and associated penalties, including administrative review and appeal to the City Code Hearings Officer. These rules support the following City program goals:

- A. Facilitate and ensure compliance with relevant BES codes, rules and policies;
- B. Prevent harm to human health, public safety, the environment, and City assets;
- C. Facilitate and ensure immediate response actions to stop violations and limit impacts;
- D. Deter future violations;
- E. Maintain City compliance with all state and federal environmental regulations, programs, and permits; and

F. Conduct enforcement in a fair, equitable, and appropriate manner.

### 3. Definitions

These rules rely on a number of program-specific terms as defined in PCC Title 17 and below:

- A. **“Compliance Order (CO)”** means a formal City order directing an individual, a business, or other entity to take specific corrective actions within a required timeframe to resolve a violation. Once the CO conditions are met and all fees and penalties paid, the original violation will be considered resolved.
- B. **“Corrective Action”** means modifications required to bring a site or activity into compliance with BES regulations.
- C. **“Cost Recovery”** means payment to the City of all reasonable costs incurred by the City which are attributable to or associated with a violation or other damage or impact to City systems.
- D. **“Education and Technical Assistance”** means non-financial assistance provided by BES to a resident or business to ensure compliance with City regulations. This is not considered an enforcement action but may accompany enforcement.
- E. **“Enforcement Action”** means the issuance of a Warning Notice, Notice of Violation, Compliance Order, or Notice of Termination, and any associated actions. An enforcement action may also include assessment of penalties or cost recovery.
- F. **“Facial Challenge”** means a challenge to a requirement that is based on an argument that the requirement cannot be applied fairly or reasonably in any situation. By contrast, an as-applied challenge is one based on an argument that a requirement should not be applied to the challenger’s particular situation because of factors that, in the challenger’s view, distinguish it from similar situations.
- G. **“Notice of Investigation”** means a written notice from BES alerting site operators and owners to an investigation of a potential violation.
- H. **“Notice of Termination (NT)”** means written notification of the City’s intent to terminate facility or site access to the public sewer and drainage system for causes not limited to repeat violations of the PCC, failure to comply with a CO, or damage to the City’s system.
- I. **“Notice of Violation (NOV)”** means written notification of violations and failures to meet the conditions of a Compliance Order. Unlike warning notices, NOVs carry a penalty.
- J. **“Repeat violation”** means a violation that (1) is a violation of the same subsection of the PCC and occurs at the same site as a previous violation or (2) is caused by the same person at a different site within 12 months of a previous violation.

- K. **“Voluntary Compliance Agreement (VCA)”** means a negotiated agreement with the City in which a person commits to required actions to achieve compliance with permit or program requirements during site modifications or a change of operations. The VCA will include required actions, implementation schedules for compliance, and consequences of failure to comply with the VCA. VCAs may be used to document approved variance actions.
- L. **“Warning Notice (WN)”** means a written violation notice that documents violations. Warning notices may be issued for violations as defined in each individual program’s rule set. This enforcement action carries no penalties. Warning notices may be issued for repeat violations.

#### **4. Regulatory Authority**

These rules are authorized by PCC Section 3.13.040 and implement the enforcement sections of the following:

- A. PCC Title 10, Erosion and Sediment Control Regulations
- B. PCC Chapter 17.32, Public Sewer System and Drainage Improvement Permits
- C. PCC Chapter 17.34, Sanitary Discharges
- D. PCC Chapter 17.35, Septage Hauler Permitting Program
- E. PCC Chapter 17.38, Drainage and Water Quality
- F. PCC Chapter 17.39, Storm System Discharges

#### **5. Violation Investigations**

BES may investigate possible PCC violations in response to citizen complaints, referrals from City staff or other agencies, or discoveries made during inspections conducted by BES or others.

