

# MINISTRY OF ENVIRONMENT AND CLIMATE CHANGE STRATEGY

## COMPLIANCE AND ENFORCEMENT POLICY AND PROCEDURE



VERSION 4  
Updated: January  
2019



Ministry of  
Environment and  
Climate Change Strategy

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<b>Effective Date:</b>	June, 2005
<b>Updates:</b>	Version 4: May 2018
<b>Responsible Area:</b>	Compliance Policy & Planning Section, Strategic Policy Branch
<b>Staff Affected:</b>	All staff in the Ministry of Environment and Climate Change Strategy engaged in compliance and/or enforcement activities.
<b>Amendments:</b>	Suggested amendments to the policy may be submitted to the Director, Compliance Policy and Planning, Strategic Policy Branch, Ministry of Environment and Climate Change Strategy
<b>What's new in this version?</b>	Non-compliance Decision matrix updated in May 2019 to reflect shift in approach from automatic referral, to consultation, between programs and COS.

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# Introduction

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Ensuring compliance with its regulatory requirements is one of the ministry's principal objectives. This is achieved through the use of a variety of compliance tools, giving consideration to using the most appropriate tool necessary to obtain compliance, and when required, to promote general deterrence.

The Compliance and Enforcement Policy and Procedure (*C&E Policy*) prescribes common requirements and procedures for all staff to ensure consistent and risk-based assessment and response to non-compliance with management oversight of complex or sensitive investigations. The *C&E Policy* achieves this in two ways:

- i. Through the use of the **Non-compliance Decision Matrix**, a tool that guides staff in their selection of an appropriate response to non-compliance. The matrix ensures staff consider certain criteria and factors when assessing risk and the impacts of the non-compliance and choosing the best tool to address it; and
- ii. By promoting **effective communication and collaboration** between ministry staff to achieve the best possible outcomes. Responding to non-compliance is often a complex and iterative process that requires both program staff expertise in the form of environmental impact assessment skills and enforcement staff (Conservation Officers & Park Rangers) expertise in the form of investigative skills. Regardless of the form, communication as a team about a compliance issue and the options to resolve it remains key to ensuring the best approach and outcomes.

Together these measures help to provide greater consistency, increased clarity and predictability regarding the consequences of non-compliance, as well as assurance that ministry resources are directed to the highest priorities. The balanced and principled use of compliance and enforcement tools demonstrates the ministry's commitment to building public confidence through accountable and transparent policies.

## Structure of this Document

The *C&E Policy* is divided into eight chapters. Chapters 1 through 3 provide important information for understanding the compliance and enforcement function in the Ministry of Environment and Climate Change Strategy. Chapter 4 presents the Non-Compliance Decision Matrix, while Chapters 5-8 focus on procedures:

- Chapter 5 is directed at field staff and explains the process to be followed when responding to non-compliance;
- Chapter 6 is directed at Conservation Officers and explains the process to be followed when responding to non-compliance;
- Chapter 7 provides guidance for Section Heads and COS Sergeants conducting investigation reviews as part of an Investigation Review Team; and
- Chapter 8 provides similar guidance to Regional Directors and COS Inspectors in conducting reviews as part of a Regional Management Team.

While the *C&E Policy* provides guidance on how ministry staff assess non-compliance and respond using a variety of enforcement tools, the Compliance Management Framework outlines the ministry's broader perspectives on overall compliance management within the ministry. This includes establishing regulatory requirements that are clear, practical and enforceable, as well as promoting compliance in ways that achieve high rates of voluntary compliance.

# Chapter 1: Enforcement Context

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## Purpose of this Chapter

1. To emphasize the ministry's commitment to achieving compliance.
  2. To explain the application and scope of the Compliance and Enforcement Policy and Procedure.
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## Introduction

Ministry of Environment and Climate Change Strategy staff have a variety of responsibilities and authorities under a number of statutes and their accompanying regulations. The type and extent of staff involvement in ensuring compliance with these requirements varies with each position and its job responsibilities. Program staff in Parks and Protected Areas (PPA), Climate Action Secretariat (CAS) and Environmental Protection (EP), as well as Conservation Officers, are responsible for dealing with non-compliance.

Program staff are generally responsible for conducting inspections which may lead to an administrative enforcement response such as the issuance of an advisory, order, administrative sanction or administrative monetary penalty. The Conservation Officer Service (COS), as the ministry enforcement program, conducts investigations which may also lead to an administrative response, restorative justice measure or prosecutorial response (violation ticket or formal charges). In many cases, collaboration between the COS and a program area is necessary to determine roles and responsibilities and the most appropriate response to non-compliance. In these cases, program staff provide information on the regulatory history or technical expertise on the environmental, human health or safety impact; Conservation Officers provide investigative expertise such as evidence collection through search and seizure and procurement of witness statements. The ministry's enforcement program is also comprised of Park Rangers who conduct investigations within parks and protected areas and use an array of different enforcement tools and approaches, including prosecution.

Ministry staff also work closely with enforcement staff in other government agencies within the natural resource sector and in other levels of government, and may enter into agreements to conduct compliance and enforcement activities on their behalf.

## 1.0 Social Regulatory Approach

Regulatory requirements administered by the ministry are dealt with in the context of a social regulatory approach as opposed to the command and control approach reflected in the *Criminal Code*. This distinction is important for the development of ministry compliance and enforcement policies as a social regulatory approach allows the program areas and the areas responsible for investigations to be consultative in determining the most appropriate response to non-compliance.

## 1.1 Ministry Position on Enforcement

The ministry strives to ensure compliance with its regulatory requirements. This is achieved through the use of a variety of compliance tools, giving consideration to using the most appropriate tool necessary to obtain compliance, and when required, to promote general deterrence.

When considering how to respond to non-compliance, ministry staff consider the severity of actual or potential impact to the environment, human health or safety, the factual circumstances of the alleged offence or the compliance history of the offender, as well as how to achieve the best environmental outcome and reduce the likelihood of recidivism. In some cases the ministry uses progressive sanctions when previous enforcement actions have been ineffective.

Additionally, the integrity and effectiveness of the regulatory regime established to protect the environment, human health and safety is highly dependent on compliance with administrative requirements such as the provision of data or licensing information. Failure to comply with these regulatory requirements, even in the absence of environmental damage, may threaten the regulatory regime and staff will consider appropriate responses, up to and including prosecution.

Ultimately the decision of whether a file should be investigated, and subsequently the most appropriate response, rests with the law enforcement arms of the ministry. The Investigation Review Process of this policy ensures that the best information available within the ministry will inform the decision on whether any given file needs to be investigated and which compliance tool is most appropriate. When a file is forwarded to the Criminal Justice Branch, the ultimate decision to lay a charge is the responsibility of Crown Counsel. This policy ensures that the best information available within the ministry will be provided to Crown Counsel to inform their decision. Prosecution is an essential compliance tool to be applied when necessary, but reserved for those situations where alternative compliance efforts are unable to achieve the desired outcomes or where a court hearing would provide broad, general deterrence.

## **1.2 Application of the Compliance and Enforcement Policy and Procedure**

The provisions of the *C&E Policy* apply to:

- All incidents of non-compliance with ministry statutes, regulations and authorizations.
- All Conservation Officers.
- All program staff in the ministry who play a role in ensuring compliance.
- Staff of other government agencies who conduct compliance and/or enforcement activities on behalf of the Ministry of Environment and Climate Change Strategy or who rely on COS to provide enforcement services on their behalf.

The *C&E Policy* is not a complete statement of policies and procedures relating to compliance and enforcement within the ministry. In using this policy, staff need to consult division-specific business rules, where applicable, that guide other aspects of compliance management.

### **1.2.1 Independence of Statutory Decision Makers**

Nothing in the *C&E Policy* restricts the discretion and autonomy exercised by ministry Statutory Decision Makers.

# Chapter 2: Inspections and Investigations

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## Purpose of this Chapter

1. To ensure a common understanding of the terms inspection and investigation.
  2. To provide information with respect to the roles and responsibilities of staff authorized to conduct inspections and investigations.
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## Introduction

Inspections and investigations are two important functions used to support the ministry's compliance management activities on the ground.

- The purpose of an **inspection** is to verify compliance with the ministry's regulatory requirements.
- The purpose of an **investigation** is to gather evidence to support enforcement proceedings in cases of suspected non-compliance.

Only designated staff may conduct these activities; however, not all staff who are authorized to conduct inspections are also authorized to conduct investigations. This chapter clarifies the differences between these two activities and touches on how to transition between them.

## 2.0 Inspections

Inspections can be characterized as any action(s) taken to verify compliance with regulatory requirements. They are generally done on a risk-based priority and are undertaken by program staff and Conservation Officers.

Inspections are typically conducted at regulated sites and facilities or at various other locations in the field such as at the roadside. Inspections include reviewing monitoring data or other materials supplied by the regulated party. They are both scheduled (based on the compliance planning process) and unscheduled, operation-specific or sector based. Unscheduled or additional inspections may also occur in response to information or complaints which come to the attention of the ministry.

Inspections may also be used to determine sectoral compliance rates, or to assess risks and gain technical understanding of new operations, equipment or processes associated with regulated activities. Compliance promotion in the form of information exchange and education is often achieved through conducting inspections. In some circumstances, activities associated with inspections may serve to identify the need for an investigation of non-compliance with regulatory requirements.

### 2.0.1 Staff Authorized to Conduct Inspections

Designated program staff and Conservation Officers are authorized by legislation to conduct inspections. While conducting inspections, staff are authorized pursuant to specific legislation to undertake certain activities such as entering upon land, as well as examining records, works and materials. The particular legislation should be reviewed with respect to the extent of the authority conferred.

## 2.0.2 Transition from Inspection to Investigation

A transition from inspection to investigation may take place when non-compliance is detected during an inspection and the purpose shifts from verifying compliance and the potential impacts upon the environment, human health and safety to collecting information and evidence that may be required to support enforcement action. Generally this transition brings with it certain legal consequences with respect to the continued conduct of the investigation. When an inspection is being conducted by staff who are not authorized to conduct an investigation, it is generally appropriate for staff to request the services of an investigator.

## 2.1 Investigations

Investigations involve a systematic process of collecting evidence and information relevant to a suspected non-compliance for the purposes of enforcement.

The need for an investigation may arise as a result of:

- non-compliance detected through compliance verification activities (monitoring, auditing or inspecting);
- information gathered from sources or informants;
- public reports of suspected offences; or
- referrals from other agencies.

Investigative activities include:

- gathering physical evidence and ensuring its continuity and integrity;
- taking statements and interviewing witnesses;
- conducting surveillance;
- obtaining and executing search warrants; and
- preparing briefs for Crown Counsel or a Statutory Decision Maker authorized to impose administrative sanctions.

### 2.1.1 Staff Authorized to Conduct Investigations

Designated ministry staff, primarily Conservation Officers and Park Rangers, are authorized to conduct investigations. While conducting investigations, these staff are authorized to conduct specific activities such as executing search warrants and performing search and seizures. Program staff often contribute technical expertise in support of an investigation.

*The basic intent of an **inspection** is not to uncover a breach of a regulatory requirement; it is to confirm compliance with the requirement and thereby protect the environment and human health or safety. It is a subtle distinction, but one that guides how the activity is undertaken. An **investigation** is initiated when there are reasonable grounds to suspect that a breach of a requirement has taken place and evidence is required to confirm it and determine an appropriate response. To gather that evidence an officer must have clear authorities and follow prescribed procedures that assure the individual's or business' rights are not compromised.*

## Chapter 3: Tools for Addressing Non-Compliance

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### Purpose of this Chapter

1. To ensure a common understanding of the purpose and use of compliance tools available to ministry staff.
  2. To specify the criteria that should be considered when selecting the most appropriate compliance tool.
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### Introduction

There are a range of compliance tools available to ministry staff when addressing non-compliance. To select the most appropriate response for individual incidents of non-compliance, it is important that staff understand the purpose of and authority for each of these tools. This chapter briefly describes each compliance tool, including its purpose and the circumstances in which it may be used. In many cases, additional guidance for using these tools can be found elsewhere on the ministry's intranet site.

### 3.0 Advisory

An advisory notifies the non-compliant party *in writing* that they are not in compliance with a specific regulatory requirement and often recommends a course of action that is expected to achieve compliance.

An advisory may:

- include an exchange of information on best management practices or technical solutions. Staff may also attend at the site/facility/development to provide additional insight into the regulatory requirements;
- reference where additional information and educational materials can be sourced; and
- include requests for a description of the cause of the non-compliance, measures being considered to prevent further non-compliance and a remedial action plan.

An advisory is often the first enforcement response taken in cases of minor to moderate non-compliance when there is a high likelihood of achieving compliance. An advisory, like a warning (below) serves as a formal record of the alleged non-compliance and forms an important element of the compliance history of the party in question.

An advisory can be issued in one of a number of formats such as a letter, a pre-printed notice similar in appearance to a violation ticket, or as part of a standardized inspection form in which a copy is provided to the individual or business being inspected.

### 3.1 Warning

Similar to an advisory, a warning notifies the non-compliant party *in writing* that they are not in compliance with a specific regulatory requirement; however, **the warning differs from an advisory in that it warns of the possibility of an escalating response should non-compliance continue.** Warnings are generally used when it is determined that an exchange of information alone would not be sufficient in achieving compliance.

A warning serves as an important formal record of the alleged non-compliance and forms an important element of the compliance history of the party in question. This becomes particularly relevant when assessing and responding to any subsequent non-compliance by the party. Although verbal warnings in the field are sometimes used, when it is important to have a record of the non-compliance, staff should follow up by issuing a written warning.

A warning may:

- require a description of the cause of the non-compliance, measures being considered to prevent further non-compliance and a remedial action plan;
- require an inspection prior to issuing the warning letter in order to gather sufficient information regarding the non-compliance (a follow-up inspection may also be undertaken in order to verify compliance); and
- request written confirmation from the client that compliance has been achieved.

When issuing a warning, staff are expected to have sufficient information to satisfy themselves that a non-compliance occurred.

