



# **PROVISIONAL COVID-19 ENFORCEMENT GUIDANCE**

## **DIVISION OF ENVIRONMENTAL QUALITY**

This document contains provisional guidance on how the Division of Environmental Quality (DEQ) may respond to instances of noncompliance that are verifiably caused by the COVID-19 public health emergency. We are mindful of the health and safety of the public, our staff, and the staff of regulated entities while maintaining our vital mission to protect the environment. We are also mindful of our collective work to limit the spread of COVID-19 through safe and timely maintenance and operations of facilities that protect public health.

This guidance will apply retroactively, beginning March 17, 2020, the date of Executive Order 20-06. DEQ will assess the continued need for and scope of this temporary guidance and will update it as needed. In order to provide fair and sufficient notice, DEQ will post a notification on <http://www.adeq.state.ar.us/> at least seven days prior to terminating this temporary guidance. DEQ will consider this guidance applicable to actions or omissions that are demonstrably linked to the COVID-19 public health emergency that occur while this guidance is in effect.

The enforcement discretion described in this guidance does not apply to criminal violations or conditions of probation in criminal sentences. Enforcement discretion as provided by this guidance document shall not be afforded to negligent or reckless actors, including those who knowingly or intentionally commit environmental violations and those who violate conditions of probation in criminal sentences, as well as other such 'bad actors.' This guidance also does not apply to activities that are carried out under Superfund and Resource Conservation and Recovery Act (RCRA) Corrective Action enforcement instruments.

### **I. CIVIL VIOLATIONS**

#### **A. General Permit Conditions**

1. Entities should make every effort to comply with their environmental compliance obligations.
2. If compliance is not reasonably practicable due to COVID-19, facilities should:
  - a. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
  - b. Identify the specific nature and dates of the noncompliance;

- c. Identify how COVID-19 was the cause of the noncompliance, and the decision and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
- d. Return to compliance as soon as possible; and
- e. Document the information, action, or condition specified in a. through d. above and submit documentation to DEQ. Documentation should be submitted through your typical contact at DEQ. If you are unsure of where to submit, please contact COVID19EE@adeq.state.ar.us.

## **B. Routine Compliance and Monitoring and Reporting**

- 1. Entities should use existing procedures to report noncompliance with routine compliance monitoring<sup>1</sup>, integrity testing<sup>2</sup>, sampling<sup>3</sup>, laboratory analysis<sup>4</sup>, and reporting or certification<sup>5</sup> pursuant to an applicable permit, regulation, or statute. If no such procedure is applicable, regulated entities should report the above-listed noncompliance in accordance with Section I.A.2 above.
  - a. No Data Indicator (NODI) Code Z should be used for Discharge Monitoring Reports (DMR) that are noncompliant due to COVID-19. In this circumstance, permittees should submit a report documenting COVID-19 as the cause of noncompliance and comply with section I.A.2 above.
- 2. DEQ expects facilities to take reasonable measures to resume compliance activities as soon as possible, including conducting late monitoring or submitting late reports.
- 3. DEQ will consider exercising enforcement discretion on a case-by-case basis for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, and reporting or certification obligations in situations where DEQ agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to DEQ and notification prior to or as soon as practicable after the non-compliance is anticipated or discovered.

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<sup>1</sup> This category may include, for example, CEMS and stack tests, relative accuracy test audits, LDAR monitoring, fence line monitoring, RICE readings and monitoring, tank and piping inspections, assessments, or stormwater inspections.

<sup>2</sup> This category may include, for example, tank integrity testing for compliance with certain “good air pollution control practices.”

<sup>3</sup> This category may include, for example, effluent sampling and testing, influent sampling and testing, and cooling tower sampling.

<sup>4</sup> This category may include, for example, laboratory holding times and turn-around times.

<sup>5</sup> This category may include, for example, reports and certifications associated with delayed activities and late reports under permit or other regulatory obligations.

4. If a submission to DEQ requires a “wet” signature of a responsible official or cognizant official, DEQ will accept a digital or other electronic signature. The mere inability to obtain a “wet” signature will not be considered a justification for failure to make a paper submission or certification. For enforcement purposes, DEQ also will accept electronic submissions even if a paper original is required.

**C. Consent Administrative Order Reporting and Milestones**

1. If a regulated entity anticipates delayed reporting or milestones pursuant to a consent administrative order, the regulated entity should utilize the notice and request for delay procedures set forth in the order.
2. DEQ intends to treat routine compliance monitoring, integrity testing, sampling, laboratory analysis, and associated reporting or certification obligations in the manner described in Section I.B.3 above and will generally not seek stipulated or other penalties for noncompliance caused by COVID-19.

**D. Facility Operations**

1. DEQ expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment.
2. Facilities should contact DEQ immediately if facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment.
3. Facilities should take all measures necessary to minimize or prevent the acute or imminent threat to health or the environment from the COVID-19-caused noncompliance. Facilities should report the noncompliance to DEQ in accordance with Section I.A.2 above.
4. If a facility suffers from failure of air emission control or wastewater or waste treatment systems or other facility equipment that may result in exceedances of enforceable limitations on emissions to air, discharges to water, land disposal, or other unauthorized releases, the facility should notify DEQ immediately.

The notification should include the following:

- a. Information on the pollutants emitted, discharged, discarded, or released;
- b. The comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s); and
- c. The expected duration and timing of the exceedance(s) or releases.

5. If facility operations result in noncompliance not already addressed, regulated entities should take the steps identified in Section I.A.2. DEQ will consider the circumstances, including the COVID-19 pandemic, when determining whether enforcement response is appropriate.
6. If a facility is a generator of hazardous waste and, due to disruptions caused by the COVID-19 pandemic, is unable to transfer the waste off-site within the time periods required under the Resource Conservation and Recovery Act (RCRA) to maintain its generator status, the facility should continue to properly label and store such waste and take the steps identified in Section A.2 above. If these steps are met, as an exercise of enforcement discretion, DEQ will treat such entities to be hazardous waste generators, and not treatment, storage, and disposal facilities. In addition, as an exercise of enforcement discretion, DEQ will treat Very Small Quantity Generators and Small Quantity Generators as retaining that status, even if the amount of hazardous waste stored onsite exceeds a regulatory volume threshold due to the generator's inability to arrange for shipping of hazardous waste off of the generator's site due to the COVID-19 pandemic.

#### **E. Licensing**

1. DEQ believes that it is more important to keep experienced, trained operators on the job, even if a training or certification is missed.
2. The Director issued Emergency Order LIS 20-137 in connection with the outbreak of novel coronavirus COVID-19 in Arkansas and its impact on the licensing programs administered by DEQ's regulatory programs.

#### **II. ACCIDENTAL RELEASES**

Regulated entities are still responsible for preventing, responding to, and reporting accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants.

#### **III. CRIMINAL VIOLATIONS**

State environmental statutes generally authorize criminal penalties for knowing conduct that violates the law. DEQ will distinguish violations that facilities know are unavoidable as a result of COVID-19 restrictions from violations that are the result of an intentional disregard for the law.

#### **IV. SELF-DISCLOSURE INCENTIVE PROGRAM**

For those violations that are not covered above, regulated entities who voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of potential violations may be eligible for a reduction or elimination of any civil penalties that otherwise might apply. More information on the Self-Disclosure Incentive Policy can be found here: <https://www.adeq.state.ar.us/legal/>.