

CHAPTER 2: DEVELOPING SOURCE CONTROL CODES/ORDINANCES AND ENFORCEMENT POLICIES

PART OF THE SOURCE CONTROL (BUSINESS/SITE) INSPECTION PROGRAM GUIDANCE MANUAL

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**Prepared by
Herrera Environmental Consultants, Inc.**

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Note:

Some pages in this document have been purposely skipped or blank pages inserted so that this document will print correctly when duplexed.

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2. DEVELOPING SOURCE CONTROL CODE/ORDINANCES AND ENFORCEMENT POLICIES

This chapter summarizes the National Pollutant Discharge Elimination System (NPDES) Municipal Stormwater permit requirements related to developing source control codes/ordinances and enforcement policies, provides recommendations for developing a source control code/ordinance, and provides recommendations for a progressive enforcement process. Supplemental resources to support this chapter can be found in the Source Control Online Resource Library (SCORL) for Chapter 2.

2.1. PERMIT REQUIREMENTS

Chapter 1: Background and Regulatory Requirements of this manual provided a high-level overview of the NPDES Municipal Stormwater permit requirements related to source control codes/ordinances and enforcement policies. This chapter provides additional detail and clarification regarding the NPDES Municipal Stormwater permit requirements and how they impact the development of source control codes/ordinances and enforcement policies, with a focus on the Western Washington Phase II Permit requirements. The following are minimum requirements for a source control code/ordinance (Western Washington Phase II Permit, S5.C.8.b.i):

“No later than August 1, 2022, Permittees shall adopt and make effective an ordinance(s), or other enforceable documents, requiring the application of source control BMPs for pollutant generating sources associated with existing land uses and activities (see Appendix 8 to identify pollutant generating sources).”

See *Chapter 3: Source Control Inventory Development, Updates, and Prioritization* for a summary of the pollutant generating sources listed in Appendix 8 of the NPDES Municipal Stormwater Permits.

The following are minimum requirements for a progressive enforcement policy (Western Washington Phase II Permit, S5.C.8.b.iv):

“No later than January 1, 2023, each Permittee shall implement a progressive enforcement policy that requires sites to comply with stormwater requirements within a reasonable time period as specified below:

- (a) If the Permittee determines, through inspections or otherwise, that a site has failed to adequately implement required BMPs, the Permittee shall take appropriate follow-up action(s), which may include phone calls, reminder letters, emails, or follow-up inspections.*

 - (b) When a Permittee determines that a site has failed to adequately implement BMPs after a follow-up inspection(s), the Permittee shall take enforcement action as established through authority in its municipal codes or ordinances, or through the judicial system.*

 - (c) Each Permittee shall maintain records, including documentation of each site visit, inspection reports, warning letters, notices of violations, and other enforcement records, demonstrating an effort to bring sites into compliance. Each Permittee shall also maintain records of sites that are not inspected because the property owner denies entry.*

 - (d) A Permittee may refer non-emergency violations of local ordinances to Ecology, provided, the Permittee also makes a documented effort of progressive enforcement. At a minimum, a Permittee’s enforcement effort shall include documentation of inspections and warning letters or notices of violation.”*
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2.2. SOURCE CONTROL CODE/ORDINANCE DEVELOPMENT

2.2.1. Scope of Enforcement

Prior to developing municipal code language and the associated source control code/ordinance, it is important to identify the scope of enforcement for source control code violations including defining where enforcement can occur, the existing enforcement process, who can enforce, and the enforcement standard. Keep in mind that procedures and timelines for changing enforcement processes may be extensive.

- **Where can enforcement occur?**

- Publicly and privately owned institutional, commercial, and industrial businesses/sites
- Multi-family sites (based on complaints)
- Home-based businesses (based on complaints)
- Single-family residential (optional – depends on the language included in the adopted source control code)
- City/County-owned properties (optional, but also addressed under S5.C.7 Operations and Maintenance)

- **What is the existing enforcement process?**

- Determine if source control code enforcement can fit within the existing enforcement process established for illicit discharges, construction site inspections, and/or private stormwater best management practice (BMP) inspections, or if modifications are needed.
- Discuss staff capacity and training needs for code enforcement officers for source control code violations compared to other code enforcement responsibilities (e.g., building code violations). See **Who can enforce?** for alternatives.