### **3.2 Order**

An order is a written, legal instrument (e.g. Dangerous Wildlife Protection Order, Eviction Order, Engineer's Order, Pollution Prevention Order, etc.) issued by designated ministry officials. Orders are an important tool in managing risk to the environment, human health or public safety, and may be used in addressing compliance issues. By requiring parties to address non-compliance issues or take proactive measures to protect the environment, orders are effective in:

- Levelling the playing field, i.e., ensuring that no party benefits from not complying;
- Deterring other potential violators; and
- Responding quickly to prevent or stop actual or potential impact to the environment, human health or safety.

An order is issued according to statutorily prescribed criteria and may:

- create a new legal requirement to undertake specific, time bound actions or cease specific actions; and
- outline the consequences for failing to comply with the requirements.

Understanding and applying the principles of administrative fairness is key during the process of drafting and issuing an order. For example, before issuing an order that may impact a person's rights or legal obligations, the director must give the person an opportunity to consider the facts upon which the decision will be based, and a chance to address any perceived inaccuracies.

An inspection may be required prior to issuing the order in order to gather sufficient information; subsequent inspections may be required to confirm compliance with an order. An order and an investigation may be undertaken concurrently, or the use of one may follow the other. Under some ministry legislation, non-compliance with an order can be addressed with an administrative penalty; it is also an offence and may be prosecuted accordingly.

### **3.3 Administrative Sanction**

As authorized by various statutes, Statutory Decision Makers have the authority to impose remedial or punitive administrative sanctions. These can include revocation or suspension of ministry issued permits, licences and other administrative instruments which authorize activities such as pesticide use and commercial operations within parks.

An administrative sanction may be issued when, in the opinion of the Statutory Decision Maker, the authorized party has undertaken activities contravening the conditions of the authorization. The sanction can vary from removing certain allowed activities to total suspension or revocation of an authorization, depending on the level of actual or potential impact to the environment, human health or safety as well as the compliance history of the party.

An administrative sanction is most appropriate when dealing with non-compliant individuals with a poor compliance history who are undertaking regulated activities that will essentially stop if the authorization is cancelled (e.g. fishing and hunting licences, pesticide applicator licences, some park use permits). By contrast, when dealing with a significant industrial operation that is out of compliance the ministry may choose an alternate tool that allows the operation to continue while compelling the operator to remediate any damage and take corrective action going forward. In each case, the level of impact and the past performance of the party will influence the decision whether or not to use an administrative sanction.

### **3.4 Administrative Penalty**

As authorized by statute, administrative penalties (APs) are discretionary financial penalties that can be imposed by designated ministry Statutory Decision Makers on those failing to comply with a particular provision of a statute, regulation or the terms of an authorization. APs can be administered with less onerous procedural and legal requirements than a court prosecution, making them an effective and efficient enforcement option.

An AP may be an appropriate response to non-compliance where, on a balance of probabilities, a decision maker determines that a regulated party has contravened a requirement of their authorization and

- an advisory, warning or ticket does not adequately reflect the severity of the contravention and therefore would not be an effective deterrent;
- an administrative sanction (e.g. licence cancellation) is not appropriate or would cause undue hardship;
- the time and cost of prosecution is not in the public interest;
- there are mitigating or aggravating circumstances that should be taken into consideration in setting the penalty; or
- it is appropriate to recover the financial benefit the regulated party received as a result of the non-compliance or to recoup the costs to government of remediating damage to Crown resources.

### 3.5 Restorative Justice

Restorative Justice (RJ) is a set of guiding principles used in dispute resolution. RJ interprets crime as a violation of people, relationships and community values and seeks restorative outcomes rather than assigning blame and punishment. Led by trained facilitators, RJ forums offer a timely and cost effective way to deal with certain environmental offences in an inclusive forum designed to promote offender accountability, repair the harm caused by the offence and restore compliance.

The ministry uses two types of restorative justice forums:

A **Community Justice Forum (CJF)** is a traditional community led restorative justice process most appropriate for individual offenders and smaller files (e.g. loaded firearms). To conduct a CJF the ministry may use its own facilitators or utilize the services of facilitators associated with one of the myriad of Department of Justice or other community-based organizations specializing in restorative justice.

A **Community Environmental Justice Forum (CEJF)** is a process used to respond to environmental offences committed by regulated companies. While founded on the same principles as traditional restorative justice, these forums differ in the amount of pre-forum work done by the facilitator to ensure an outcome commensurate with the violation and acceptable to all participants. Consult the ministry CEJF policy & procedures (COS SharePoint) or [CEJF website](#) for more information.

Restorative Justice can be used for a wide range of non-compliance and responsible parties (individuals and companies) subject to ministry policy. Specifically, RJ may be considered for any case of non-compliance where all of the following conditions are met:

- the offender admits fault, takes responsibility for the offence and demonstrates a sincere desire to repair the harm caused by the offence;
- harm has been done, or potentially could have been done, to an individual or community **and** appropriate representatives can be identified to speak to the harm;
- the offender, community representatives and the investigating officer freely and fully consent to participate; and
- in the opinion of the investigating officer, there is enough prima facie evidence to pursue charges against the individual or company if the forum does not proceed. RJ is not an option to be considered in cases of insufficient evidence or to truncate an investigation.

When using either type of restorative justice forum, staff must have sufficient evidence to satisfy themselves that an offence has occurred. The same burden of proof is required to pursue a restorative justice outcome as is required to pursue a prosecution.

### 3.6 Ticket

Prosecutions by way of a Ticket Information are a summary means of dealing effectively and quickly with the most minor offences. Prosecution by way of a ticket may be initiated by designated ministry staff. In deciding whether to issue a ticket, authorized ministry officials must determine that the:

- contravention is an offence and is ticketable under provisions such as the Violation Ticket Administration and Fines Regulation, the *Contraventions Act* (Federal), and the British Columbia Sport Fishing Regulations (federal *Fisheries Act*); and
- issuance of a ticket is the most appropriate enforcement option for the situation.

The same standard of proof is required for the issuance of violation tickets as is required for formal charges through the courts. If a ticket is disputed, the Crown is required to prove the offence at trial. The offender who chooses not to contest a ticket is deemed to have pleaded guilty to the offence and is subject to the specified penalty. Tickets may be issued when:

- there has been non-compliance with a regulatory requirement;
- an advisory or warning is not appropriate;
- the evidence supports a reasonable likelihood of conviction;
- the public interest requires legal proceedings, but not a public hearing;
- the set fine is adequate for the offence; and
- there is no substantial damage to the environment, human health or safety or a significant loss of government revenue.

### 3.7 Court Prosecution

A court prosecution is a legal proceeding initiated against a person or company alleged to have committed an offence(s). The offender is compelled to attend court at a specific time and place to answer to a charge of unlawful activity by either:

- i. an appearance notice issued by an enforcement official in the field (typically used when the officer anticipates difficulty tracking the party down in the future); or
- ii. being served a summons, signed by a Justice of the Peace in response to a laying of charges.

If an offender does not attend court as required, an arrest warrant may be issued with a charge of 'failing to appear'.

Formal charges may be recommended by ministry staff, but are initiated by Crown Counsel in the exercise of their discretion. A recommendation to the Criminal Justice Branch of a formal charge is appropriate where in the opinion of the investigator there is sufficient evidence to prove the commission of the alleged offence, and one or more of the following apply:

- other methods of enforcement have in the past proven ineffective or there is reason to believe that other enforcement methods will not be effective;
- the potential accused is a repeat offender;
- the action of the offender was wilful, or fell significantly below the standard of due diligence;
- there is more than minimal damage to the environment or human health, or there was substantial potential for damage to the environment or human health;
- the lives or safety of persons were endangered, or there was substantial potential for the lives or safety of persons to be endangered;

- there is a significant non-compliance with regulatory requirements; or
- the public interest in the maintenance of environmental values requires a prosecution.

Crown Counsel is also authorized under the Criminal Code of Canada to pursue alternatives to court prosecution either before or after charges have been laid. Alternative Measures can take a variety of forms, including a restorative justice forum, but always result in a negotiated agreement between the offender and the Crown with respect to restitution for the offence. This option is offered to an offender solely at the discretion of Crown Counsel.

### **3.8 Additional Tools**

Ministry staff have access to a number of other tools that help to compel compliance or to uphold the integrity of the regulatory regime. Depending on the situation, these tools may be used instead of, or in addition to, other enforcement responses.

#### **3.8.1 Public Reporting of Enforcement Actions**

The ministry has become a national leader in environmental enforcement reporting, publishing the **Quarterly Environmental Enforcement Summary** since 2006. The enforcement reporting program has two goals:

- to demonstrate government's commitment to transparency, and
- to promote deterrence among regulated parties and the public by reporting the names of individuals and companies who have violated environmental laws.

The ministry's enforcement reporting currently includes orders, administrative sanctions, violation tickets, court convictions and restorative justice.

In addition to publishing the quarterly summary on the ministry website in PDF format, in 2011 the ministry added the **Environmental Violations Database (EVD)** to its reporting toolkit. The EVD is an online searchable database containing over 25,500 enforcement actions dating back to 2006. Data can be searched by name of violator, type of enforcement action, location, act, date, etc. Each program area within the ministry has defined business rules for recording and submitting enforcement action data for inclusion in the EVD and subsequent reporting in the summary.

#### **3.8.2 Fine Recovery Processes**

In addition to other compliance tools, the ministry relies on financial penalties (tickets, court convictions, administrative penalties) to address non-compliance. In order for these tools to be effective in deterring harmful behaviours, government must maintain a high collection rate. Even when an amount of money owed to the Province is not substantial, pursuing collection is critical to uphold the deterrence value of these enforcement tools.

On behalf of the Ministry of Finance, ICBC collects fines for all **violation tickets** issued under legislation and regulations administered by the ministry. When a ticket is unpaid it is sent to an ICBC contracted collections agency. If the fine remains unpaid, ICBC may opt to proceed with actions such as garnisheeing wages or

recovering the funds directly from the offender's bank account. Revenue Solutions BC (RSBC) provides a similar service to Court Services Branch with respect to outstanding **court fines**.

Compliance Policy and Planning Section (Strategic Policy Branch) is the ministry lead for monitoring unpaid fines and working with these other agencies on collections.

### **3.8.3 Civil Forfeiture**

This is an administrative enforcement tool where civil court proceedings are used to confiscate assets (cash, real estate, vehicles, etc.) believed to be the instruments or proceeds of unlawful activity. Civil forfeiture cases are handled by the government's civil forfeiture office via a civil suit. The process uses a reverse-onus test that requires defendants to prove they did not gain the asset from unlawful activity; cases are decided on the balance of probabilities. Once a judge decides property is forfeited, it can be sold and the proceeds used by the provincial government to compensate victims of crime, to fund crime prevention programs, to remedy the environmental effects of illegal activity and to cover the costs of administering the act.

Civil Forfeiture may be used when:

- the offender personally benefitted from the crime;
- there is "real property" involved that can be forfeited;
- the action of the offender was deliberate;
- the impact upon human health, safety or the environment was not trivial; and/or
- the offender has had previous violations.

Civil forfeiture is an option that can be used in addition to other enforcement tools or when other enforcement tools have not been successful, as for example, when a case is dismissed by the courts. The ministry could still pursue a civil forfeiture based on a balance of probabilities. This option is explored during the Post-Investigation Review Process, in consultation with the COS Major Investigations Unit (MIU) who manages civil forfeitures on behalf of the ministry.

### **3.8.4 Referral to Professional Association**

The ministry may refer a disciplinary matter to a professional body with or without taking other enforcement action. Professional associations have a duty to monitor and enforce standards of conduct for their members to uphold the reputation of the profession and to safeguard the public interest. To ensure the competence of its members, an association is responsible for investigating allegations of professional misconduct and where warranted, taking subsequent disciplinary action.

With the increasing use of qualified professionals in the environmental field, a disciplinary referral can be an effective way for the ministry to address unsatisfactory performance that results in non-compliance. It allows the ministry to share responsibility for dealing with individuals operating beyond the scope of their qualifications or failing to exercise due diligence with those best positioned to administer consequences.

When deciding whether to refer a disciplinary matter staff must consult with the association in question; every professional association will have a disciplinary process which sets out how to file a complaint.

## Chapter 4: Non-Compliance Decision Matrix

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### Purpose of this Chapter

1. To ensure consistency and fairness in the assessment of and response to non-compliance.
  2. To reinforce the ministry's commitment to compliance by ensuring the most appropriate measures are used to achieve compliance - taking into consideration the facts specific to the situation, as well as the need for general deterrence.
- 

### Introduction

This chapter presents the Non-Compliance Decision Matrix along with guidelines for its application. The Matrix is a risk-based tool for assessing the variability and severity of factors influencing the selection of compliance tools. These factors include:

- escalating levels of environmental, human health or safety impacts (actual or potential); and
- a diminishing likelihood of achieving compliance.

The Non-Compliance Decision Matrix is a guidance tool that helps to ensure a consistent and principled approach to assessing and responding to regulatory non-compliance; it is to be used with discretion by staff when considering the context and specifics of individual cases of non-compliance.

## 4.0 Application

### 4.0.1 Factors for Consideration in Applying the Non-Compliance Decision Matrix

In responding to regulatory non-compliance, it is necessary to examine the available information to determine the full extent of the non-compliance and any related regulatory history. The following factors provide guidance in developing an appropriate response.

a) Effectiveness in achieving the desired result

While each fact pattern will be different in relation to non-compliance, the most important factor in determining an appropriate response is the effectiveness of the tool in achieving compliance as quickly as possible with no recurrence.

Factors to be considered include:

- any related history of non-compliance;
- the person's willingness to co-operate with officials;
- evidence of corrective action already taken; and
- the existence of enforcement actions taken under federal or other provincial statutes.

b) Nature of the non-compliance

This includes consideration of:

- the seriousness of the actual or potential impact to the environment, human health or safety;
- the level of care exercised by the person;
- whether the non-compliance was deliberate;
- whether monetary gain resulted from the commission of the non-compliance;

- whether the non-compliance is a repeated occurrence;
- whether there are attempts to conceal information or otherwise subvert the regulatory requirements; and
- whether there is a need for general deterrence.

c) Consistency in enforcement

Ministry compliance efforts should attempt to achieve consistency in response to non-compliance. Accordingly, where feasible, staff may consider how similar situations have been addressed – recognizing that each case of non-compliance will have different circumstances which may suggest a different response.

