

TITLE 39
HEALTH AND SAFETY

CHAPTER 68
INSTITUTIONAL CONTROLS PROGRAM FOR THE BUNKER HILL MINING AND METALLURGICAL
COMPLEX SUPERFUND FACILITY

39-6801. SHORT TITLE. This chapter shall be known and may be cited as the "Institutional Controls Program for the Bunker Hill Mining and Metallurgical Complex Superfund Facility Act."

[39-6801, added 2023, ch. 73, sec. 1, p. 241.]

39-6802. ESTABLISHMENT OF INSTITUTIONAL CONTROLS PROGRAM. In accordance with the comprehensive environmental response, compensation, and liability act of 1980 (CERCLA), 42 U.S.C. 9605, as amended by the superfund amendments and reauthorization act of 1986 (SARA), P.L. [99-499](#), and, to the extent practicable, the national oil and hazardous substances pollution contingency plan, 40 CFR 300, the remedial actions for the Bunker Hill superfund site are selected and documented in decision documents referred to as a record of decision (ROD) and the body of documents referred to as the administrative record. The institutional controls program (ICP) was established under the residential soils/populated areas August 30, 1991, ROD as a component of the human health remedy to maintain protective barriers to underlying contamination. As the Bunker Hill superfund site expanded, this area was referred to as operable unit (OU)-1. The ICP was incorporated into the non-populated areas for OU-2 in the September 22, 1992, ROD to focus on areas of future development, and OU-3 in the September 12, 2002, interim ROD for residential and community areas outside of OU-1 and OU-2. Institutional controls administrative area maps showing the geographic boundaries for the ICP are available to the public on the internet or through the department upon request.

[39-6802, added 2023, ch. 73, sec. 1, p. 241.]

39-6803. DEFINITIONS. As used in this chapter, unless a different meaning clearly appears from the context:

(1) "Access restrictions" means physical barriers such as fences, barricades, curbs, barrier rocks, trenches, and temporary barriers that restrict access by vehicles, pedestrians, and animals to contaminated areas.

(2) "Agricultural land" means land used for pasturing animals or for cultivation and production of agricultural crops, including conservation reserve activities.

(3) "Applicant" means any person, contractor, public utility, government, or other entity that is required to apply for an institutional controls program (ICP) permit.

(4) "Barrier" means any physical structure, material, or mechanism that acts to break the pathway between contaminants and human receptors, including but not limited to soil, crushed aggregate/gravel, asphalt and Portland cement concrete, fences, walls, floors, ceilings, access restrictions, or other structure or covering that separates contaminants from contact with people or keeps contaminants in place.

(5) "Board" means the Idaho board of environmental quality.

(6) "Building construction" means construction activity to be performed for any new structure involving disturbance of soil in excess of one (1) cubic yard.

(7) "Building renovation" means construction activity to be performed on any existing structure involving ceiling or insulation removal, work in dirt crawl spaces or basements, or disturbance of soil in basements or crawl spaces in excess of one (1) cubic yard.

(8) "Commercial property" means retail, wholesale, and commercial businesses; public and common use areas; public buildings; and undeveloped properties accessed by a maintained road or street and zoned for commercial development.

(9) "Contaminants" means soil or other material containing, or likely to contain, concentrations of lead, arsenic, or cadmium as identified in the standards for contaminant management pursuant to this chapter.

(10) "Department" means the Idaho department of environmental quality.

(11) "Designee" means the entity responsible for implementing the requirements of this chapter as identified by the department through a formal agreement.

(12) "Developed recreation areas" means commercial and public recreation areas containing constructed features such as boat ramps, picnic areas, and campgrounds outside the city limits of incorporated communities in the Coeur d'Alene river corridor as defined under ICP administrative area for OU-3. The developed recreation areas of the trail of the Coeur d'Alenes includes all constructed trail surfaces, stop and views, oases, rest stops, and trailheads, exclusive of all undeveloped areas within the trail right-of-way.