- A. **Complaint or Referral Response.** BES will respond to or refer a complaint in a timely manner. BES will investigate a complaint, determine if a violation exists, and respond to a complainant with relevant findings. If BES determines that a violation is not governed by these rules, BES staff will contact the appropriate bureau or agency, if any.
- B. **Violation and Penalty Assessment.** Based on the investigation, BES staff may assess a violation, suggest corrective actions, and assess a penalty. Enforcement notices will be mailed to the property owner and the person found to be in violation, if different. Notices will contain procedures for requesting administrative review and appeal per Sections 9 and 10 of these rules.
- C. **Final Determinations.** A person who receives a violation notice other than a warning notice will receive a BES final determination regarding the violation after:
  - 1. The review and appeal periods specified in BES enforcement notices have passed; or

2. BES conducts an administrative review per a request as described in Section 9.

## 6. Violation Classification

Violations are classified based on the degree of deviation from BES's regulations or the degree to which it jeopardizes human health, safety, or welfare or the environment. The violation classes are as follows:

- A. Class I Violations.** A class I violation is one that has a high degree of deviation from the regulations or that poses a substantial threat to human health and safety, property, or the environment. Examples include a spill of toxic or otherwise hazardous materials, an introduction of unpermitted materials into a public system, or removal of or damage to a public improvement that requires immediate repair. Refusal to comply with these rules is also a class I violation.
- B. Class II Violations.** A class II violation is one that has a moderate degree of deviation from the regulations or that poses a significant threat to human health and safety, property, or the environment.
- C. Class III Violations.** A class III violation is one that is not a class I or class II violation, is a minor deviation from the regulations, or poses a minimal threat to human health and safety, property, or the environment. Examples include a first-time reporting failure, non-performance of general site or BMP maintenance, a de minimis discharge, and failure to retain or provide required records.
- D. Warning Notice Violation.** A warning notice will be sent for a minor reporting or operational violation arising from a minor deviation from City regulations.

## 7. Enforcement Tools

The following enforcement tools may be used by BES staff. Failure to take required corrective actions may result in escalating enforcement and increased penalty assessments.

- A. Notice of Investigation.**
- B. Warning Notice (WN).**
- C. Notice of Violation (NOV).**
- D. Voluntary Compliance Agreements (VCAs).** Voluntary Compliance Agreements do not preclude BES from taking enforcement action under other statutory provisions if other violations or deficiencies are discovered.
- E. Compliance Order (CO).** A compliance order may be used in conjunction with an NOV. Noncompliance with a CO will result in additional NOVs, a revised CO, and escalating enforcement and penalties.
- F. Withholding Services.** To the extent allowed under the PCC, BES may withhold plan review, permitting or other administrative services from the site owner or operator for failure to remedy a violation.

**G. Notice of Termination (NT).**

**H. BES Abatement.** BES may address a continuing violation or emergency on public or private property through summary abatement after providing parties with reasonable notice as circumstances allow. These parties will be responsible for all costs associated with the abatement per Section 8.B and for maintaining to BES's satisfaction any remedy installed or required by BES.

**I. Legal Action.** The City may file suit in any court of competent jurisdiction for any failure of a person to take required corrective action.

**J. Referral to Other Agencies.** The City may refer civil and criminal violations to federal, state, or local agencies as appropriate.

## **8. Penalties and Cost Recovery**

**A. Penalties.** Each individual violation may carry a penalty in an amount determined by the relevant program's administrative rules. Penalties are determined based on a penalty algorithm that assigns a numerical score for each applicable criteria listed below.

**1. Penalty Determination.** BES may assess penalties commensurate with the severity of the violation based on:

- a.** Harm or potential harm to public health, safety or the environment. BES will assess the severity of the violation or the degree to which a violation jeopardizes human health, safety, or welfare or the environment.
- b.** System impacts. BES will assess impacts to City sewer or drainage assets, systems, or operational processes when such impacts do not require immediate repairs by the property owner or full cost recovery for City repairs.
- c.** Violation history and unresolved violations. BES will consider a person's history of violations.
- d.** Actions taken to remedy a violation. BES will consider the cooperativeness and timeliness of responses to violations.
- e.** Violation types. Violation types include, but are not limited to:
  - i.** Denial of entry. Denying lawful entry to BES staff investigating a pollution complaint or inspecting for compliance with BES requirements will constitute a separate violation with a maximum per-violation daily penalty as determined by the PCC.
  - ii.** Falsification of records. Falsifying monitoring data or reports or tampering with meters, samplers, or other data collectors will constitute a separate violation and will result in a maximum per-violation daily penalty as determined by the PCC.