#### **4.0.2 Promotion of General Deterrence**

The Non-Compliance Decision Matrix is designed to assist staff in assessing individual cases of non-compliance. Where staff encounter non-compliances which, in isolation, do not warrant an investigation, but the cumulative or collective impact of these non-compliances may require a response by the ministry, staff are to raise these situations with the Investigation Review Team (see chapter 7). This team, in conjunction with the Regional Management Team, is responsible for identifying emerging trends in non-compliance and developing a systematic and coordinated response in order to promote general deterrence.

#### **4.0.3 Independence of Statutory Decision Makers**

The Non-Compliance Decision Matrix is a guidance tool; it is in no way to impair the professional judgment, discretion and autonomy exercised by ministry Statutory Decision Makers.

#### 4.1 Non-Compliance Decision Matrix (updated May 2019)

		ESCALATING ENVIRONMENTAL, HUMAN HEALTH OR SAFETY IMPACTS (ACTUAL OR POTENTIAL)				
		LEVEL 1	LEVEL 2	LEVEL 3	LEVEL 4	LEVEL 5
DIMINISHING LIKELIHOOD OF COMPLIANCE (COMPLIANCE HISTORY/ WILLINGNESS AND CAPACITY TO COMPLY)	CATEGORY A (high)	ADVISORY	ADVISORY - WARNING	WARNING - ADMIN PENALTY	ADMIN PENALTY	INVESTIGATION
	CATEGORY B	ADVISORY - WARNING	WARNING - ADMIN PENALTY	WARNING - ADMIN PENALTY	ADMIN PENALTY - CONSULT	
	CATEGORY C	WARNING - ADMIN PENALTY	WARNING - ADMIN PENALTY - ADMIN SANCTION	ADMIN PENALTY - ADMIN SANCTION - CONSULT	CONSULT	
	CATEGORY D	WARNING - ADMIN PENALTY - ADMIN SANCTION	ADMIN PENALTY - ADMIN SANCTION - CONSULT	ADMIN PENALTY - CONSULT	CONSULT	
	CATEGORY E (low)	CONSULT	INVESTIGATION			

**A note about Orders:** Most enforcement tools are selected within a context of escalating enforcement. However, orders are different. Ministry legislation establishes specific legal conditions that must be met for orders to be imposed. In other words, orders are selected within a context of addressing an (actual or potential) environmental impact. For example, under *EMA*, staff must have “reasonable grounds” to believe that pollution is occurring, or is likely to occur, before issuing s. 81 and 83 orders. Also unlike other tools, orders can be used in conjunction with other more ‘punitive’ enforcement responses such as AMP (currently *EMA* and *IPMA* only), permit sanction, restorative justice or prosecution where the non-compliance warrants it.

## Levels of Escalating Environmental, Human Health or Safety Impacts

(Actual or Potential)

### LEVEL 1

- Non-compliance that does not result or is unlikely to result in any environmental, human health or safety impact; or
- Minor administrative non-compliance.

### LEVEL 2

- Non-compliance resulting in a minor, temporary impact to the environment or minor, temporary threat to human health or safety; or
- Significant administrative non-compliance.

### LEVEL 3

- Non-compliance resulting in a moderate, temporary impact to the environment or moderate, temporary threat to human health or safety.

### LEVEL 4

- Non-compliance resulting in a significant impact to the environment or significant threat to human health or safety (may be temporary or permanent).

### LEVEL 5

- Known or likely human health impact that is severe in effect, i.e. resulting in hospitalization and/or long term human health consequences.

## Categories of Likelihood of Compliance

(Compliance History/Willingness and Capacity to Comply)

### CATEGORY A - Indications of future and ongoing compliance are very high

- No previous occurrences of non-compliance;
- Good demonstrated awareness of and/or capacity to meet regulatory requirement; and/or
- Offender has a reasonable and cooperative attitude.

### CATEGORY B - Indications of future and ongoing compliance are uncertain

- Few previous occurrences of non-compliance; and/or
- Questionable awareness of and/or capacity to meet regulatory requirement.

### CATEGORY C - Indications of future and ongoing compliance are unlikely

- Numerous previous occurrences of non-compliance; and/or
- Little or no awareness of and/or capacity to meet regulatory requirement.

### CATEGORY D - No indication of future and ongoing compliance

- Wilful violation of ministry regulatory requirement; and/or
- Little or no demonstrated willingness or capacity to meet regulatory requirement.

### CATEGORY E - Indications of obstruction and ongoing or future non-compliance

- Hindering or obstructing a ministry official;
- Refusing to furnish required information; and/or
- Intentionally including false or misleading information in any required document.

# Chapter 5: Responding to Non-Compliance Guidance for Program Staff

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## Purpose of this Chapter

1. To ensure consistency and fairness in the assessment of and response to non-compliance.
  2. To provide guidance to program staff in determining when it is advisable to consult with the COS on non-compliance.
  3. To provide guidance to program staff on when the Investigation Review Process applies.
- 

## Introduction

This chapter outlines the procedure for program staff to follow when they become aware of an incident of regulatory non-compliance. The procedure sets out common steps and decision points that guide staff into one of four “compliance streams”, as illustrated in the flow chart on page 24. There are four key steps for staff in determining which stream to follow:

- Assess the non-compliance using the Non-Compliance Decision Matrix;
- Consult the COS, if required;
- Determine if an investigation is warranted (if it is sensitive in nature or requires ongoing program support the investigation is subject to the Investigation Review Process (IRP)); and
- Take alternative steps to address the non-compliance, if an investigation is not warranted.

These steps underscore the importance of cross-divisional collaboration - at both the field and management levels - in determining the most appropriate compliance measure for certain cases of non-compliance. Use of the procedure by all ministry staff helps to ensure that consultation occurs when required, and that non-compliance is addressed in a consistent and effective manner across the ministry.

## 5.0 Application

### 5.0.1 General Application

Responding to non-compliance is often a complex and iterative process. This procedure outlines the steps to take in a “textbook” situation. However, depending on the circumstances of the case, some additional steps may be required and/or some steps may occur in a slightly different order. For example, complex files may require dialogue between a number of different compliance partners both within and external to the ministry (e.g., other ENV programs, other natural resource agencies, Local Government, DFO, RCMP). Program staff may also consult other ministry staff (e.g., Conservation Officer, Park Ranger, Director, Section Head, Regional Director) for advice at any time during the process. Similarly, staff may begin to fill out the Investigation Referral Form (see 7.0.1 for information about when to use the IRF) earlier than noted in the procedure. What is most important is that staff do, in fact, perform the key steps outlined in the procedure.

### **5.0.2 Exigent/Urgent Circumstances**

This policy is not intended to impair the discretion of ministry staff to take immediate investigative action when necessary. In situations where the delay necessary to obtain a review by the IRT would likely result in danger to the environment, human health or safety, or the loss or destruction of evidence, ministry staff may request the involvement of an appropriate ministry investigator, or commence the investigation immediately if they are qualified to do so.

### **5.0.3 Use of the Non-Compliance Decision Matrix**

Irrespective of whether an investigation is subject to the IRP, ministry staff are still expected to use the Non-Compliance Decision Matrix to guide their assessment of the regulatory non-compliance. If staff need additional guidance or advice on addressing an issue of non-compliance, they may choose to refer the matter to the Investigation Review Team (IRT) even if it is not subject to the IRP.

### **5.0.4 Use of More than One Compliance Tool at a Time**

In some circumstances, it is appropriate to consider multiple approaches to non-compliance. For example, a Pollution Prevention Order, issued to address the immediacy of a situation, may be followed by an investigation and further administrative or prosecutorial action, as appropriate. In another example, an administrative sanction may be imposed following a prosecution. The appropriate legislation should be reviewed when considering multiple approaches.

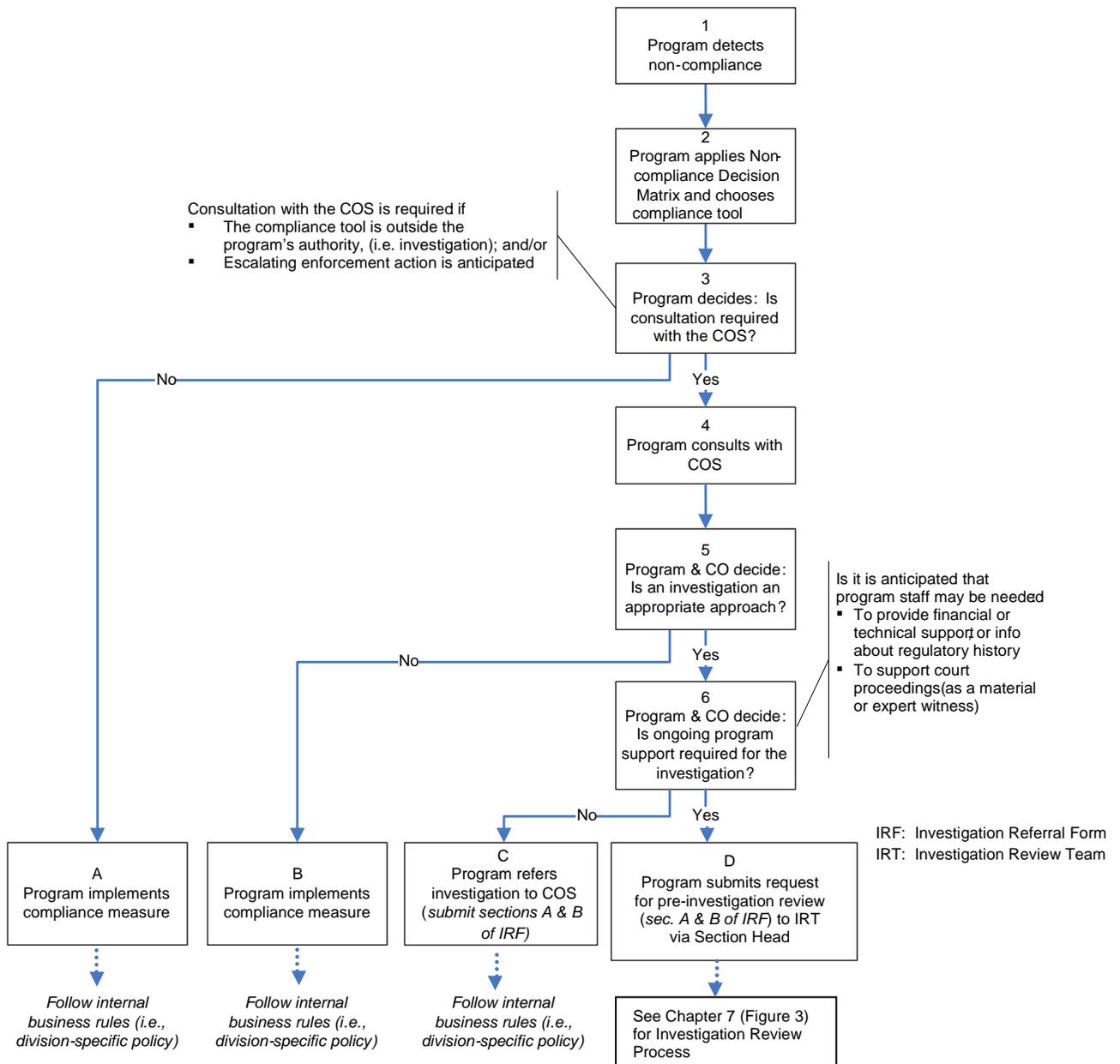
### **5.0.5 Communication with a Regulated Party during an Investigation**

During the investigative process it is important to ensure that communication between program staff and the regulated party do not compromise the investigation. Ongoing communication with the regulated party is often necessary to mitigate environmental, human health or safety impacts, or seek solutions to rectify ongoing non-compliance. In these situations, program staff must ensure that there is dialogue with the investigating officer regarding roles and responsibilities prior to engaging in discussions with the regulated party.

### **5.0.6 Involvement of the Major Investigations Unit (MIU) - Provincial Investigations Branch**

The MIU is a unit of the COS that deals with complex commercial or industrial environmental investigations. Program staff do not refer investigations directly to the MIU. The decision to engage the MIU is made internally by COS Supervisors in consultation with the Inspector, MIU. This decision to refer investigations to the MIU is based on the severity and complexity of the non-compliance coupled with the availability of resources.

**Figure 1: Procedure for responding to non-compliance  
~Program Staff~**



**Compliance Stream A**

Compliance Measure is within program's authority (e.g. advisory, warning, order, administrative remedy) & no consultation with COS is required.

**Compliance Stream B**

Consultation determines that an investigation is not warranted therefore the non-compliance is addressed by the program.

**Compliance Stream C**

Consultation determines that investigation (possibly resulting in a ticket or formal charges) is the most appropriate approach but ongoing program support is not required. Priority is given to investigation referrals that link to provincial or regional compliance strategies.

**Compliance Stream D**

Consultation determines that investigation is the most appropriate approach and ongoing program support is required. Priority is given to investigation referrals that link to provincial or regional compliance strategies.

## 5.1 Procedure

The steps described below correspond with the numbered steps in Figure 1 on page 23.

1. Program staff may detect the non-compliance in the course of their work, or it may be reported to them by a member of the public or another regulatory agency.
2. Program staff will use the Non-Compliance Decision Matrix to assess the non-compliance and select a compliance measure. (See Chapter 4 for guidance in using the matrix.)
3. Irrespective of the compliance measure chosen, program staff will determine if consultation with the Conservation Officer Service (COS) is required. Consultation is required if:
  - the compliance measure selected from the matrix is outside the program's authority (i.e., investigation); and/or
  - it is anticipated that escalating enforcement action may be required in the future.

*If consultation with COS is not required* ⇒ **Compliance Stream A**

- Program staff will implement the most appropriate tool for achieving compliance, following division-specific policy. Measures may include issuance of an advisory, warning, order, administrative remedy and/or referral to another agency. (See Chapter 3 for further information about these tools.)
- Program staff will follow division-specific reporting requirements to record the response to non-compliance.
- If a warning or an order is issued, program staff will send a copy to the COS Sergeant for recording in COORS. This is necessary for informational purposes – to create a record of non-compliance - and in the case of orders, because the order creates a new legal requirement. As such, subsequent action may be required by the COS to enforce it.