- **Who can enforce?**

Code enforcement officers within the jurisdiction may be housed in a different department (e.g., community development) and focused on other code enforcement responsibilities (e.g., building code violations). In that case, jurisdictions may consider allowing a deputized person in the stormwater/surface water division of their public works department to enforce the source control code (i.e., source control inspector, stormwater program manager, or department director) to streamline coordination and follow-up.

See the following public rule example:

Public Rule Example: Delegation of Authority (Section IV.D of SCORL Supplemental Resource 2C)

[Jurisdiction] establishes the [Jurisdiction Authority], or their delegated agent, as the responsible party for taking enforcement action. Documentation of enforcement actions are authorized to be signed by personnel from [x] as follows:

1. Corrective Action and Compliance Letters: [Stormwater Inspector]
2. Maintenance Correction Letters: [Asset Unit Manager]
3. Cease Discharge Notices: [Source Control Program Manager]
4. Voluntary Compliance Agreements: [Source Control Program Manager]
5. Notice of Violation and Penalties: [Stormwater Services Section Manager]
6. Notice of Violation and Penalties with fines and cost assessments in excess of \$100,000: [Stormwater Services Section Manager] with the approval the [Jurisdiction Authority]

[Yellow-highlighted bracketed text] can be replaced with jurisdiction-specific terminology and titles.

- **What is the enforcement standard?**

The enforcement standards for implementation are the required source control BMPs included in Volume IV of the Stormwater Management Manual for Western Washington (SWMMWW), or a Phase I Program approved by Ecology. If a business/site has failed to adequately implement required BMPs, a permittee can follow a formal enforcement process when necessary and in accordance with local codes.

2.2.2. Code/Ordinance Structure

As noted in the NPDES Municipal Stormwater permit language, jurisdictions have some flexibility in deciding how to incorporate source control language into their municipal code and other enforceable documents. There may be advantages to developing a public rule, policy, or strategy document for some aspects of a source control (business/site) inspection program rather than an ordinance. Options for structuring source control program language and some of their advantages and disadvantages are summarized in Table 2.1. Consult early and often with a City/County attorney to ensure that the proposed approach is legally enforceable.

Type of Authority^a	Application	Advantages	Disadvantages	Recommendation
Ordinance	Legal language with full council approval	Provides an enforceable framework for the program	<ul style="list-style-type: none"> • Requires council approval process prior to any modifications • May limit program's ability to adapt over time 	Include permit-required elements in an ordinance (see Table 2.2 and the Source Control Code Builder Matrix included in the SCORL Supplemental Resources)
Public Rule/ Director's Rule	Any department order, directive, or regulation which has the force of law	<ul style="list-style-type: none"> • Allows agencies to carry out ordinance by setting specific requirements • Typically approved by a department director (not by council) • Provides flexibility to modify/adapt without council approval 	Not available to all jurisdictions	Consider using this option to develop program details and procedures such as: <ul style="list-style-type: none"> • Enforcement penalty matrix • Compliance timelines • Cost recovery
Policy	Interprets how a jurisdiction will apply its code	<ul style="list-style-type: none"> • Establish intent and methods for code implementation • May not require council approval 	None identified	Consider using this option to: <ul style="list-style-type: none"> • Document policies in SWMP • Communicate approach to Ecology • Emphasize education first prior to enforcement action
Strategy	Internal procedure for program operations	Provides flexibility to modify/adapt without council approval	Not useful as a stand-alone document, but can work in conjunction with the code to provide clarity regarding program requirements	Develop program details and procedures to support source control code language

^a Consult early and often with a City/County attorney to ensure that proposed approach is legally enforceable.

SCORL = Source Control Online Resource Library.

SWMP = Stormwater Management Program.