(13) "Director" means the director of the Idaho department of environmental quality.

(14) "Disposal" means the placement of contaminants into an authorized repository.

(15) "Eligible properties" means residential properties and commercial properties within the institutional controls administrative areas for OU-1 and OU-2 that were maintained properties when the ROD for the OU was established, or maintained properties in OU-3 and existing as of March 27, 2007, and requiring remediation, but not yet remediated.

(16) "Excavation" means any digging, breaching, or disruption of soil or other protective barrier, not including cultivation of agricultural lands and gardens or mining activities regulated under other state and federal programs, that may release or expose contaminants to the environment.

(17) "ICP permit" means a permit for the contaminant management authorization for projects subject to this chapter.

(18) "Infrastructure" means facilities such as trails, roads, streets, highways, and bridges; stormwater, drinking water, and wastewater systems; flood prevention systems, including dikes and levees; and utilities, including electrical power and natural gas systems.

(19) "Large project" means a project where one (1) cubic yard or more of soil containing contaminants is disturbed or removed and also includes but is not limited to infrastructure construction and maintenance; building construction, renovation, and demolition; demolition of existing buildings and construction of subdivisions and planned unit developments (PUD); construction within and maintenance of right-of-ways; and land development or any change in the use of land that may result in the release or migration of contaminants.

(20) "Mining activities" means the recovery of a mineral from mineral-bearing deposits, which includes reclamation, extraction, excavation, overburden placement, disposal of tailings resulting from processing, and disposal of mineral extraction wastes, including tailings that are the result of extraction, waste rock, and other extraction wastes uniquely associated with mining.

(21) "OU-1" means the operable unit 1 for the institutional controls administrative area designated to include the twenty-one (21) square-mile area surrounding the former smelter complex, also referred to as the "Bunker Hill box." OU-1 includes the populated areas of the Bunker Hill box.

(22) "OU-2" means the operable unit 2 for the institutional controls administrative area designated to include the twenty-one (21) square-mile area surrounding the former smelter complex, also referred to as the "Bunker Hill box." OU-2 includes the non-populated areas of the Bunker Hill box.

(23) "OU-3" means the operable unit 3 for the institutional controls administrative area designated to include areas of mining-, milling-, and smelting-related contamination in the south fork of the Coeur d'Alene river corridor from its headwaters to the confluence with the north fork of the Coeur d'Alene river and from the confluence of the north and south fork to the mouth of the river and its confluence with Coeur d'Alene lake, including adjacent floodplains, tributaries, and fill areas. The area also includes the trail of the Coeur d'Alenes inside and outside the administrative boundary, except that portion within the exterior boundaries of the Coeur d'Alene Indian reservation. The area also includes areas in the Coeur d'Alene river corridor, as defined in this subsection, outside the administrative boundary where testing has verified that contaminants related to mining, milling, and smelting have come to lie and remediation is required. This area is also referred to as the "Coeur d'Alene basin." The area does not include any area within OU-1 or OU-2 or any other area excluded under this chapter.

(24) "Owner" means any person, partnership, or corporation having ownership, title, or dominion over property for which an ICP permit is required.

(25) "Record of compliance" means the record maintained pursuant to this chapter for small projects.

(26) "Record of decision" or "ROD" means the decision document identifying the selected remedy under CERCLA.

(27) "Release" means any excavation, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, dumping, or disposing of contaminants into the environment.

(28) "Repository" means an authorized disposal location for contaminants that has been established by the department and the United States environmental protection agency.

(29) "Residential property" means property used by private individuals or families as a residence and undeveloped properties accessed by a maintained road or street and zoned for residential development.

(30) "Sensitive populations" means pregnant women and children up to twelve (12) years old.

(31) "Site" means the geographic area that includes the institutional controls administrative areas for OU-1, OU-2, and OU-3 within the Bunker Hill superfund site.

(32) "Small project" means a project where less than one (1) cubic yard of soil containing contaminants is disturbed or means interior work that is not building renovation.