As Parks staff are responsible for the enforcement of compliance with the orders that they issue, these orders do not need to be forwarded to COS. Park Rangers will send copies of orders to the PPA Safety, Compliance & Enforcement Officer in Victoria.

- End of procedure -

4. **If consultation is required**, program staff will contact a field Conservation Officer (CO) within the specific geographic area in which the non-compliance occurred and provide background relating to the non-compliance. (If unsure who the appropriate field CO is, contact the COS Sergeant in the geographic area in which the non-compliance occurred).

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🕒 If consultation cannot be done immediately, program staff must contact a field CO within 5 business days of detecting the non-compliance to establish:

- A process and timeline for consultation; or
  - A mutually-agreeable date for initiating discussions about the process and timelines for consultation.
-

Ideally, consultation should be in a form that permits dialogue on the nature and complexity of the issue (e.g., phone call or in-person), with the objectives being to:

- Obtain clarity on the facts to ensure that both program staff and the CO have the same understanding of the non-compliance;
- Discuss the likelihood of achieving compliance and the degree of environmental impact, and come to an agreement on where the non-compliance fits on the Non-Compliance Decision Matrix; and
- Review the compliance history, including what actions have been taken to date, and discuss next steps. Due diligence and officially-induced error should form part of this discussion.

**Note:** the recipient of a request to consult (i.e. received by phone message or email) should acknowledge the request promptly even if current operational priorities prohibit action on the file at that time. Responding to non-compliance is a priority for all staff; as well, a timely response contributes to building or maintaining effective working relationships within the ministry and/or with partner agencies. Early communication between an investigator and technical program staff can affect whether an investigation proceeds, in accordance with specific actions taken or not taken when the non-compliance is first detected.

5. Program staff and the CO will decide whether an investigation is the most appropriate approach to address the non-compliance. If consensus cannot be reached, the matter must be raised to the program Section Head and COS Sergeant for resolution.

*If consultation determines that an investigation is not warranted* ⇒ **Compliance Stream B**

- Program staff will implement the most appropriate tool for achieving compliance, following division-specific policy. Measures may include issuance of an advisory, warning, order, administrative remedy and/or referral to another agency. (See Chapter 3 for further information about these measures.)
- Program staff will follow division-specific reporting requirements to record the response to non-compliance.
- If a warning or an order is issued, program staff will send a copy to the COS Sergeant for recording in COORS. This is necessary for informational purposes – to create a record of non-compliance - and in the case of orders, because the order creates a new legal requirement. As such, subsequent action by the COS might be required to enforce it.

As Parks staff are responsible for the enforcement of compliance with the orders that they issue, these orders do not need to be forwarded to COS. Park Rangers will send copies of orders to the PPA Safety, Compliance & Enforcement Officer in Victoria.

- End of procedure -

6. ***If consultation determines that an investigation is warranted***, program staff will determine (in consultation with the CO) if:
  - a) Ongoing program support is required for the investigation. This would apply if it is anticipated that program staff may be needed:

- to contribute financial or human resources;
- to implement a complementary program-specific compliance measure (e.g., an order); and/or
- to support other administrative or prosecutorial enforcement actions such as a restorative justice forum or court proceedings (i.e., through material or expert witness testimony).

Essentially, the test is to anticipate whether the investigation needs a cross-divisional, collaborative approach to be successfully completed.

or

- b) The investigation is sensitive in nature. A sensitive investigation is one that involves an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties.

At this time COS will consider the nature of the file to determine whether the investigation will be undertaken by zone staff or will be referred to the Major Investigations Unit.

*If consultation determines that an investigation is warranted, but the investigation is neither sensitive in nature nor requires ongoing program support ⇒ **Compliance Stream C***

- Program staff will refer the investigation to the COS by completing sections A - B of the Investigation Referral Form (IRF) and forwarding it to the COS Sergeant in the geographical location in which the non-compliance occurred.
- The COS will conduct the investigation in accordance with internal business rules.

- End of procedure -

*If consultation determines that an investigation is warranted and the investigation is sensitive in nature and/or it requires ongoing program support ⇒ **Compliance Stream D***

- This investigation is subject to the Investigation Review Process. Program staff will refer the investigation to the Investigation Review Team (via the Section Head) by completing sections A-B of the Investigation Referral Form.

- Continue to Chapter 7 for guidance about the Investigation Review Process -

## 5.2 Frequently Asked Questions

### 5.2.1 Why do the flow charts only show Conservation Officers conducting investigations? I am in a program area and I conduct investigations too.

These two terms - inspections and investigations - are often confused. Investigations involve a systematic process of collecting evidence and information relevant to a suspected non-compliance for the purposes of building a case for possible court prosecution. Consequently, only designated staff, primarily COs and Park Rangers, are authorized to conduct investigations.

This means that what some staff refer to as investigations are actually inspections. Inspections are a type of verification activity used to assess compliance with regulatory requirements (e.g., site and

facility visits, field checks). They are generally done on a risk-based priority and may be undertaken by program staff or COs. An inspection may lead to an administrative enforcement response such as the issuance of an advisory, order, administrative sanction or penalty, or it may lead to an investigation (at which point the services of an investigator should be requested). Inspections themselves are not subject to the IRP.

See Chapter 2 for more information about the differences between inspections and investigations.

### **5.2.2 What do I do if I encounter a non-compliance that requires immediate investigation?**

Take immediate action! This policy is not intended to impair the ability of ministry staff to take immediate investigative action when necessary. In situations where the delay necessary to obtain a review by the IRT would likely result in damage to the environment, or risk to human health or safety, or the loss or destruction of evidence, ministry staff may request the involvement of an appropriate ministry investigator, or commence the investigation immediately if they are qualified to do so. If not, try to document as much information as possible (observe, record and report) and contact a CO as quickly as possible.

### **5.2.3 What if I have been made aware of a suspected non-compliance, but I cannot get to the location in order to verify if it is serious, i.e. how it might scan out on the Non-Compliance Decision Matrix? Do I need to fill out any forms to request a CO to check on the matter?**

You don't need to fill out any forms, but it is helpful to provide the CO with as much information as possible so that they can prioritize its importance against competing demands. If available, it is helpful to provide photos, a sense of the reliability of the information provided, any history at the site, etc. At this stage, the COS will simply be providing you an "eyes and ears" service to verify the information you have. After receiving feedback from COS, you will be required to complete the Investigation Referral Form if you wish to request an investigation.

Some programs may have established business rules and protocols with COS around the routing of and response to public reports of suspected non-compliance.

### **5.2.4 What if I have confirmed a non-compliance and through discussions, the CO and I agree that program support is not required, but that the CO needs to investigate because it is likely a ticketable offence?**

You would refer the investigation to the COS, filling out sections A & B of the Investigation Referral Form. Refer to Stream C in Figure 1: Procedure for responding to incidents of non-compliance - Program Staff, pg 23.

### **5.2.5 What if it isn't clear who "detected" the non-compliance (as noted in step 1 of the procedure)? In that case, who is responsible for completing the Investigation Referral Form to initiate the IRP?**

In general, the person who holds the majority of information about the case (or the person who has the primary relationship with the party) is the person who should assume the role of "initiator" and take responsibility for completing the Investigation Referral Form. Of course, this may not be clear in all cases and the unique circumstances of each case will need to be considered in making this determination. In some cases more than one program could be involved in the initial response to

non-compliance (e.g. a spill at a regulated site could involve both an Environmental Emergency Response Officer (EERO) and Environmental Management or Integrated Pesticide Management staff) and a conversation between them may be necessary to collectively agree on who will complete the IRF.

Uncertainty about “ownership” of a non-compliance should never delay or prevent the submission of a request for investigation. The requirements for the Investigation Referral Form have been kept to a minimum. Any incidents of non-compliance that are determined to be subject to the IRP should be significant enough to justify your time spent completing the form.

### 5.2.6 How do tickets fit into this process?

Using Figure 2: Procedure for responding to non-compliance –COS on page 33, tickets will be dealt with in one of three ways:

#### Compliance Stream A

A CO may issue a ticket without consulting the program area in cases where the CO determines that:

- no information regarding regulatory history and/or environmental impact is required from the program area; or
- there is a relevant compliance strategy already in place (i.e., program areas have provided specific written guidance on dealing with these non-compliances).

#### Compliance Stream C

Following initial consultation with the program area and agreement that an investigation is warranted, but that **ongoing program support is not needed** – a CO may proceed with an investigation and issue a ticket, or possibly proceed to Crown with charges or take no further action.

#### Compliance Stream D

Following initial consultation with the program area and agreement that an investigation is warranted, and agreement that **ongoing program support is needed** - the investigation would be subject to the IRP. If at the post-investigation stage the investigative team recommends a ticket as the most appropriate compliance measure, and the IRT/RMT supports this recommendation, then a ticket would be issued.

Refer to Figure 2 on page 32 for more information about the compliance streams.

### 5.2.7 Is a warning an administrative or prosecutorial enforcement response?

The issuance of a warning is a prosecutorial enforcement response. In order to issue a warning, staff need to satisfy themselves, beyond a reasonable doubt, that a non-compliance occurred. In some instances, this information may be readily apparent through the inspection process; in other instances, a significant amount of work may have to be undertaken, such as through the investigation process, in order to determine *beyond a reasonable doubt* that the non-compliance occurred. If the test of “beyond a reasonable doubt” is not met, but based on the “balance of probability” the non-compliance occurred, staff may choose to issue an advisory to the non-compliant party.

### 5.2.8 What about dealing with non-compliances that aren’t subject to the IRP? Why doesn’t the C&E Policy provide procedures for dealing with those?

Incidents that fall into compliance streams A, B or C are subject to division- specific business rules, rather than the cross-divisional business rules of the IRP. This means that field staff should follow

existing division-specific procedures for issuing advisories, warnings, orders or administrative sanctions or penalties. If common procedures do not exist, it is the responsibility of the division or region to develop them. While the *C&E Policy*, and the IRP specifically, was put in place as a mechanism to ensure cross-divisional collaboration on certain investigations, staff are encouraged to work collaboratively across divisions to deal proactively with non-compliances whether they are subject to the IRP or not.

# Chapter 6: Responding to Non-Compliance – Guidance for Conservation Officer Service

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## Purpose of this Chapter

1. To ensure consistency and fairness in the assessment of and response to non-compliance.
  2. To provide guidance to Conservation Officers in determining it is advisable to consult with program staff on non-compliance.
  3. To provide guidance to COS on when the Investigation Review Process applies.
- 

## Introduction

This chapter outlines the procedure for Conservation Officers (COs) to follow when they become aware of an incident of regulatory non-compliance. The procedure sets out common steps and decision points that guide COs into one of four “compliance streams”, as illustrated in the flow chart on page 32. There are four key steps for determining which stream to follow:

- Assess the non-compliance using **the Non-Compliance Decision Matrix**;
- Consult program staff, if required;
- Determine if an investigation is warranted (if it is sensitive in nature or requires ongoing program support the investigation is subject to **the Investigation Review Process (IRP)**); and
- **Take alternative steps** to address the non-compliance, if an investigation is not warranted.

These steps underscore the importance of cross-divisional collaboration - at both the field and management levels - in determining the most appropriate compliance measure for certain cases of non-compliance. Use of the procedure by all ministry staff helps to ensure that consultation occurs when required, and that non-compliance is addressed in a consistent and effective manner across the ministry.

## 6.0 Application

### 6.0.1 General Application

Responding to non-compliance is often a complex and iterative process. This procedure outlines the steps to be taken in a “textbook” situation. However, depending on the circumstances of the case, some additional steps may be required and/or some steps may occur in a slightly different order. For example, complex files may require dialogue between a number of different compliance partners external to the ministry (e.g., FLNR, Fisheries and Oceans Canada, RCMP) to determine who will take the investigative lead. COs may also consult with one or more program staff at any time during the process. Similarly, COs may begin to fill out the Investigation Referral Form (IRF) earlier than noted in the procedure. What is most important is that COs do, in fact, perform these key steps.

### 6.0.2 Exigent/Urgent Circumstances

This policy is not intended to impair the discretion of ministry staff to take immediate investigative action when necessary. In situations where the delay necessary to obtain a review by the IRT would likely result in damage to the environment, or risk to human health or safety, or the loss or destruction of evidence, COs may commence the investigation immediately.

### **6.0.3 Use of the Non-Compliance Decision Matrix**

Irrespective of whether an investigation is subject to the IRP, ministry staff are still expected to use the Non-Compliance Decision Matrix to guide their assessment of the regulatory non-compliance. If COs need additional guidance or advice on addressing an issue of non-compliance, they may choose to refer the matter through the Investigation Review Team (IRT) even if it is not subject to the IRP.

### **6.0.4 Communications with the Program Area during an Investigation**

Where an alternative approach to proceeding with charges is being considered during the course of an investigation, the investigating officer and program staff must discuss the options and reach consensus regarding proceeding with an alternative approach prior to discussing the alternative approach with the regulated party under investigation.

### **6.0.5 Involvement of the Major Investigations Branch (MIU)**

Program staff do not refer investigations directly to the MIU; the decision to engage the MIU in an investigation is made internally by COS Sergeants or Inspectors (during the IRP discussions).