2.2.3. Required and Recommended Code Elements

The Source Control Code Builder Matrix (SCORL Supplemental Resource 2A) includes multiple examples of source control code sections addressing minimum required content. Table 2.2 provides an overview of the permit-required and recommended/optional code elements for source control code language.

Table 2.2. Source Control Program Municipal Code Elements.			
Section Title	Section Description	Permit-Required Content	Recommended/Optional Content
Purpose	Describes the purpose of this code section	<ul style="list-style-type: none"> None identified 	<ul style="list-style-type: none"> Provide an overview of the source control program and its importance
Applicability	Describes the applicability of this code section	<ul style="list-style-type: none"> Publicly and privately owned institutional, commercial, and industrial businesses/ sites Implementation of required source control BMPs to control pollution discharging into the MS4 	<ul style="list-style-type: none"> Expand applicability to other businesses/ sites if source control is applied more broadly in a city/county
Definitions	Define terms used in this code section	<ul style="list-style-type: none"> Define Source Control BMPs 	<ul style="list-style-type: none"> Define all key terms used in this section (or reference other code sections where terms are defined)
Authority	Allows permittee to conduct enforcement activities	<ul style="list-style-type: none"> Formal enforcement authority must be available and used as necessary 	<ul style="list-style-type: none"> Recommend also including delegation of authority in this section (if applicable)
Adopted BMP Manual	Defines where business/ site owners can find more information on required and recommended source control BMPs	<ul style="list-style-type: none"> Identify the BMP Reference Manual (SWMMWW or applicable Phase I drainage/ stormwater manual as the reference for source control BMPs) 	<ul style="list-style-type: none"> Provide specific BMP requirements and exemptions
Right-of-Entry	Allows an inspector to enter the premises, inspect, and sample (if needed)	<ul style="list-style-type: none"> None identified; however, the permittee must maintain records of sites that are not inspected because the property owner denies entry 	<ul style="list-style-type: none"> Recommend including right-of-entry language to help facilitate inspection access
Hazards	Provides authority to order immediate stop to activities that cause risk to human health and safety	<ul style="list-style-type: none"> None identified specifically related to source control, but is addressed in the IDDE section of the permit 	<ul style="list-style-type: none"> This may be a helpful section to include if hazards are identified during a business/site inspection

Table 2.2 (continued).		Source Control Program Municipal Code Elements.	
Section Title	Section Description	Permit-Required Content	Recommended/Optional Content
Progressive Enforcement Process	Provides a description of the progressive enforcement process	None identified	<ul style="list-style-type: none"> Most Phase I jurisdictions and IDDE codes include a short description of the progressive enforcement process. This may also be helpful to include in source control code (or a separate public rule or strategy document).
Outreach and Education	Prescribes education and technical assistance programs as an option for enforcement	Education and technical assistance programs are allowed if formal enforcement authority is available and used as necessary	<ul style="list-style-type: none"> Important to include as the first step in a progressive enforcement process
Administrative (or Civil) Penalties	Describes administrative (or civil) penalties that can be assessed for Class I and Class II violations	<p>The NPDES Municipal Stormwater permit incorporates 40 CFR 122.41(a)(3) by reference which includes the following administrative penalties:</p> <ul style="list-style-type: none"> Penalties for Class I violations are not to exceed \$10,000 per violation The maximum amount of any Class I penalty is not to exceed \$25,000 Penalties for Class II violations are not to exceed \$10,000 per day for each day during the violation The maximum amount of any Class II penalty is not to exceed \$125,000 	<ul style="list-style-type: none"> Penalties can be adjusted to be lower values – the CFR specifies the maximum values, but not the minimum values. Specific monetary penalties may be helpful to include in source control code (or as a separate public rule or strategy document).
Criminal Penalties – Negligent Violations	Describes criminal penalties that can be assessed for negligent violations	<p>The NPDES Municipal Stormwater permit incorporates 40 CFR 122.41(a)(2) by reference which includes the following criminal penalties for negligent violations:</p> <ul style="list-style-type: none"> <u>Initial violation</u>: \$2,500 to \$25,000 per day of violation, or imprisonment of not more than 1 year, or both <u>Second or subsequent conviction</u>: Not more than \$50,000 per day of violation, or imprisonment of not more than 2 years, or both 	<ul style="list-style-type: none"> Penalties can be adjusted to be lower values – the CFR specifies the maximum values, but not the minimum values. Specific monetary penalties may be helpful to include in source control code (or as a separate public rule or strategy document).