(33) "Trail of the Coeur d'Alenes" means all developed recreation areas and undeveloped areas within the former Union Pacific railroad Mullan and Wallace branch right-of-way.

[39-6803, added 2023, ch. 73, sec. 1, p. 242.]

39-6804. SCOPE AND APPLICABILITY. (1) The purpose of this chapter is to ensure that ICP activities associated with excavation and grading, such as infrastructure development and maintenance; building construction and renovation; and land development, redevelopment, or modification within the institutional controls administrative areas, provide for the construction and maintenance of contaminant barriers and implementation of other contaminant management requirements to preclude the release and migration of contaminants as necessary to protect public health and the environment. It is imperative that current and future development and construction activities proceed in a manner that minimizes the release of contaminants into the environment to minimize exposure to area residents, communities, workers involved in area project work, and environmental receptors and to complement existing land use regulations and permitting processes and provide a screening process to determine whether proposed activities are subject to this chapter.

(2) It is the intent of the department to work with local governments, Idaho public health district No. 1, the United States environmental protection agency, federal land management agencies, the Coeur d'Alene Tribe, and private parties in managing contaminants within the regulated area by way of the ICP. This chapter establishes standards for barrier installation and maintenance and other contaminant management practices by:

- (a) Requiring ICP permits and requiring barriers for certain construction and excavation activities;
- (b) Licensing contractors, utilities, and government entities that may disrupt or construct barriers or otherwise disturb contaminants;
- (c) Adopting performance standards;
- (d) Inspecting for project compliance as required;
- (e) Regulating the movement and disposal of contaminants;
- (f) Making it unlawful to knowingly disrupt a barrier in a fashion likely to expose persons to contaminants;
- (g) Maintaining records of ICP activities, including a database tracking system to assist the public, lenders, and potential purchasers of property within the site;
- (h) Providing technical assistance and testing;
- (i) Providing health screening and intervention;
- (j) Ensuring a readily available repository for contaminants;
- (k) Providing materials to maintain and restore barriers for small projects;
- (l) Providing disposal containers to assist in removing contaminated soil for small projects and for transport and disposal of such soil;
- (m) Providing health and safety information and training to licensees and the public;
- (n) Providing plastic, gravel, and use of vacuums for interior projects; and
- (o) Maintaining guidelines for managing contaminants.

(3) The department may delegate its authority to implement the ICP, as defined by this chapter, to a designee with local multi-jurisdictional authority through a formal agreement.

- (4) (a) This chapter does not apply to:
- (i) Operations undertaken at the direction of, under the supervision of, and subject to inspection by the United States environmental protection agency, including directing, supervising, and inspecting project work or on lands owned or otherwise under the jurisdiction, custody, and control of the Coeur d'Alene Tribe or the federal land management agencies such as the United States department of agriculture forest service and the bureau of land management; or
 - (ii) The Union Pacific railroad or its contractors when conducting activities within the trail of the Coeur d'Alenes pursuant to the requirements of the consent decree entered August 25, 2000, by the United States district court for the district of Idaho (Case Nos. [91-0342](#) and [99-606](#)).
- (b) This chapter does not address financial liability for contaminant management resulting from a failure of a CERCLA remedy due to a natural disaster.
- (5) Contaminant management on eligible properties will not require construction of final barriers in accordance with this chapter by the owner but may require dust, erosion, and health and safety and temporary cap controls to prevent further migration onto lands of others. Applicant performed soil testing will be conducted consistent with sampling and analytic procedures developed by the department.

[39-6804, added 2023, ch. 73, sec. 1, p. 244.]

39-6805. STANDARDS FOR CONTAMINANT MANAGEMENT. (1) Except as otherwise provided in this chapter, contaminant management is required on all properties within the institutional controls administrative areas of OU-1, OU-2, and OU-3, including properties that have been remediated; properties tested and scheduled for remediation; properties not yet tested; properties with testing of deep soils (below eighteen (18) inches) by the applicant where a project may result in deep excavations; and properties with replacement and repair of remediation barriers in accordance with the remedial design report or other management activities designated for that geographic location or specific property.