## **6.1 Procedure**

*The steps described below correspond with the numbered steps in Figure 2 on page 33.*

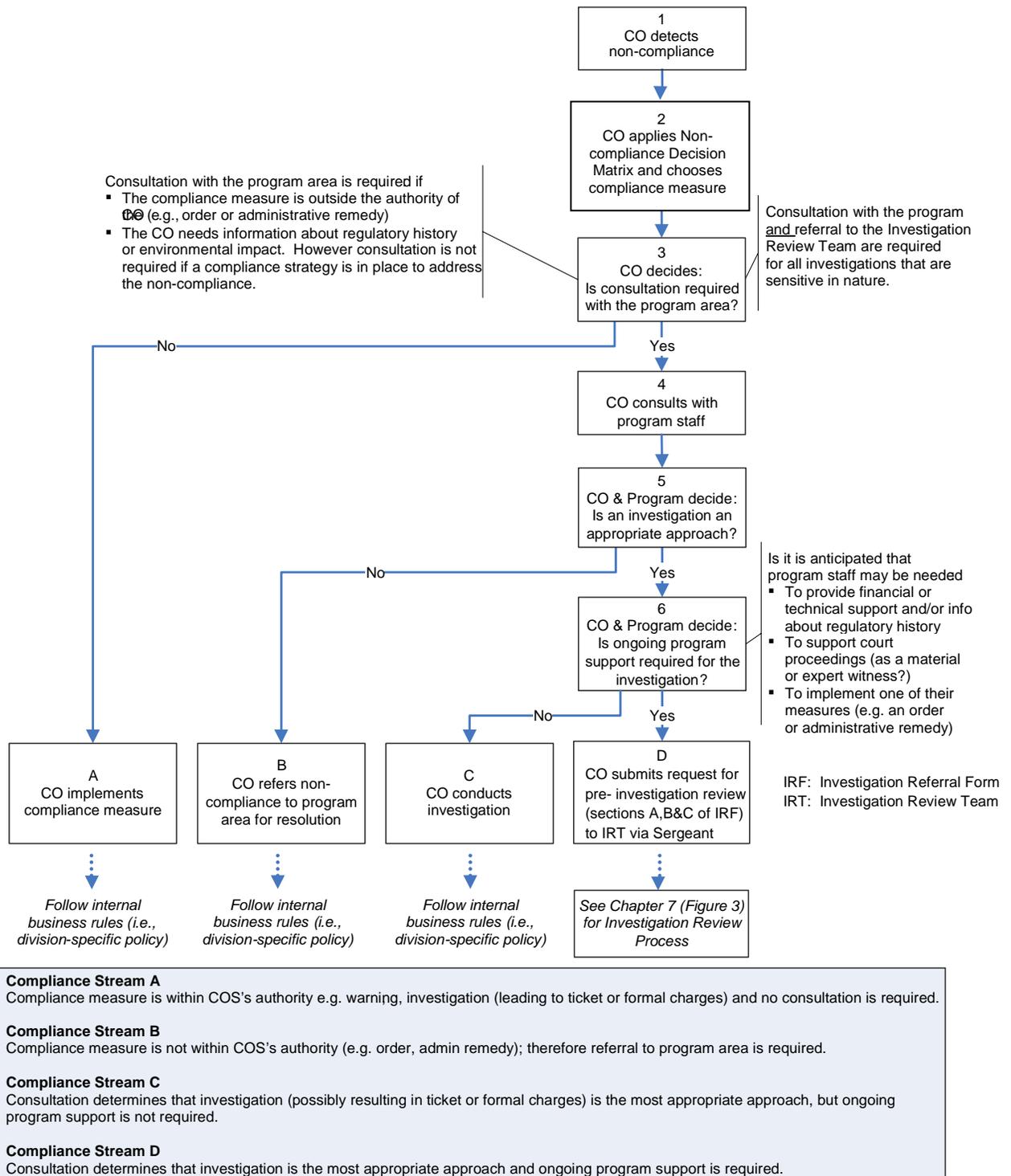
1. COs may detect the non-compliance in the course of their work, or it may be reported to them by a member of the public or another regulatory agency.
2. The CO will use the Non-Compliance Decision Matrix to assess the non-compliance and select a compliance measure. (See Chapter 4 for guidance in using the matrix.)
3. Irrespective of the compliance measure chosen, the CO will determine if consultation with the program area is required. Consultation is required if:
  - the compliance measure selected from the matrix is outside the CO's authority (e.g., Pollution Abatement Order, Administrative Sanction or Administrative Monetary Penalty); and/or
  - the CO needs history about the regulated party and/or technical expertise about the environmental, human health and/or safety impacts of the non-compliance. However, consultation is not required if a compliance strategy is in place to address the non-compliance.

Regulatory history means there is a substantial likelihood that there is an ongoing relationship between the person/business and the ministry related to permit/license/regulatory administration or a compliance inspection regime.

Environmental impacts requiring consultation would include situations where environmental values (e.g. fish, wildlife, habitat) are unknown or have not been pre-determined, and/or where an expert witness would be required to confirm environmental impacts.

Essentially, the test here is to anticipate whether the investigation needs a cross-divisional or cross- agency, collaborative approach to be successfully completed.

**Figure 2: Procedure for responding to non-compliance  
Conservation Officer Service**



A detailed explanation of each of these steps begins on page 32.

Consultation with the program area and referral to the Investigation Review Team (IRT) is required for all investigations that are sensitive in nature. A sensitive investigation is one that involves an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties. Referrals to the IRT are made following the procedure for Compliance Stream D.

*If consultation is not required* ⇒ **Compliance Stream A**

- The CO will enter an occurrence in COORS.
- The CO will implement the most appropriate tool for achieving compliance, following internal business rules. Responses may include issuing a warning or conducting an investigation. (See Chapter 3 for further information about these measures.)

- End of procedure -

**4. If consultation is required,** the CO will contact program staff in the appropriate program role and geographic area and provide background relating to the non-compliance. (If unsure who the appropriate staff member is, contact the Section Head in the geographic area in which the non-compliance occurred).

⌚ If consultation cannot be done immediately, the CO must contact program staff within 5 business days of detecting the non-compliance to establish:

- A process and timeline for consultation; or
- A mutually-agreeable date for initiating discussions about the process and timelines for consultation.

Ideally, consultation should be in a form that permits dialogue on the nature and complexity of the issue (e.g., phone call or in-person), with the objectives being to:

- Obtain clarity on the facts to ensure that both the CO and program staff have the same understanding of the non-compliance;
- Discuss the likelihood of achieving compliance and the degree of environmental impact, and come to an agreement on where the non-compliance fits on the Non-Compliance Decision Matrix; and
- Review the compliance history, including what actions have been taken to date, and discuss next steps. Due diligence and officially-induced error should form part of this discussion.

**Note:** it is expected that the recipient of a request to consult (i.e. received by phone message or email) will acknowledge the request promptly even if current operational priorities prohibit action on the file at that time. Responding to non-compliance is a priority for all staff; as well, a timely response contributes to building or maintaining effective working relationships within the ministry and/or with partner agencies. Early communication between an investigator and technical program staff can affect whether an investigation proceeds, in accordance with specific actions taken or not taken when the non-compliance is first detected.

5. The CO and program staff will decide whether an investigation is the most appropriate approach to address the non-compliance. If consensus cannot be reached, the matter must be raised to the COS Sergeant and program Section Head for resolution.

*If consultation determines that an investigation is not warranted* ⇒ **Compliance Stream B**

- The CO will refer the non-compliance to the program area by forwarding an occurrence report to the Section Head.
- Program staff will implement the most appropriate tool for achieving compliance, following division-specific policy. Measures may include issuance of an advisory, warning, order, administrative sanction or administrative monetary penalty and/or referral to another agency. (See Chapter 3 for further information about these measures.)

- End of procedure -

6. *If consultation determines that an investigation is warranted*, the CO will determine

- i. *in consultation with program staff* – is ongoing program support required to support the investigation? This would apply if it is anticipated that program staff may be needed:
- to provide financial or human resources;
  - to provide technical or scientific advice;
  - to implement a complementary program-specific compliance measure (e.g., an order); and/or
  - to support other administrative or prosecutorial enforcement proceedings (e.g. through material or expert witness testimony).

and

- ii. *in consultation with the COS Sergeant* – does the local zone office have the capacity, skills or experience to undertake the investigation, or should it be referred to the Major Investigations Unit?

*If consultation determines that an investigation is warranted, but the investigation is not sensitive in nature nor requires ongoing program support or referral to MIU* ⇒ **Compliance Stream C**

The CO will conduct the investigation and record the result in COORS, in accordance with internal business rules.

- End of procedure -

*If consultation determines that an investigation is warranted and the investigation is sensitive in nature and/or it requires ongoing program support* ⇒ **Compliance Stream D**

- This investigation is subject to the Investigation Review Process (IRP). The CO will refer the investigation to the IRT by completing sections A-C of the Non-Compliance Form.

- Continue to Chapter 7 for guidance about the IRP -

## 6.2 Frequently Asked Questions

### 6.2.1 What do I do if I encounter a non-compliance that requires immediate investigation?

Take immediate action! This policy is not intended to impair the ability of ministry staff to take immediate investigative action when necessary. In situations where the delay necessary to obtain a review by the IRT would likely result in damage to the environment, or risk to human health or safety, or the loss or destruction of evidence, COs may commence the investigation immediately.

### 6.2.2 What if we don't think consultation is necessary at the start of an investigation, but find out mid-way that it is?

Always begin the consultation process when you first identify the need for it, even if this is mid-way through an investigation. Return to step 4 in Figure 2 and follow the procedure from that point.

### 6.2.3 What if it isn't clear who "detected" the non-compliance (as noted in step 1)? In that case, who is responsible for completing the Investigation Referral Form to initiate the IRP?

In general, the person who holds the majority of information about the case (or has the primary relationship with the party) is the person who should assume the role of "initiator" and take responsibility for completing the Investigation Referral Form. Of course, this may not be clear in all cases and the unique circumstances of each case will need to be considered in making this determination. In some cases more than one program could be involved in the initial response to non-compliance (e.g. a spill at a regulated site could involve both an Environmental Emergency Response Officer (EERO) and Environmental Management or Integrated Pesticide Management staff) and a conversation between them may be necessary to collectively agree on who completes the IRF.

Uncertainty about "ownership" of a non-compliance should never delay or prevent the submission of a request for investigation. The requirements for the Investigation Referral Form have been kept to the barest minimum possible. Any incidents of non-compliance that are determined to be subject to the IRP should be significant enough to justify your time spent on completing the form.

### 6.2.4 How do tickets fit into this process?

Using Figure 2: Procedure for responding to incidents of non-compliance- COS on page 32, tickets will be dealt with in one of three ways:

#### Compliance Stream A

A CO may issue a ticket without consulting the program area in cases where the CO determines that:

- no information regarding regulatory history and/or environmental impact is required from the program area; or
- there is a relevant compliance strategy already in place (i.e., program areas have provided specific written guidance on dealing with these non-compliances).

#### Compliance Stream C

Following initial consultation with the program area and agreement that an investigation is warranted, but that **ongoing program support is not needed** - a CO may proceed with an investigation and issue a ticket, pursue alternative approaches or take no further action.

### Compliance Stream D

Following initial consultation with the program area and agreement that an investigation is warranted, and agreement that **ongoing program support is needed** - the investigation would be subject to the IRP. If at the post-investigation review, the investigative team recommends a ticket as the most appropriate compliance measure, and the IRT/RMT supports this recommendation, then a ticket would be issued.

Refer to Figure 2 on page 33 for more information about the compliance streams.

#### **6.2.5 Do we need to consult with the program area in all cases where the ministry has a regulatory relationship with the person/business?**

No, consultation is not required in every case, just when there is a substantial likelihood of an ongoing regulatory relationship. For example:

- *Environmental Management Act* authorizations – these are many and varied. Schedules 1 and 2 of the *Waste Discharge Regulation* set out which activities are regulated under specific types of authorizations, including permits, approvals, regulations, and codes of practice. It is likely that there is an ongoing relationship with the regulated party for at least permits and approvals. Those entities regulated by either regulation and codes of practice may have an ongoing relationship with EP, at least in the context of there being some past compliance assessment. In addition to these general principles, any party presently under pollution prevention, pollution abatement or information orders may be considered to have an ongoing relationship with EP.
- A heliski company that holds a Park Use Permit, Crown Lands Recreation tenure, and is currently under an Environmental Management Act Pollution Prevention Order. The heliski operator may have had non-compliances associated with one or more of these sets of requirements.

# Chapter 7: Investigation Review Process – *Investigative Review Teams*

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## Purpose of this Chapter

1. To provide guidance to program area Section Heads and COS Sergeants in conducting pre and post investigation reviews as part of an Investigation Review Team.
  2. To ensure a common understanding by ministry staff of the process for and objectives of the Investigative Review Process.
  3. To provide clarity on when and how to use the Investigation Referral Form.
- 

## Introduction

The purpose of the Investigation Review Process (IRP) is to ensure that cross-divisional collaboration occurs for all investigations in which the COS requires ongoing support from a program area and/or that are sensitive in nature (see Compliance Stream D, page 24 and 33). These investigations are typically the most complex, resource-intensive and high-profile investigations undertaken by the ministry. Management review, in the form of the IRP, is needed to ensure that consultation between the COS and program area(s) occurs and that the investigations are in keeping with ministry priorities, as well as human and financial resource capacity. In cases where the investigation team is considering the use of one of the ministry's newer enforcement tools such as Community Environmental Justice Forums or administrative monetary penalties, approval is required by the CO Inspector or Regional Director. This is a transitional requirement, necessary only until the ministry develops capacity to fully utilize these new tools.

**The Investigation Review Process** ensures program and enforcement staff effectively communicate when undertaking complex, resource-intensive or sensitive investigations.

This chapter outlines the procedure for investigation reviews conducted by an Investigation Review Team (IRT). The IRT is comprised of the COS Sergeant and the Section Head from the affected program area(s), all from the same geographic area in which the non-compliance occurred. All incidents of non-compliance that fall into Compliance Stream D must be submitted to the IRT for a **pre investigation review**. If the IRT supports the investigation, it may also conduct a post investigation review to ensure that the investigative team selected the most appropriate compliance approach (see page 41 for the objectives of the pre and post investigation reviews and the role of the IRT in these reviews.) The **post investigation review** may be an informal or more formal discussion depending on the circumstances of the investigation and the degree of consensus between the program and COS on the appropriate enforcement response.

The IRT refers requests for investigation to the Regional Management Team (RMT) in cases where it cannot reach consensus, it is unable to resource the investigation and/or the investigation is sensitive in nature. Chapter 8 outlines the process for investigation reviews conducted by the RMT.

A **team debrief** is required for all significant IRP files. This session, which could range from a 20 minute conference call to a full day meeting, gives the investigation team an opportunity to reflect on the process and outcomes in order to both acknowledge successes and address any operational challenges.