Table 2.2 (continued).		Source Control Program Municipal Code Elements.	
Section Title	Section Description	Permit-Required Content	Recommended/Optional Content
Criminal Penalties – Knowing Violations	Describes criminal penalties that can be assessed for knowing violations	<p>The NPDES Municipal Stormwater permit incorporates 40 CFR 122.41(a)(2) by reference which includes the following criminal penalties for knowing violations:</p> <ul style="list-style-type: none"> ● Initial violation: \$5,000 to \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. ● Second or subsequent conviction: Not more than \$100,000 per day of violation, or imprisonment of not more than 6 years, or both. 	<ul style="list-style-type: none"> ● Penalties can be adjusted to be lower values – the CFR specifies the maximum values, but not the minimum values. ● Specific monetary penalties may be helpful to include in source control code (or as a separate public rule or strategy document).
Criminal Penalties – Knowing Endangerment Violations	Describes criminal penalties that can be assessed for knowing endangerment violations	<p>The NPDES Municipal Stormwater permit incorporates 40 CFR 122.41(a)(2) by reference which includes the following criminal penalties for knowing endangerment violations:</p> <ul style="list-style-type: none"> ● Initial violation: Not more than \$250,000 or imprisonment of not more than 15 years, or both. Organizations could be subject to a fine of up to \$1,000,000. ● Second or subsequent conviction: Not more than \$500,000 or by imprisonment of not more than 30 years, or both. Organizations could be subject to a fine of up to \$2,000,000. 	<ul style="list-style-type: none"> ● Penalties can be adjusted to be lower values – the CFR specifies the maximum values, but not the minimum values. ● Specific monetary penalties may be helpful to include in source control code (or as a separate public rule or strategy document).
Liberal Interpretation	Statement that the section is to be interpreted liberally to protect water quality and human health and safety.	None identified	<ul style="list-style-type: none"> ● This statement could be useful to provide flexibility for inspectors and other stormwater management program staff.
Non-Liability	Statement that the section does not incur any liability for the city/county or its employees/officers.	None identified	<ul style="list-style-type: none"> ● This statement could be useful for city/county staff, but should be reviewed by city/county legal staff prior to including.

Table 2.2 (continued).		Source Control Program Municipal Code Elements.	
Section Title	Section Description	Permit-Required Content	Recommended/Optional Content
Voluntary Compliance Agreement	This section describes the process for preparing a voluntary compliance agreement.	None identified	<ul style="list-style-type: none"> This may be a helpful step to include for progressive enforcement prior to assessing administrative or criminal penalties.
Additional Costs Assessment	If there are other costs for city/county staff for assisting with a source control code violation, those can also be listed in the code.	None identified	<ul style="list-style-type: none"> This statement could help the city/county get reimbursed for any emergency support provided to address a knowing or knowing endangerment violation.
Collection of Penalties and Costs	This section describes the process for a city/county to collect penalties and costs.	None identified	<ul style="list-style-type: none"> This language may be helpful to include in source control code (or as a separate public rule or strategy document).

BMP = best management practice

CFR = Code of Federal Regulations

IDDE = Illicit Discharge Detection and Elimination

NPDES = National Pollutant Discharge Elimination System

SWMMWW = Stormwater Management Manual for Western Washington

2.3. PROGRESSIVE ENFORCEMENT

Progressive enforcement processes vary by jurisdiction but follow several key themes:

- **Technical assistance and education** is recommended at the first step of enforcement, prior to issuing penalties. This approach can also support developing relationships between businesses and inspectors, and contributes to business owner/staff awareness of the program intent and purpose.
- **Written notices** are provided at each step of the process to communicate required actions and potential penalties.
- Enforcement actions increase in severity if businesses are not responsive.
- Enforcement action workflows diverge based on the type of violation.