(2) As necessary to protect public health and the environment, the department may impose contaminant management requirements, other than barrier installations, on projects where:

(a) For OU-1 and OU-2, soils exhibit lead concentrations in excess of three hundred fifty (350) parts per million (ppm) lead, particularly where a property has been remediated with either six (6) or twelve (12) inches of clean fill but contaminants in the three hundred fifty (350) to one thousand (1,000) ppm lead range remain below the six (6) or twelve (12) inch depth and those contaminants may be disturbed by a large or small project;

(b) For OU-1 and OU-2, any large or small project or building renovation involves the breaching or disturbance of a barrier or the disturbance or migration of contaminants exceeds one thousand (1,000) ppm lead; and

(c) For OU-3, properties testing below action levels in the top eighteen (18) inches where large or small projects may disturb contaminants below eighteen (18) inches are in excess of one thousand (1,000) ppm lead or one hundred (100) ppm arsenic.

(3) Developed recreation areas with surface soil containing lead concentrations greater than seven hundred (700) ppm lead and one hundred (100) ppm arsenic shall be capped pursuant to the applicable remedial design report or other management activities designated for that geographic location.

(4) Agricultural and undeveloped land within the institutional controls administrative area are exempt, unless excavation and grading activities such as soil transport off-site or development by the owner or his agents on these lands is likely to result in the release or migration of contaminants from these lands to adjacent nonagricultural or undeveloped areas.

(5) All barriers existing or constructed after the effective date of this chapter shall be maintained and protected to construction specifications as directed by the department. Materials used for barriers will be sampled for contaminants to ensure:

(a) For OU-1 and OU-2, that they have no earthen materials containing, on average, more than one hundred (100) ppm of lead or arsenic, nor more than five (5) ppm of cadmium, with no individual sample containing more than one hundred fifty (150) ppm of lead; and

(b) For OU-3, that soil and crushed aggregate/gravel imported for barrier material shall contain less than one hundred (100) ppm lead, thirty-five (35) ppm arsenic, and five (5) ppm cadmium based on average of backfill sampling results. No single sample of replacement materials may exceed one hundred fifty (150) ppm lead or forty-five (45) ppm arsenic.

(6) No new PUD or subdivision will be developed without contaminant management on any portion of the property that exceeds the following contaminant concentrations:

(a) For OU-1 and OU-2, average of three hundred fifty (350) ppm lead or a single lot exceeds one thousand (1,000) ppm lead; and

(b) For OU-3, one thousand (1,000) ppm lead or one hundred (100) ppm arsenic.

(7) No person may conduct, except in accordance with this chapter, any activity within the institutional controls administrative area that breaches a barrier, may breach a barrier, or disturbs the same or otherwise results in a threat to public health or the environment from the migration of contaminants through tracking on tires or vehicles, visible airborne dust, excavation, transport, disposal, renovation, demolition, or run-on or run-off from stormwater or in any other manner on properties tested and requiring remediation and on properties not yet tested within the institutional controls administrative area.

(8) Barriers are required as necessary to attain the standards described in this chapter. Construction and maintenance criteria for barriers are specified in the remedial design report designated for each applicable geographic location and are available through the department upon request.

[39-6805, added 2023, ch. 73, sec. 1, p. 245.]

39-6806. INSTITUTIONAL CONTROLS PROGRAM PERMIT APPLICATION AND ADMINISTRATION. (1) An ICP permit is required for large projects and building renovations.

(2) An ICP permit is required for a project that changes the use of a property containing contaminants. A new barrier or additional or more substantial barrier may be required unless waived by the department.

(3) A single annual ICP permit covering a specific list of projects may be obtained from the department by public utilities and government entities eligible under this chapter at the beginning of each year's construction season.

(4) To apply for an ICP permit, all applicants need to complete a form provided by the department.