## **7.0 Application**

### **7.0.1 Use of the Investigation Referral Form (IRF)**

The electronic IRF is used:

- By ENV program areas when
  - referring a file to the COS for potential investigative action (not an IRP file); or
  - requesting a pre-investigation review by the IRT or RMT (IRP files)
- By the COS when
  - initiating a pre-investigation review by the IRT or RMT
- By other partner agencies (e.g. FLNR, OGC) when
  - referring a file to COS for investigation

*Note:* This form is not typically used by the COS to refer incidents of non-compliance to a program area for potential response. Some regions use an occurrence report for that purpose.

The IRF is located on the Investigation Review Process homepage on the COS SharePoint. Access to this restricted site is granted by COS HQ, Victoria.

### **7.0.2 Exigent/Urgent Circumstances**

This policy is not intended to impair the discretion of ministry staff to take immediate investigative action when necessary. In situations where the delay necessary to obtain a review by the IRT would likely result in damage to the environment, or risk to human health or safety, or the loss or destruction of evidence, ministry staff may request the involvement of an appropriate ministry investigator, or commence the investigation immediately if they are qualified to do so.

### **7.0.3 Independence of Statutory Decision Makers**

Nothing in this policy restricts the discretion and autonomy exercised by ministry Statutory Decision Makers. The IRT and RMT provide a collaborative cross-divisional review of investigations. As a result of those deliberations, the IRT or RMT may recommend that an order or administrative remedy is an appropriate response to the non-compliance. This recommendation is not binding on the Statutory Decision Maker. In accordance with the principles of administrative fairness, it may be necessary to refer the adjudication of an administrative sanction to a Statutory Decision Maker who was not involved in the IRT/RMT deliberations.

### **7.0.4 Special or Covert Operations**

“Special” or “covert” investigations are undertaken by the COS when traditional investigative techniques have failed, or are unlikely to succeed (e.g., trafficking in wildlife), or the urgency of the situation is such that immediate use of this investigative technique is necessary. Due to the sensitive nature of these types of investigations and the risk to officer safety if the offender discovered the true identity of the officer, the dissemination of information regarding these investigations is closely guarded and not discussed outside of the COS. However, the principles within the C&E Policy regarding whether an investigation is required are applied when decisions regarding conducting a “special or covert” investigation are made.

### **7.0.5 Alternative Compliance Measures**

During the course of an investigation, alternative remedies to prosecutorial action may be identified as suitable means to achieving compliance. Therefore, in assessing the results of an investigation, the Non-Compliance Decision Matrix continues to provide guidance in considering the full range of compliance tools. Staff are encouraged to consider alternative responses and may seek guidance from the IRT where those measures involve considerable ministry oversight, i.e. extensive remediation or mitigation plans.

## Investigation Review Process

The purpose of the Investigation Review Process (IRP) is to ensure that cross-divisional, or cross-agency (as required) collaboration occurs for all investigations in which the COS requires ongoing support from a program area to provide knowledge about the alleged offender's regulatory history and/or the extent of the environmental, human health or safety impact.

### Purpose of the PRE-INVESTIGATION REVIEW

To ensure that:

- Staff in the program areas responsible for protecting environmental values and enforcement officers in the Conservation Officer Service consult when determining the need for an investigation.
- Decisions to undertake investigations subject to the IRP are guided by consideration of the priorities of the ministry, as well as the ministry's human and financial resource capacity.

### Role of the INVESTIGATION REVIEW TEAM (IRT)

To review staff decisions to investigate to ensure:

- There has been careful and thorough consideration of the compliance history and complete disclosure of the regulator's previous contact with the regulated party;
- The alleged offence falls within the scope of the ministry's responsibilities or whether it should be referred to another agency such as the FLNR, RCMP or Department of Fisheries and Oceans;
- Consistency with priorities articulated by ministry programs; and
- Adequate resources (financial and human) are available and assigned to undertake the investigation (i.e., estimation of person hours required, as well as legal sampling and analysis costs).

### Purpose of the POST-INVESTIGATION REVIEW

To ensure that the most appropriate compliance approach is selected at the conclusion of an investigation to ensure:

- A high likelihood of ongoing compliance;
- Remediation/mitigation approaches are implemented (where appropriate);
- Public interest is satisfied; and
- General and specific deterrence objectives are met.

### Role of the INVESTIGATION REVIEW TEAM (IRT)

To review the investigative findings and recommendation(s) to ensure that the investigative team considered:

- The full suite of compliance alternatives and selected an appropriate approach to achieving compliance; and
- The need to achieve general deterrence, if that is concluded to be necessary.

**NOTE:** In cases where the investigator and program staff communicate throughout the investigation an informal post-investigation 'check-in' may be all that is required prior to commencing with the enforcement response. A more deliberate IRT discussion is required when the choice of enforcement tool is not apparent or where factors such as resourcing must be considered. In either case, a formal 'post mortem' **team debrief** on every IRP file is required for the benefit of organizational learning and continuous improvement.

In addition to these considerations, the Regional Management Team (RMT) is responsible for conducting pre and post investigation reviews if:

- Members of the IRT cannot reach consensus about the need for an investigation or the most appropriate approach;
- The IRT cannot resource the investigation; and/or
- The investigation is sensitive in nature (i.e., it involves an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties).

## 7.1 Procedure

The steps described below correspond with the numbered steps in Figure 3 on page 42.

1. **See Compliance Stream D, page 23 and 32:** Request for investigation referred to the IRT by program staff or CO using the electronic Investigation Referral Form (IRF).
2. **If the program Section Head received the request for investigation,** the Section Head will convene the IRT by contacting the COS Sergeant in the geographic region in which the non-compliance occurred.

**If the COS Sergeant received the request for investigation,** the COS Sergeant will convene the IRT by contacting the applicable program Section Head(s) in the geographic region in which the non-compliance occurred.

The COS Sergeant will determine if consultation with the Major Investigations Unit is required. Consultation is required if the zone does not have the capacity, experience or expertise to undertake the investigation. If this is the case, both the Inspector, Operations and the Inspector, MIU will participate in the pre-investigation review.

**The IRT will conduct a pre investigation review** to consider the request for investigation. The IRT will consider whether:

- There has been careful and thorough consideration of the compliance history and complete disclosure of the regulator's previous contact with the regulated party;
- The alleged offence falls within the scope of the ministry's responsibilities or whether it should be referred to another agency such as FLNR, the RCMP or DFO;
- Proceeding with an investigation is consistent with priorities established by ministry divisions; and
- Adequate resources (financial and human) are available and assigned to undertake the investigation (e.g., estimation of person hours required, as well as legal sampling and analysis costs).

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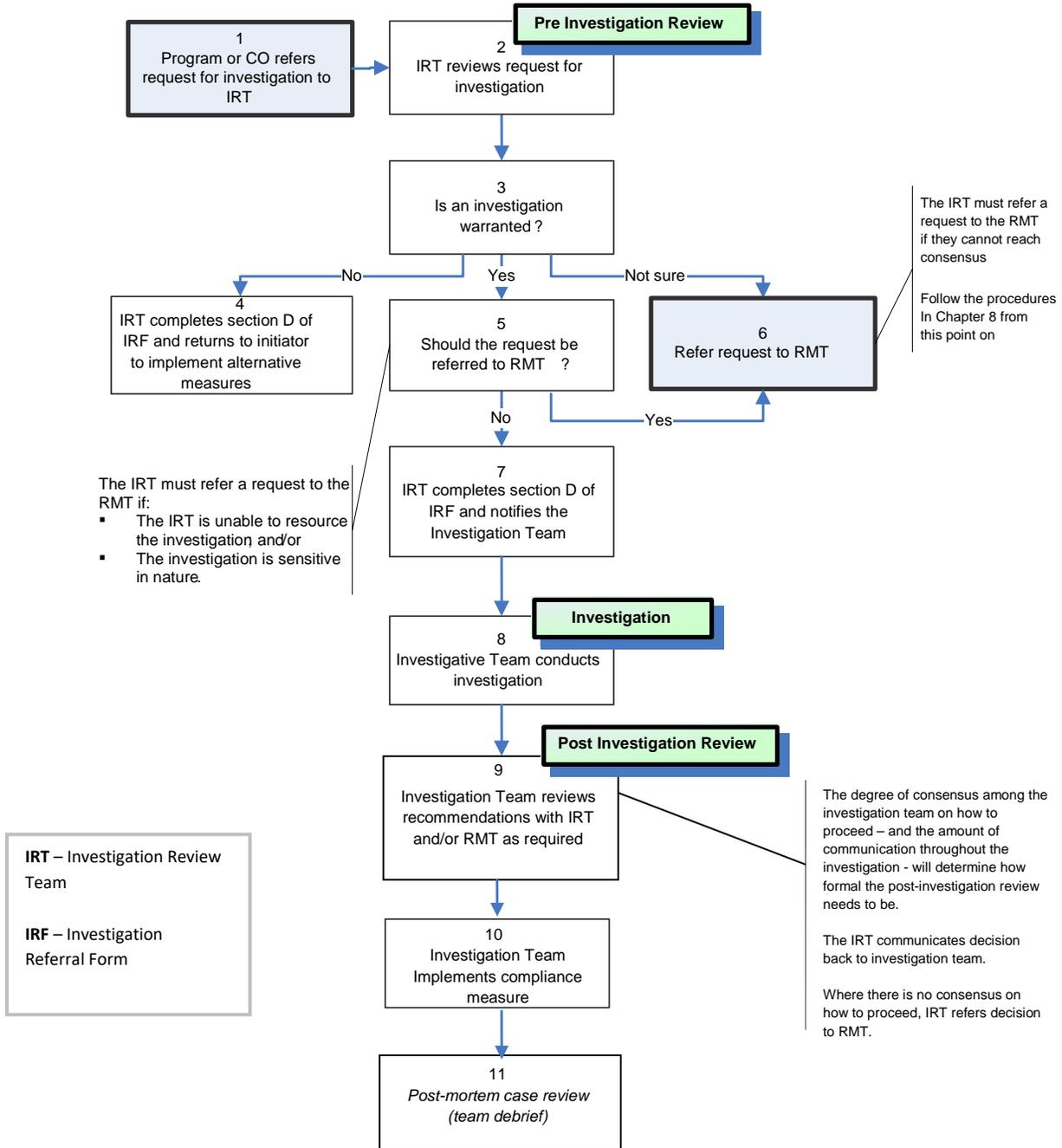
⌚ The IRT must conduct a pre investigation review and make a decision within 15 working days of receiving the IRF unless extended by mutual agreement of IRT members.

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The pre investigation review **must** be held verbally (i.e., conference call or in-person), and key team members should be invited to participate. The reason for holding this review verbally rather than electronically is two-fold:

- to ensure that members of the IRT have a clear understanding and thorough discussion of the case; and
- to reduce the risk of written information that is either inaccurate or speculative from being disclosed in a court proceeding and/or under the provisions of the *Freedom of Information and Protection of Privacy Act*, and thereby damaging the outcome of the court case.

**Figure 3: Investigation Review Process**  
*Reviews conducted by the Investigation Review Team*



A detailed explanation of each of these steps begins on page 41.

The IRT will decide whether an investigation is the most appropriate approach to address the non-compliance. **If the IRT cannot reach consensus on whether an investigation is warranted**, the COS Sergeant records the lack of consensus in Section D of the IRF– *Is this Investigation Supported by the IRT* - and emails the link to the form to the COS Inspector to consult with the Regional Management Team (RMT).

4. ***If the IRT decides that an investigation is not warranted***, the COS Sergeant will record the decision in section D of the Investigation Referral Form (IRF) – *Is this Investigation Supported by the IRT* - and notifies the initiator to implement an alternative compliance measure. Depending on the circumstances of the case and the chosen measure, either program staff or the COS will implement the measure. Measures may include issuance of an advisory, warning, order, administrative sanction or penalty or referral to another agency. (See Chapter 3 for further information about these measures.)

Each member of the IRT will advise relevant parties within their division of the IRT’s decision and rationale for not supporting the request for investigation.

5. ***If the IRT decides that an investigation is warranted***, the IRT will consider whether the request should be referred to the RMT. The IRT must refer the request to the RMT if:
  - The IRT is unable to resource the investigation; and/or
  - The investigation is sensitive in nature (i.e., it involves an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties).
6. ***If the IRT must refer the request to the RMT***, the COS Sergeant will indicate referral is ‘Required’ in section E of the IRF and email the form to the COS Inspector.

Go to Chapter 8 and from this point on, follow the procedure outlined on page 47.

7. ***If the IRT does not need to refer the request to the RMT***, the COS Sergeant will:
  - Complete section D of the IRF, indicating the IRT’s support for the investigation and the resources assigned by the IRT for the investigation; and
  - Notify the lead investigator (COS).

Each member of the IRT will advise relevant parties within their division of the IRT’s decision to support the request for investigation.

8. ***The Investigative Team will conduct the investigation.***

The lead investigator (COS) will consult with program staff on the investigation team through the investigation and help to formulate the recommended response. All pertinent conversations will be documented in the enforcement file.

9. **The post-investigation review** provides an opportunity for the investigation team to review the result of an investigation and to confirm the most appropriate enforcement response. In some cases, such as where an investigation is straightforward or where there has been regular communication among the investigation team throughout, the post-investigation review may be a less formal 'check-in'. In cases where the team does not agree on the response, or where there is a resourcing or capacity question – e.g. a Community Environmental Justice Forum is deemed an appropriate way to proceed but requires the assignment of a ministry facilitator - a more formal review with the members of the IRT (and possibly RMT) is required.

The COS Sergeant will arrange the post investigation review with the members of the IRT. These reviews **must** be held verbally (i.e. conference call or in-person), and key team members should be invited to participate. The IRT will review the investigative team's recommended compliance measure. Rather than reviewing details of the procedural aspects of the investigation (e.g., how evidence was collected or how much sampling was done), the IRT should focus on whether the investigative team considered:

- The full suite of compliance alternatives and selected an appropriate approach to achieving compliance; and
- The need to achieve general deterrence, if that is concluded to be necessary.

If the IRT cannot reach consensus as to the most appropriate compliance measure, the COS Sergeant (on behalf of the IRT) will refer the matter to the RMT.