The sequence of progressive enforcement actions varies by jurisdiction. An example enforcement workflow is shown in Figure 2.1 (the native Visio file provided as SCORL Supplemental Resource 2B can be modified to match a jurisdiction-specific process). Additional example workflows are also available for reference (see SCORL Supplemental Resource 2D for the following):

- Example Workflows 1 & 2 – Enforcement workflow diagram (from the Appendix D resources for the BIG Report, provided by participating jurisdictions)
- Example Workflows 3 & 4 – City of Seattle enforcement process flow charts for Illicit Discharges and Connections and for BMP Based Violations)

Note: Examples provided by jurisdictions are for reference only and may not be the current version.

2.3.1. Comparison of Civil Penalties

Table 2.3 summarizes some of the civil penalties that have been set by various Western Washington jurisdictions in their municipal code. Penalty structures can vary based on the type and severity of the violation and other factors. The civil penalties listed in Table 2.3 do not vary based on the type of code violation (e.g., illicit discharge, construction site stormwater runoff, source control).

Table 2.3. Examples of Civil Penalties Applied by Local Jurisdictions.		
Jurisdiction	Civil Penalty Amount ^a	Municipal Code Reference
Bellevue	Maximum of \$500 penalty per day per violation.	Section 1.18.075 – Enforcement Procedures for Violations of Chapters 24.02, 24.04, 24.06 and 23.76 BCC.
Bellingham	Maximum of \$500 penalty per day per violation.	Section 15.42.100 – Infractions – Penalty.
Kent	Maximum of \$250 per day.	Section 7.05.210 – Penalties, Enforcement.
Olympia	<ul style="list-style-type: none"> ● \$50 for the first day of violation. ● \$125 for the second day of the same violation. ● \$250 thereafter for each day of violation. ● Each day of violation shall constitute a separate civil infraction. 	Section 13.16.180 – Enforcement - Civil and Criminal Penalties - Public Nuisance.
Redmond	<ul style="list-style-type: none"> ● Minimum of \$100 per violation. ● Maximum of \$1,000 per violation. 	Section 1.14.060 – Criminal Violations and Penalties, Civil Violations and Penalties, and Other Penalties.
Seattle	<ul style="list-style-type: none"> ● Minimum penalty is \$250. ● Maximum penalty is \$5,000 per day per violation. 	Section 22.808.010 – Violations.
Tacoma	Maximum of \$10,000 per day per violation.	Section 12.08D.400 – Violations and Enforcement.
Vancouver	\$250 for the first violation.	Section 22.02.070 – Monetary Penalties.

^a Civil penalty amounts are from the October 2021 version of the municipal code for each of the jurisdictions listed and are subject to change.