- iii. Repeat violation. BES may assess repeat violations up to twice the total penalty for a single violation. Increased penalties will continue to be assessed for every occurrence of a repeat violation.
  - iv. Failure to construct to an engineering standard or specification. Failure to comply with the engineering and construction standards of the City's Standard Construction Specifications, the Sewer and Drainage Facility Design Manual, or the Stormwater Management Manual, as applicable, may be a violation.
  - v. Improper or inadequate maintenance. Failure to develop, update, or implement a required operations and maintenance plan.
  - vi. Knowing violations. A person who can be shown to have had previous knowledge of City requirements may be assessed a penalty based on determination of previous knowledge. Previous knowledge may be inferred from past or present discharge permits or authorizations, City of Portland building- or development-related permits or approvals, or the provision of public outreach materials that cite the PCC or administrative rules.
2. **Daily penalty assessments.** BES may assess penalties per violation and per day and may apply a multiplier for each day that a violation continues. This includes, but is not limited to:
- a. Violations that must be rectified immediately to protect public health and safety or the environment; and
  - b. Failure to comply with a CO.
3. **Escalating penalties.** Failure to meet corrective action requirements by the due dates specified in NOV, VCA or other agreements will be subject to increased levels of enforcement and penalty for continued non-compliance.
- B. Cost Recovery.** BES may recover all City costs related to the abatement of a violation and all outstanding penalties from the person(s) assessed a violation. Liens may be imposed on the subject property or properties in accordance with the provisions of PCC Chapter 22.06. BES may recover costs related to:
- 1. Staff time for City personnel, including the City's legal counsel, through all stages of the City's response to a violation;
  - 2. Sampling, analyses and the use of pollution control supplies and equipment;
  - 3. Use of contracted professional and labor services;
  - 4. Repair or replacement of City infrastructure, including pavement; and
  - 5. Penalties related to enforcement against the City by another regulatory agency as a result of the violation.

## 9. Administrative Review

A person may request reconsideration of a BES decision through administrative review as described in this Section. All enforcement notices will include information on requesting BES administrative review. After the requestor has exhausted all BES administrative review, the requestor may file for an appeal of a decision with the Code Hearings Officer (CHO) per Portland City Code Title 22. A person may only appeal a decision that is subject to administrative review by BES.

- A. Administrative Review Requests.** A person to whom an enforcement notice was addressed will have 20 business days from the date the notice was issued to submit a written request for administrative review of a decision described in the notice. The requestor must provide all information known to the requestor that supports an assertion made in the written request for administrative review. The requestor must provide such information via graphic, written, or recorded communication, or in person at the administrative review meeting. BES will hold an administrative review meeting within 15 business days of receipt of the written request for administrative review unless BES determines in its reasonable discretion that a delay is justified. The requestor may provide detailed information in writing in lieu of attending the administrative review meeting.
- B. Non-Reviewable Items.** A BES decision made under these rules is subject to administrative review except that BES will not grant administrative review for the following:
1. BES's authority to impose penalties for a violation of law;
  2. BES's authority to recover costs for City abatement of a violation of these rules or associated City Code;
  3. BES's determination of the cost to the bureau of staff time, materials, supplies, services, equipment, other assets, administrative costs, overhead, etc., unless the person seeking administrative review alleges a mathematical error in how BES calculated the cost;
  4. A Facial Challenge - as that term is defined in these rules - to a requirement in these rules or associated City Code, or to any technical standard; and
  5. Other items that are specified as non-reviewable in program-specific BES administrative rules.
- C. BES Evaluation.** BES will use authorizing City Code, the provisions of these and program-specific rules, City records, and the testimony and documentation provided by the requestor to make a final determination on the issue that is the subject of the administrative review. BES may adjust the penalty or type of enforcement action, including rescinding the original enforcement action.
- D. Final Determination.** BES will issue to the requestor a written final determination within 10 business days of the administrative review meeting unless an extension is agreed to by all parties. The final determination will provide information about the process for filing an appeal to the CHO.