**All pertinent decisions or elements of the IRT post-investigation review conversation at this point should be recorded in the COORS investigation file.**

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⌚ When the IRT conducts a formal post investigation review to decide whether to support the investigative team's recommendation(s), a decision must be communicated to the investigation team within 15 working days of receiving the referral, unless the timeframe is extended by mutual agreement of IRT members.

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The IRT members will notify all relevant parties within their division of the final outcome, including those who initiated the investigation if they were not part of the investigative team.

10. The investigative team will implement the compliance measure.  
Where the decision is to proceed with the recommendation of charges to Crown Counsel, the lead investigator will update the investigative team and IRT members electronically as the case moves through the various stages of prosecution.
11. **A post-mortem case review** is recommended at the conclusion of all IRP files. This debrief brings together members of the investigation team and their supervisors (IRT, possibly RMT) to reflect on what worked well and what could be improved upon. This is a valuable exercise not only for continuous learning and improvement, but also to acknowledge the commitment and contributions of staff, irrespective of the outcome of the file. Considering the ministry's investment of resources in IRP files – the most sensitive or complex cases - taking an hour or two

to debrief is time well spent. These meetings may be organized, facilitated and documented by the Compliance Policy & Planning Section, Strategic Policy Division.

## **7.2 Frequently Asked Questions**

### **7.2.1 What is the reason for the post investigation review? Is the ministry trying to reduce the number of cases forwarded to Crown Counsel?**

Absolutely not. The role of the IRT/RMT at a post investigation review is to ensure that the investigative team considered the full suite of compliance measures and selected the most appropriate approach for achieving compliance. The IRT/RMT will always support a prosecution response for those cases where alternative compliance efforts are not appropriate or will not achieve the desired outcome.

What is important to recognize is that although prosecution is the most serious enforcement action that can be taken, it is not always feasible or the most effective in bringing about compliance. Each case must be assessed on its own merits to determine the most appropriate and effective response.

### **7.2.2 What is a “sensitive” investigation? Why are these cases automatically subject to the IRP?**

Sensitive investigations involve “an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties”. Any investigations that meet these criteria, regardless of whether they require cross-divisional collaboration, are subject to the IRP and review by the RMT.

Sensitive investigations are subject to the IRP because there are often additional considerations or processes that the ministry must apply in such cases. For example, when dealing with an aboriginal person asserting aboriginal rights, the ministry may need to contact the Ministry of Justice to determine the merits in proceeding with an investigation. In the case of other government agencies, it may not be in the public interest (and public support may not exist) for one level of government to sanction another level of government.

Note: The definition of sensitive cases is not intended to be exhaustive and may not cover all investigations that are sensitive in nature. If staff undertake an investigation that they feel is sensitive (but is not covered by this definition), they should complete a IRF and forward it to their Section Head (program area) or Sergeant (COS) for submission to the RMT.

### **7.2.3 Why is it now mandatory to have a have a post-mortem case review at the conclusion of IRP files? This seems time consuming.**

Depending on the complexity of the case or the number of parties involved, this debrief could be as short as a 30 minute conference call, or as long as a full day in-person meeting. These file debriefs are only required for IRP files – those investigations involving both enforcement and program staff where the ministry has invested the most time and resources. Taking time to review and evaluate the approach taken and the outcomes of the investigation is valuable for a number of reasons:

- to capture 'lessons learned';
- to engage in substantive discussion on issues that emerged during the file;
- to assist with recognizing emerging organization or sector wide patterns and trends;
- to take the opportunity to recognize the effort and commitment of individual staff involved in the investigation; and
- to highlight effective teamwork or take the time to analyze barriers to teamwork.

Because these sessions will be organized and facilitated by the Compliance Policy & Planning Section, the investment of time and effort on the part of the investigation team is not expected to be unreasonable.

# Chapter 8: Investigation Review Process - *Regional Management Teams*

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## Purpose of this Chapter

1. Provide guidance to Regional Directors and Inspectors in conducting pre and post investigation reviews as part of a Regional Management Team.
  2. Ensure a common understanding by ministry staff of the process for and objectives of the IRP.
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## Introduction

This chapter outlines the procedure for investigation reviews conducted by Regional Management Teams (RMTs). While all requests for investigation are initially submitted to an Investigation Review Team (IRT), the IRT must refer requests for investigation to the RMT in cases where it cannot reach consensus, it is unable to resource the investigation and/or the investigation is sensitive in nature.

The RMT conducts pre and post investigation reviews in the same manner as the IRT. The main difference is that the cases reviewed by the RMT are exceptional in their complexity, sensitivity and/or resource requirements and, therefore, require review by senior management. As exceptions, such investigations are also fewer in number.

The RMT is comprised of the COS Inspector and the Regional Director from the affected program area(s) (EP or PPA), all from the same geographic area in which the non-compliance occurred. Depending on the file, it may also include the Inspector, Major Investigations Unit.

## 8.0 Application

Same as for reviews conducted by the Investigation Review Team. See Chapter 7, pages 39-40.

## 8.1 Procedure

The steps described below correspond with Figure 4 on page 49.

1. **See step 6, Chapter 7, page 43:** Request for investigation referred to the RMT by the IRT.
2. The COS Inspector will convene the RMT by contacting the Regional Director(s) of the relevant divisions in the geographic region in which the non-compliance occurred.

The RMT will conduct a pre investigation review to consider the request for investigation. The RMT will consider whether:

- There has been careful and thorough consideration of the compliance history and complete disclosure of the regulator's previous contact with the regulated party;
- The alleged offence falls within the scope of the ministry's responsibilities or whether it should be referred to another agency such as FLNR, RCMP or Department of Fisheries and Oceans;

- Proceeding with the investigation is consistent with priorities established by ministry divisions; and
- Adequate resources (financial and human) are available and assigned to undertake the investigation (e.g., estimation of person hours required, as well as legal sampling and analysis costs).

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⊕ RMT must conduct a pre investigation review and make a decision within 15 working days of receiving the Investigation Referral Form (IRF). This timeframe may be extended, if necessary, upon mutual agreement of the RMT keeping in mind the importance of a timely response.

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The pre investigation review **must** be held verbally (i.e., conference call or in-person), and key team members should be invited to participate.

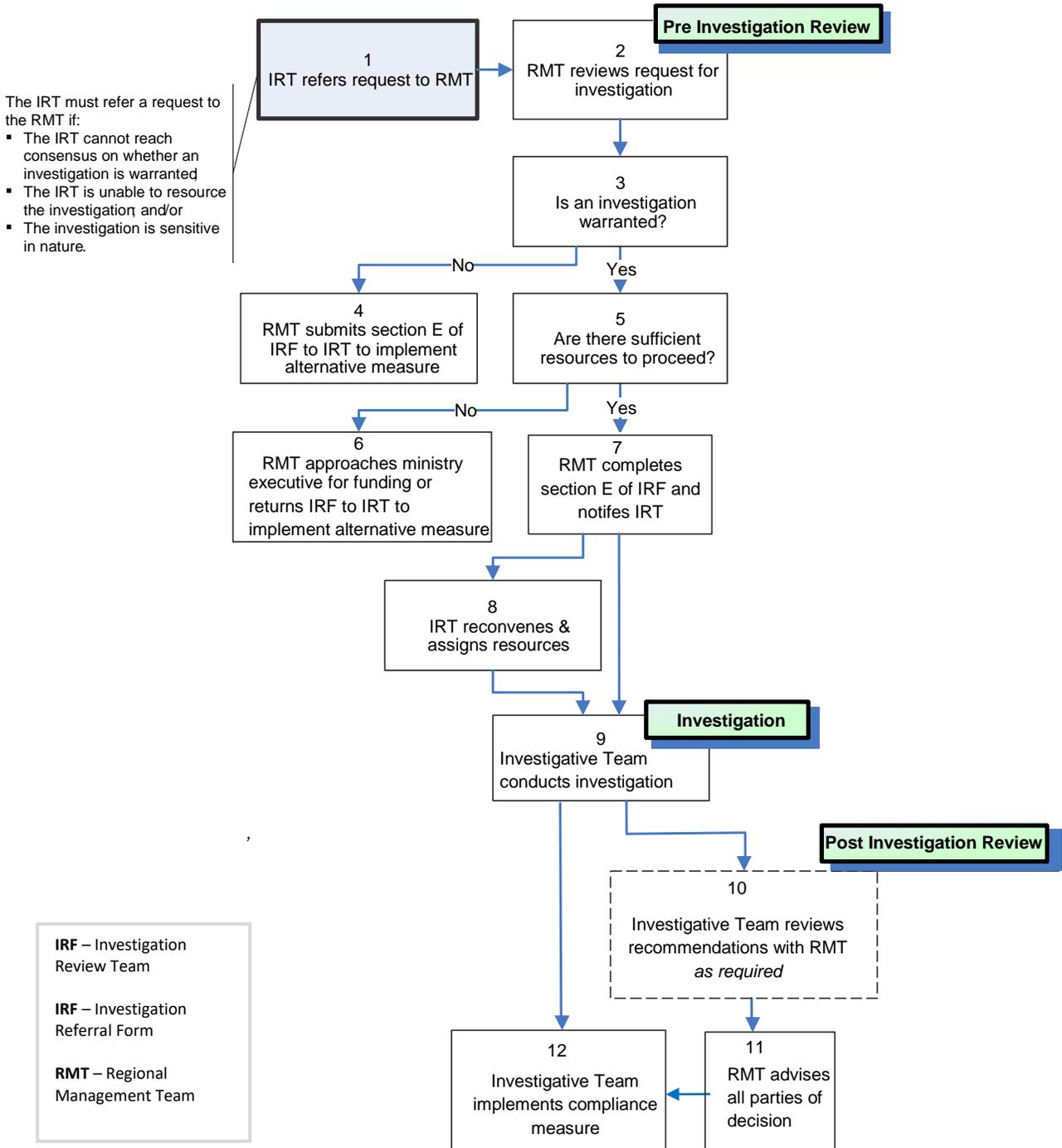
The reason for holding this review verbally rather than electronically is two-fold:

- To ensure that members of the RMT have a clear understanding and thorough discussion of the case.
  - To reduce the risk of written information that is either inaccurate or speculative from being disclosed in a court proceeding and/or under the provisions of the *Freedom of Information and Protection of Privacy Act*, and thereby damaging the outcome of the court case.
3. The RMT will decide whether the investigation is warranted. If the RMT cannot reach consensus as to whether an investigation is warranted, the COS Inspector (on behalf of the RMT) will refer the matter to the Chief Conservation Officer. The Chief CO, after consultation with the relevant Regional Director(s) of Regional Operations, will decide which measure to implement.
  4. ***If the RMT decides that an investigation is not warranted***, the COS Inspector will complete section E of the Investigation Referral Form (IRF) and RMT will notify their respective members on the IRT. The RMT may direct the IRT to undertake a specific compliance measure or it may request that the IRT determine which measure is most appropriate.

Each member of the RMT is responsible for advising other relevant parties within their division of the decision and rationale on whether or not to support the request for investigation.

5. ***If the RMT decides that an investigation is warranted***, the RMT will determine if there are sufficient resources to proceed.
6. ***If there are not sufficient resources to proceed with the investigation***, the RMT may approach ministry executive to request exceptional resources or it may return the case to the IRT to implement alternative measures.

**Figure 4: Investigation Review Process**  
*Reviews conducted by the Regional Management Team*



An explanation of each of these steps begins on page 47.

***If there are sufficient resources to proceed with the investigation***, the COS Inspector will complete section E of the IRF indicating the RMT's support of the investigation. The COS Inspector may also indicate the RMT's assignment of resources, or the RMT may return the form to the COS Sergeant for the purpose of having the IRT assign the investigative resources.

Each member of the RMT will advise relevant parties within their division of the RMT's decision to support the request for investigation.

7. If necessary, the COS Sergeant reconvenes the IRT to assign resources and notifies the lead investigator (COS).

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⌚ IRT must assign resources within five days of receiving the referral form. This timeframe may be extended, if necessary, upon mutual agreement of the IRT.

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8. The investigative team will conduct the investigation.

The lead investigator (COS) will consult with program staff on the investigation team through the investigation and to formulate the recommended response. All pertinent conversations will be documented in the enforcement file. Where the team does not agree on the response, the matter will be referred to the IRT for post-investigation review.

9. If a post-investigation review is conducted but the IRT cannot agree on the most appropriate response, the COS Inspector will arrange a post investigation review with the members of the RMT. These reviews **must** be held verbally (i.e., conference call or in-person), and key team members should be invited to participate. The RMT will review the investigative team's recommended compliance measure. Rather than reviewing details of the procedural aspects of the investigation (e.g., how evidence was collected or how much sampling was done), the RMT should focus on whether the investigative team considered:

- The full suite of compliance alternatives and selected an appropriate approach to achieving compliance; and
- The need to achieve general deterrence, if that is concluded to be necessary.

If the RMT cannot reach consensus as to the most appropriate compliance measure, the COS Inspector (on behalf of the RMT) will refer the matter to the Chief Conservation Officer. The Chief CO, after consultation with the relevant Regional Operations Director(s), will decide which measure to implement.

**All decisions of the RMT or other pertinent elements of the post-investigation review conversation at this point are recorded in the COORS investigation file.**

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⌚ When RMT conducts a post investigation review, its decision whether to support the team's recommendation must be made and communicated back to the investigation team within 15

working days of receiving the request. This timeframe may be extended, if necessary, upon mutual agreement of the RMT keeping in mind the importance of a timely response.

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10. The RMT members will notify all other relevant parties within their division of the final outcome.

11. The investigative team will implement the compliance measure.

Where the decision is to proceed with the recommendation of charges to Crown Counsel, the investigating CO will update the investigative team and RMT members electronically as the case moves through the various stages of prosecution.

## **8.2 Frequently Asked Questions**

### **8.2.1 What is a “sensitive” investigation? Why are these cases automatically subject to the IRP?**

Sensitive investigations involve “an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties”. Any investigations that meet these criteria, regardless of whether they require cross-divisional collaboration, are subject to the IRP and review by the RMCT.