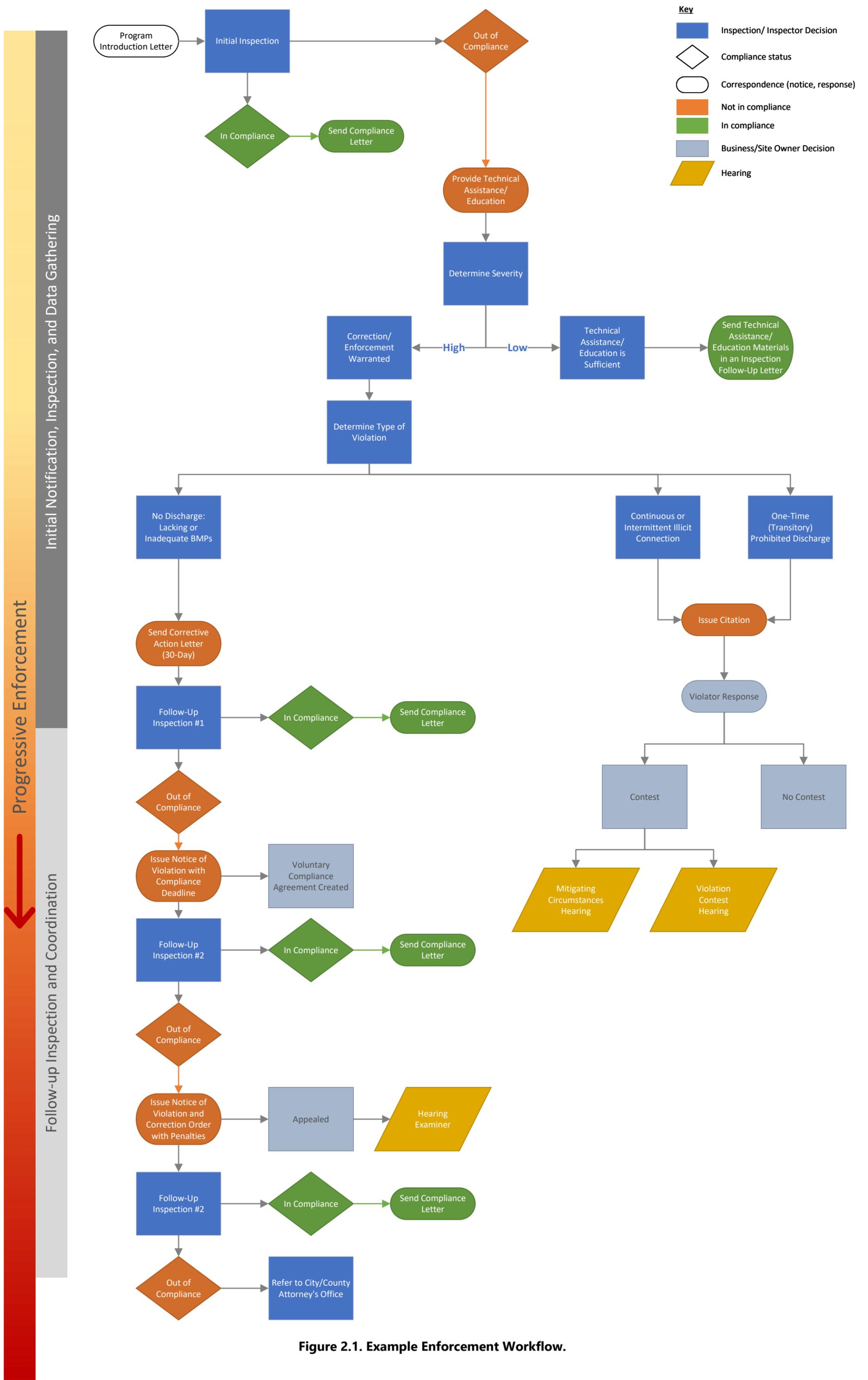


Figure 2.1. Example Enforcement Workflow.

2.3.2. Penalty Structures

Determining penalties at various stages of enforcement may depend on several factors related to severity of the violation and knowledge or intent of the responsible parties. Factors may include:

- Did the violation result in a minor, moderate, or major public health risk or environmental damage?
- Did the violation adversely impact infrastructure? Was additional maintenance required due to the violation?
- Was the action a willful and knowing violation? Did anyone benefit economically from non-compliance?
- Was the responsible party unresponsive in correcting the violation? Had any attempts been made to correct the violation or were attempts made to disguise the violation?
- Was there a history of compliance issues at property or with the responsible party? Was this a repeat violation? (e.g., within last 5 years?)
- Was the violation a result of improper operation or inadequate maintenance? Was the violation due to failure to properly implement source control BMPs?

Penalty matrix examples are available from Western Washington permittees that use rating structures with increasing penalties based on a point system: see SCORL Supplemental Resources 2E and 2F for examples. To implement a penalty matrix, consider implementation as a public rule rather than municipal code/ordinance for more flexibility to adapt the program as needed. Consult early and often with a City/County attorney to ensure that proposed approach is legally enforceable. Supporting documentation for a penalty matrix may include:

- Documentation of the point system
- Documentation of the decision processes
- A description of the records to justify penalties
- A summary of inspection fees (if applicable)
- A description of cost recovery methods
- Documentation of penalty and cost collection

Documentation of the Point System

Document the point system (e.g., justification, circumstances, tiers) and associated penalty amount and basis (e.g., per day) such as the following example:

Penalty Matrix Example (see full penalty matrix in SCORL Supplemental Resource 2E)

Points	≤9	10-15	16-21	22-24	>24
Penalty	\$500	\$1,000	\$2,500	\$5,000	\$10,000

Documentation of the Decision Process

Document the decision process. For example, “All penalty matrix decisions are to be reviewed and approved by source control program staff to ensure consistency of application.”