(5) The department may waive certain application requirements or information, or request additional or alternative actions or information, depending on the type and extent of the project and conditions encountered. In no instance may a waiver violate the intent of this chapter or the applicable ROD for the relevant OU.

(6) Work requiring an ICP permit may not commence until an inspection has been made or waived by the department and an ICP permit has been issued.

(7) If the ICP permit involves work within any public right-of-way, the appropriate agencies shall be notified of the work by the entity receiving the ICP permit.

(8) All work governed by this chapter is subject to inspection by the department.

(a) All ICP permits granted pursuant to this chapter remain subject to other inspections and requirements prescribed by state or local governments.

(b) The applicant will notify the department within forty-eight (48) hours of completing the work, excluding weekends and holidays, and call for inspection in accordance with the terms of the ICP permit. The inspector will note approval of the work in writing and enter same in the database tracking system or note reasons for disapproval and steps that shall be taken to complete the work. Upon completion of the work to the department's satisfaction, the final approval will be noted in the database tracking system. Such entry constitutes the record of compliance for the project. The department may waive the inspection requirement.

(9) Any ICP permit may be revoked or a stop work order may be issued, without notice by the department, for noncompliance with or violation of any of the provisions of this chapter or any requirement or limitation of the ICP permit. If an ICP permit is revoked, the department shall take such steps as are necessary to eliminate any danger from contamination, including completion of work by the department. The applicant, contractor, or owner may be required to pay all costs and expenses for abatement of any danger and completion of the project, including legal fees incurred by the department to obtain compliance. The department will endeavor to provide written notice but reserves the right to act summarily to protect public health and the environment.

(10) A record of compliance for small projects that documents compliance with the performance standards established by this chapter will be entered into the database tracking system based on an inspection requested of the department by the property owner or tenant. The record of compliance signifies the property owner or tenant was informed of and provided with applicable performance standards and guidelines and materially complied with the same.

(11) Licensing for contractors, public utilities, and government entities.

(a) Any contractor working on a project requiring an ICP permit shall be licensed by the department. There will be no charge for a contractor's

license. A contractor's license will not be needed for an owner working on his own property.

(b) Any public utility or government entity, including a city, county, special purpose district, or the state of Idaho, upon a demonstration that supervisory employees have participated in training approved by the department, may receive an annual license that will allow its employees to perform excavation and grading operations without obtaining individual ICP permits. This license may be granted by the department and will require that the utility or entity comply with the standards of contaminant management and all other requirements contained in this chapter. Entities licensed under this section shall maintain a log of all excavations and grading operations on a form approved by the department. All forms shall be forwarded to the department on a schedule determined by the department. All licensees shall telephone the Shoshone county or Kootenai county one-call locating service, as appropriate, prior to any excavation or grading operation. Licenses will be renewed annually upon a showing that the utility or government entity has operated in compliance with this chapter.

(c) To obtain a license from the department, the contractor, public utility, or government entity shall participate in training approved by the department and pass an annual examination administered by the department, focusing on the reasons for and methods of controlling contaminants. Supervisors involved in activities dealing with contaminants shall participate in the training and pass information on to employees as is necessary to protect their health and safety and assure compliance with this chapter.

(d) Any contractor whose license has been revoked by the department within the past three (3) years shall, as a condition of reinstatement and maintaining the status of a licensed contractor, be bonded in the minimum amount of two thousand dollars (\$2,000). Said bond shall be at least five percent (5%) of the cost of any contract the contractor is engaged in, whichever is greater; shall be in a form approved by the department; and shall be suitable to insure payment for completion of barrier work not completed by the contractor. A cash deposit or other security acceptable to the department may be utilized in lieu of a bond. The department may establish a bonding program for all contractors, if deemed necessary to carry out the provisions of this chapter.

(e) Suspension or revocation of license.

(i) Upon a showing that a contractor, public utility, or government entity licensee has violated any provision of this chapter or has violated any other health or building code within the boundaries of the site or institutional controls administrative area, suspension or revocation of license may be imposed. Suspension may be made by the department. Revocation may be made by the director upon recommendation of the department. Notification of suspension or revocation shall be in writing. No suspension may be made for more than thirty (30) days without approval of the director. Revocation of license may be made by the director upon a showing of good cause.