Sensitive investigations are subject to the IRP because there are often additional considerations or processes that the ministry must apply in such cases. For example, when dealing with an aboriginal person asserting aboriginal rights, the ministry may need to contact the Ministry of Attorney General to determine the merits of proceeding with an investigation. In the case of other government agencies, it may not be in the public interest (and public support may not exist) for one level of government to sanction another level of government.

Note: The definition of sensitive cases is not intended to be exhaustive and may not cover all investigations that are sensitive in nature. If staff undertake an investigation that they feel is sensitive (but is not covered by this definition), they should nevertheless complete an IRF and forward it to their Section Head (program area) or Sergeant (COS) for submission to the RMT.

### **8.2.2 What is expected of RMT members when extraordinary resources are required (step 6) to fund an investigation?**

If members of the RMT agree that an investigation is warranted but are unable to resource it through their existing operating budgets, they may decide to request the additional funds from ministry executive.

### **8.2.3 What if members of the RMT disagree about how to proceed on any aspect of a case?**

See step 10. If members cannot reach consensus, the COS Inspector (on behalf of the RMT) will refer the matter to the Chief Conservation Officer. The Chief CO, after consultation with the relevant Executive Director(s) of Regional Operations, will decide how to proceed.

## Abbreviations

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**AP** – Administrative Penalty  
**C&E Policy** – Compliance and Enforcement Policy and Procedure  
**CEJF** – Community Environmental Justice Forum  
**CJF** – Community Justice Forum  
**COORS** – Conservation Officer Online Reporting System  
**COs** – Conservation Officers  
**COS** – Conservation Officer Service  
**CPP** – Compliance Policy and Planning Section (Strategic Policy Branch)  
**DFO** – Fisheries and Oceans Canada  
**ENV** – Ministry of Environment and Climate Change Strategy  
**EP** – Environmental Protection Division  
**FLNR** – Ministry of Forest, Lands, Natural Resource Operations and Rural Development  
**IRF** – Investigation Referral Form  
**IRP** – Investigation Review Process  
**IRT** – Investigation Review Team  
**MIU** – Major Investigations Unit (Provincial Investigations Branch)  
**PPA** – Parks & Protected Areas  
**RCMP** – Royal Canadian Mounted Police  
**RMT** – Regional Management Team  
**RJ** – Restorative Justice

## Definitions

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For the purposes of this policy:

**Administrative Monetary Penalty** – a financial penalty imposed by a ministry Statutory Decision Maker on a non-compliant party in accordance with legislation.

**Administrative remedy** – refers generally to an administrative (vs. prosecutorial) enforcement action that can be taken by program staff in response to a non-compliance, such as an administrative sanction (e.g. suspending a license or permit) or an administrative monetary penalty.

**Administrative sanction** - suspension, restriction or cancellation of a ministry authorization, including approvals, licences or permits.

**Advisory** - a document notifying a party that they are not in compliance with a specific regulatory requirement and that requests the non-compliance be corrected.

**Alternative Measures** – an alternative to court prosecution offered at the discretion of Crown Counsel either before or after charges have been laid. Alternative Measures are enabled in the *Criminal Code of Canada*

and can take a variety of forms, including a restorative justice forum, but will always result in a negotiated agreement between the offender and the Crown with respect to restitution for the incident. Consideration of this option by Crown occurs after the ministry has submitted a Report to Crown.

**Appearance Notice** - a form that enforcement officers can serve to an alleged offender in the field that compels them to court to answer to a charge of unlawful activity.

**Authorization** – refers to rights or privileges granted by government as authorized under legislation or regulations (e.g., licences, permits and approvals).

**Balance of Probabilities** – the standard of proof test that is required for ministry decision makers to take administrative enforcement action in response to non-compliance. This is a lower standard of proof than what is required to pursue prosecutorial action.

**Beyond a Reasonable Doubt** – a higher standard of proof test that is required to take prosecutorial action, such as issuing a violation ticket or pursuing criminal charges, where responsibility for the contravention must be proved *beyond a reasonable doubt*.

**Charge Approval** - the decision process where Crown Counsel reviews all the information and evidence submitted to them by way of a Report to Crown Counsel in order to determine if charges (can be proved and meet the public interest standard) are approved for prosecution.

**Civil Forfeiture** – a civil court proceeding used to ‘confiscate’ assets believed to be the instruments or proceeds of unlawful activity.

**Community Environmental Justice Forum (CEJF)** - a problem-solving forum that utilizes the principles of restorative justice to address environmental offences committed by regulated companies. The facilitated forum brings together the offending company, community representatives who can speak to the impact of the offence on the community and the enforcement agency to identify and agree on appropriate restitution for the incident. Although considered an administrative tool, the same standard of proof applies to test to determine if a CEJF is the same as is required for a prosecution,

**Community Justice Forums (CJF)** - a problem-solving forum that utilizes the principles of restorative justice to address environmental offences committed by individuals. The facilitated forum brings together the offender and those members of the community directly harmed by the offence (‘victims’) to mend relationships and identify appropriate restitution for the offence.

**Compliance** - conformity with regulatory requirements established by government to protect the environment, human health and safety and/or public resources.

**Compliance Measure /Tool**- broadly speaking, refers to any action taken on the part of the ministry to encourage compliance with its regulatory requirements including information exchange, education, compliance promotion activities as well as the array of enforcement responses used to compel compliance.

**Crown Counsel** - a prosecutor employed by, or on contract to, the Criminal Justice Branch of the Ministry of Justice or the Federal Department of Justice.

**Due Diligence** - taking all reasonable precautions to prevent or avoid a non-compliant incident from occurring. This standard requires that a person take all the care which a reasonable person might have been expected to take in all the circumstances or, in other words, be in no way negligent.

**Enforcement tool (administrative)** - one type of response in the array of tools that may be used to achieve compliance; it includes advisories, orders, administrative sanctions, administrative monetary penalties, and disciplinary referrals to professional associations. Decisions are based on a *balance of probability* that the non-compliance occurred and the rules of “natural justice” are applied during the decision making process.

**Enforcement tool (prosecutorial)** - one response in the array of tools that may be used to achieve compliance; it includes warnings, violation tickets and formal charges. Decisions are based on having *reasonable grounds* to believe that the non-compliance occurred and the test of *beyond a reasonable doubt* is used by the Courts to adjudicate an outcome.

**Formal Charges** - laying of charges by way of a “Form 2 Information” in front of a Justice of the Peace.

**General Deterrence** - refers to a theory of law enforcement that taking specific enforcement action against a few will deter many others from committing the same or similar non-compliance.

**Inspection** - activities undertaken to verify compliance with a regulatory requirement.

**Investigation** – involves the gathering of information and evidence relevant to a suspected non-compliance where the purpose is to build a case for possible prosecution or other enforcement response.

**Investigation Referral Form (IRF)** – the standardized electronic form used by programs to refer a file to the COS for investigation or by an investigative team to request a pre-investigation review by the Investigation Review Team. When used for the latter, the IRF is intended to secure commitment to the investigation by both the COS and the program. The IRF includes summary details of the contravention, compliance history of the alleged offender and enforcement actions taken or to be taken. *Formerly referred to as the Non-Compliance Form.*

**Investigation Review Process (IRP)** – a process for ensuring cross-divisional or cross-agency review of all investigations that require ongoing technical support from a program area and/or are sensitive in nature. The process includes pre and post investigation reviews conducted by an Investigation Review Team or a Regional Management Team.

**Investigation Review Team (IRT)** - includes the Sergeant from the Conservation Officer Service and the Section Head from the affected program area(s) in the geographic location where the non-compliance occurred. Depending on the nature of the issue, it may also include an enforcement supervisor from one or more partner agencies (FLNR, DFO, RCMP, etc.).

Note:

- For matters relating to the *Integrated Pest Management Act*, the Senior Pesticide Officer is the program area representative on the IRT.
- For matters relating to contaminated sites and land remediation under the *Environmental Management Act*, the Senior Contaminated Sites Officer, Remediation Assurance & Brownfields (Surrey) is the program area representative on the IRT.
- For matters relating to Industry Product Stewardship under the Recycling Regulation, the Section Head, Industry Product Stewardship/ Waste Prevention Section (Victoria) is the program area representative on the IRT.

**Investigative Team** – the Conservation Officer and program staff assigned by the Investigation Review Team or Regional Management Team to conduct an investigation. It may also include an enforcement officer from one or more partner agencies where an issue is of cross-agency interest or where the other agency offers a particular skill set (FLNR, DFO, RCMP, etc.).

**Non-Compliance** - failure by an individual or regulated company to meet regulatory requirements.

**Non-Compliance Decision Matrix** - a risk-based tool that guides a response to non-compliance, considering the environmental, human health and safety impacts, and the regulated party's likelihood of achieving compliance.

**Order** - a written, legal instrument issued by designated ministry officials which may be used to address non-compliance.

**Post-mortem case review** – refers to the team debrief that occurs at the conclusion of all Investigation Review Process files. This debrief brings together members of the investigation team and their supervisors to reflect on what worked well and what could be improved upon for the benefit of continuous learning and improvement, as well as to acknowledge the commitment and contributions of staff.

**Program Areas/ Staff** – within the Ministry of Environment and Climate Change Strategy include Parks and Protected Areas, Environmental Protection and Climate Action Secretariat. May also refer to Ministry of Forests, Lands, Natural Resource Operations, and Rural Development program areas (Fish & Wildlife Branch, Forests, Lands and Water) or program staff from other agencies where COS is providing enforcement services.

**Reasonable Grounds** - a set of facts or circumstances that leads one to come to a conclusion beyond that of mere suspicion.

**Regional Management Team** – for the purposes of this policy and procedures, includes the COS Inspector and the Regional Director(s) from the affected program area(s), in the geographic location in which the non-compliance occurred.

Note:

- For matters relating to contaminated sites and land remediation under the *Environmental Management Act*, the Manager, Brownfields & Remediation Assurance (Surrey) is the program area representative on the RMT.
- For matters relating to Industry Product Stewardship under the Recycling Regulation, the Manager, Waste Prevention Section (Victoria), is the program area representative on the RMT.

**Regulatory Requirements** - obligation, demand or prohibition placed by legislation or regulation on an individual, entity or activity. This includes authorizations, permits, licences or other requirements derived from a legislative or regulatory authority.

**Report to Crown Counsel** - a formal document submitted to Crown Counsel containing all the information and evidence necessary for Crown Counsel to make an informed decision on whether a charge meets the Criminal Justice Branch charging standard.

**Restorative Justice** - a recognized form of dispute resolution that views non-compliance as a violation of people and relationships and where offenders are encouraged to take responsibility for their actions in a meaningful way, by repairing the harm caused by their crime.

**Sensitive investigation** - involves an aboriginal person asserting aboriginal rights, or a government agency (e.g., municipal, regional, provincial, federal, Crown Corporation), or an employee of a government agency acting in the course of his/her normal duties.

**Ticket** - a charging document which may be used instead of “formal charges”. Generally a ticket responds to minor offences and prescribes a monetary penalty to be paid.

**Warning** - a document that notifies a party that they are not in compliance with a specific regulatory requirement and warns of escalating response should non-compliance continue.

## Appendix 1: Administration and Monitoring of the C&E Policy

The effectiveness of the *C&E Policy* relies, in part, on ongoing monitoring to ensure that the policy is being implemented as intended and that any potential enhancements are identified and addressed in a timely manner. Consistent oversight helps to ensure that the policy timelines are being achieved, consultation is occurring as required and all investigations subject to the IRP are, in fact, referred to the IRT. Similarly, there are tasks associated with the ongoing administration of the *C&E Policy* - such as training and staff support - that are also essential to its effective implementation.

### Responsibility Matrix – Administration of the Investigation Referral Form

	TASK	RESPONSIBILITY
Completion of Investigation Referral Form (IRF)	<ul style="list-style-type: none"> <li>Completion of Sections A-B (Purpose of Form &amp; Contravention Summary)</li> </ul>	Initiator - may be either program area or COS, depending on who detects the non-compliance
	<ul style="list-style-type: none"> <li>Completion of Section C (Request for Investigation Supported by COS)</li> </ul>	COS Sergeant
	<ul style="list-style-type: none"> <li>Completion of Section D – Pre-investigation Review (if required)</li> </ul>	COS Sergeant on behalf of the IRT
	<ul style="list-style-type: none"> <li>Completion of Section E - Referral to Regional Management Team (if required)</li> </ul>	COS Inspector on behalf of RMT
Storage of completed forms	<ul style="list-style-type: none"> <li>Forms are stored electronically in COS SharePoint</li> <li>Form can be downloaded as a 'pdf' and attached to COORS file.</li> </ul>	All
Maintenance of IRF and SharePoint ledger	<ul style="list-style-type: none"> <li>Granting user access rights</li> <li>Technical trouble-shooting</li> </ul>	COS SharePoint Administrator

## Responsibility Matrix - Administration of the C&E Policy

	TASK	RESPONSIBILITY
Implementation Monitoring/ trouble shooting	<ul style="list-style-type: none"> <li>• Ensuring procedures are implemented as intended</li> <li>• Enforcing timelines</li> <li>• Encouraging effective communication between parties</li> </ul>	COS and program leadership teams
Training	<ul style="list-style-type: none"> <li>• Development and maintenance of training materials</li> <li>• Ad-hoc training initiatives, as required</li> </ul>	Compliance Policy & Planning (Strategic Policy Branch)
	<ul style="list-style-type: none"> <li>• Training new employees on the C&amp;E Policy</li> </ul>	Section Heads (programs)
	<ul style="list-style-type: none"> <li>• Refresher training for staff on the C&amp;E Policy, as required</li> </ul>	Sergeants (COS)
Policy materials	<ul style="list-style-type: none"> <li>• Revisions to the C&amp;E Policy</li> <li>• Policy related materials</li> </ul>	Compliance Policy & Planning (Strategic Policy Branch)
Post-mortem case review by IRT	<ul style="list-style-type: none"> <li>• Scheduling the meetings</li> <li>• Facilitating</li> <li>• Recording outcomes</li> </ul>	Compliance Policy & Planning (Strategic Policy Branch)

# Appendix 2: Compliance & Enforcement Policy & Procedures Pull-Out