Description of Records to Justify Penalties

Provide a description of the records that should be maintained to justify penalties (see *Chapter 6: Post-inspection Data Management and Recordkeeping*).

Summary of Inspection Fees (if applicable)

Some jurisdictions may consider implementing an inspection fee to recover costs of the program, regardless of whether a violation occurred. Based on the experience and input of multiple Western Washington jurisdictions, the following are recommended:

- Waiving the inspection fee for businesses that achieve compliance
- Providing inspections (and technical guidance) without assessing an inspection fee. This allows inspectors to provide technical assistance and establish a positive relationship with the business, by providing a service that is free of charge. Especially for initial inspections, this approach may be beneficial to establishing rapport and a positive perception of the source control inspection program.

Description of Cost Recovery Methods

Provide a description of the methods to recover additional costs to the jurisdiction associated with a source control violation, including labor and equipment for follow-up inspections, infrastructure repairs, etc., such as the following public rule example:

Public Rule Example: Additional Costs Assessment (Section IV.G in SCORL Supplemental Resource 2C)

In addition to any monetary penalties, the [Jurisdiction Authority] may collect investigation and correction costs, which may include, but are not limited to:

- Costs incurred by [Jurisdiction] as a result of a violation including infrastructure repair, cleanup, and remediation;
- Billed cost, including labor, administration, overhead, overtime, profit, taxes, and other related costs, for a hired contractor to investigate and/or perform the abatement work;
- Labor, administration, overhead, overtime, and other related costs for the [Jurisdiction] staff and crews to investigate and/or perform the abatement work;
- Administrative costs to set up contracts and coordinate work;
- Time spent communicating with the responsible party, any other enforcing agencies, and the affected community;
- Inspections for compliance with this rule, documentation of costs, and invoicing the responsible party;
- Cost of equipment, materials, and supplies, including all related expenses for purchasing, renting, and leasing;
- Laboratory sampling and analytical costs;
- Recording fees; and
- Cost of mobilization, disposal of materials, and cleanup.

[Yellow-highlighted bracketed text] can be replaced with jurisdiction-specific terminology and titles.

Documentation of Penalty and Cost Collection

Provide documentation of how penalties and costs are collected, such as the following public rule example:

Public Rule Example: Collection of Penalties and Costs (Section IV.H in SCORL Supplemental Resource 2C)

1. The Director may issue an invoice and demand for payment of civil penalties and costs when the responsible party has failed to pay a penalty by the deadline in a Notice and Order and has failed to file an appeal within the required time periods established in [Jurisdiction]. The invoice shall include:

- Name of the responsible party
- Either a legal description of the property corresponding as nearly as possible to that used for the property on the rolls of the [Jurisdiction] Assessor or, where available, the property's street address where the violation(s) has taken place;
- A description of the violation(s);
- The amount of the penalty;
- Notice that if the amount due is not paid within 30 days, the [Jurisdiction Authority] may collect the unpaid amount in any lawful manner, including, but not limited to, referral of the matter to a collection agency; and
- Notice that interest shall accrue on the unpaid balance at the statutory rate if not paid within 30 days after the invoice date.

2. If the Hearing Examiner has issued an order or judgment imposing penalties, costs, damages, or expenses for a violation of this subtitle, and the Hearing Examiner's order or judgment is not appealed within 30 days, the [Jurisdiction Authority] may:

- Refer the matter to the [Jurisdiction] Prosecutor to initiate any appropriate legal action in an appropriate forum;
- Send an invoice and demand for payment as described above; or
- Add a Special Assessment to the responsible party's property.

[Yellow-highlighted bracketed text] can be replaced with jurisdiction-specific terminology and titles.