(ii) Any person aggrieved by suspension or revocation of license may petition for review pursuant to section [39-107](#) (5), Idaho Code. Filing a petition for review stays the suspension or revocation,

unless the board of environmental quality makes a finding that such stay is likely to present a health risk to a person or persons.

(iii) If a license is revoked, the contractor may, upon payment of any cleanup or remediation costs related to past work, reapply for reinstatement of license after one (1) year; however, a contractor whose license has been revoked may not obtain a new license under a different corporate or partnership status until the provisions of this paragraph are satisfied.

(12) Performance of work.

(a) All work done pursuant to an ICP permit shall be completed in a neat and workmanlike manner and so scheduled as to cause the minimum interference with traffic or public use, if applicable, and a minimum dispersal of contaminants.

(b) If the work is unduly delayed by the applicant, and if the public interest reasonably so demands, the department has the authority, upon twenty-four (24) hours' written notice to the applicant, to complete the work to the extent that the barrier is restored and any hazardous material is covered or removed. The actual cost of work by the department, including legal fees plus fifteen percent (15%) as an overhead charge, shall be charged to and paid by the applicant or the owner.

(13) Approval of alternative standards. Any person seeking approval of alternative standards as described in this chapter may submit a written request for approval to the department. The request shall be accompanied by an engineering report indicating why the requesting party should be relieved of the requirement for compliance or why the requested alternate standard is appropriate. At the applicant's expense, the department may consult with its own engineer to confirm the applicability of this chapter to the proposed project. The department may approve an alternate standard where such approval does not jeopardize the public welfare or existing barriers. The decision of the department will be in writing, stating the reasons for its decision. Any person aggrieved by the department's action or inaction may petition for review pursuant to section [39-107](#) (5), Idaho Code.

(14) Owner and applicant responsibility for claims and liabilities. Both the owner and the applicant are responsible for ensuring that all requirements of this section are complied with. The applicant is responsible for all claims and liabilities arising out of work performed by the applicant under the ICP permit or arising out of the applicant's failure to perform obligations with respect to these regulations. The owner is responsible for all claims and liabilities for work done by the owner with or without an ICP permit and for work done at the direction of the owner without an ICP permit. The owner remains responsible to complete the project or to restore the premises to a safe condition to the satisfaction of the department should the applicant fail to complete or restore it.

(15) Responsibility of permit applicant. It is the responsibility of any person applying for, or required to apply for, a permit by this chapter to show affirmatively, by all reasonable means, that his undertaking complies with this chapter or with any related rules, statutes, or ordinances.

(16) Permit revocation. Any permit or permission, actual or implied, granted by the department may be revoked, for cause, by written notice sent to the permit holder or his agent. Any person, association, or corporation who continues to act under such permit or permission, actual or implied, more than ten (10) days after the sending or delivery of notice of revocation is

presumed to be in violation of this chapter and subject to the penalties provided in this section.

(17) Variances. A variance may be granted only upon an affirmative showing by an applicant that a unique and undue hardship is caused by a physical characteristic of a project site under an ICP permit that is not of the applicant's making and that approval of the variance would not be contrary to the public interest or to the purposes of this chapter.

(18) Enforcement. Failure to comply with the provisions of this chapter shall be subject to enforcement pursuant to the enforcement provisions of the Idaho environmental protection and health act in section [39-108](#), Idaho Code.

[39-6806, added 2023, ch. 73, sec. 1, p. 246.]

39-6807. INCONSISTENT LAWS -- THIS CHAPTER CONTROLS. If any provision of this chapter is inconsistent with the provisions of any other law, general, specific, or local, the provisions of this chapter control.

[39-6807, added 2023, ch. 73, sec. 1, p. 249.]

CHAPTER 69
-- [RESERVED]