

# Alaska Pollutant Discharge Elimination System (APDES) Program Enforcement Response Guide

## **I. Purpose, Principles, and Measures**

This Guide is for the Alaska Pollutant Discharge Elimination System (APDES) compliance and enforcement officers responsible for determining the appropriate enforcement response to a specific violation of a permit and related sections of state law. This Guide serves two purposes:

1. It recommends an enforcement response that is timely and appropriate with respect to the nature and severity of the violation and the overall degree of noncompliance.
2. It ensures uniform application of enforcement response to comparable levels and types of violations.

This Guide addresses a broad range of Permit violations and is not intended to cover them all. The enforcement responses are suggested responses and reflect the enforcement actions available to the Department. The Department, when taking into consideration the elements of the Enforcement Response Guide, can elect any of the enforcement responses available under, and consistent with, state law. Strict compliance with this guidance is not necessary, as the Department maintains enforcement discretion in all cases.

The measure of the effectiveness of an enforcement response includes whether: the noncompliant facility returns to compliance as expeditiously as possible; the enforcement response establishes the appropriate deterrent effect for the particular violators and for other potential violators; and promotes fairness of government treatment among comparable violators, as well as among complying and noncomplying parties.

When making determinations on the level of the enforcement response, the technical and legal staff should consider:

- the degree of deviation from the permit condition or legal requirement,
- severity of adverse impacts or threats of adverse impacts to human health or the environment,
- the duration of the violation,
- previous actions (such as previous informal and formal enforcement actions taken against the violator and any records of previous noncompliance including public complaints, and addition of consideration),
- the deterrent effect of the response on the violator and on the similarly situated regulated community, and
- the level of intent, or evidence of knowing neglect, in the genesis of the violation towards criminal prosecution through the Environmental Crimes Unit (ECU).

## II. Timing of Enforcement Response

The Department will respond to significant noncompliance (SNC) in a timely and appropriate manner. The response should reflect the nature and severity of the SNC violation, and unless there is supportable justification, the response must require corrective action measures to return to compliance as quickly as possible. The designation of SNC can encompass a wide variety of dischargers. The corrective measures required of noncompliant facilities may be equally distinct, however, corrective measures are required to be planned/implemented as soon as possible to mitigate ongoing harm and should not wait until the existence of an enforcement action becomes known to the permittee or the conclusion of an enforcement action to begin implementation.

There is no specific timeframe established to initiate or complete an enforcement response (both formal and informal). The Department has variable timeframes for initiating enforcement responses in response to violations, some of which are immediate, like an Emergency Order in the event of immediate harm/threat to humans or environment, while others will follow the Department's general guideline is that within 60 days of identifying a violation, the appropriate response will be determined and the action initiated, or if not initiated, documented. The Department will take into consideration the appropriate formal enforcement response in those instances when noncompliance continues beyond what is considered a reasonable time.

## III. Enforcement Responses

The Department will exercise three possible levels of response to a Permit violation: no action<sup>1</sup>, informal response, or formal response. The Department must review the violation and determine the appropriate response. Refer to Table 1 for the specific observations (violations) identified and the range of response prescribed. The range of response includes the 'lowest' level of enforcement response appropriate for the violation. Certain situations, such as repeat violations from prior inspections, may warrant the use of a higher level of enforcement than outlined in Table 1. The range of response is intended to implement consistent and timely compliance actions; however, the inspectors have the most accurate information regarding the violations and the actual or potential risk associated with them. As such, Table 1 is intended to be implemented as guidance which is consistently followed, but deviations from the range of response, either towards a higher or lower-level compliance action, is acceptable with justification.

### A. NO ACTION

**Cover Letter** is used when an inspection or record review determines that the permittee is in full compliance with the requirements of their APDES permit. In such a situation, a Cover Letter is issued.

### B. INFORMAL RESPONSES

**Compliance Assistance (phone call, email, in-person, or on-site)** is used by the Department to inform a permittee of a problem and to informally request correction of a violation. Documentation of the notification and response will be saved within the Environmental Data Management System (EDMS) and taken into consideration for inclusion at subsequent inspections. Phone calls should be noted in the EDMS database record and be followed up with Compliance Letter if requested information and/or documents are not received within the specified timeframe.

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<sup>1</sup> No action response may be utilized as a discretionary option to violations – such as data entry errors.

**Compliance Letter** is a letter that notifies the permittee that a compliance matter requiring corrective action has been discovered. While all permit violations are a violation of the Alaska Statutes and potentially the Clean Water Act, some violations represent a minimal risk to human health or the environment through the frequency or nature of the violation.

**Notice of Violation (NOV)** is a letter that notifies the permittee that a serious violation requiring corrective action has been discovered. A NOV may also be issued if the permittee demonstrates recalcitrance of less serious violations if the applicant is not demonstrating action towards compliance over time. Staff are not required to issue a NOV every time a violation is observed. A NOV is not an order.

For the distinction between when to issue a Compliance Letter or a Notice of Violation, refer to Table 1. In situations where the observed violations represent a combination of situations which can be responded to in a Compliance Letter and NOV, the higher-level enforcement action should be issued. For example, if an inspector observes two violations (failure to sign an inspection report and effluent exceedances) and one is responded to as a NOV while the other may get a Compliance Letter, a NOV should be issued.

### C. FORMAL RESPONSES

**Expedited Settlement Agreement (ESA)** under AS 46.03.020 is a legally binding contract between the violator and the state to settle an action before filing a civil complaint and is generally used only when further remedial actions are unnecessary to resolve permit violations and when filing a consent decree is not warranted. An ESA is generally appropriate in situations where the economic benefit from noncompliance is minor, but the violations are severe enough to warrant a formal response.

**Settlement Agreement** under AS 46.03.020 is similar in many ways to an ESA, however, can be utilized when the civil monetary penalty will exceed the generally accepted thresholds of an ESA (such as when significant economic benefit or environmental harm occurred that requires a higher penalty be assessed for the violations), an ESA worksheet has not been developed, or where a COBC is no longer appropriate (such as the respondent no longer requires corrective actions and is in compliance with their permit). Other situations where a Settlement Agreement might be appropriate likely exist, and this is not an exhaustive list.

**Compliance Order by Consent (COBC)** or Consent Order under AS 46.03.020 is an enforceable agreement that lists the terms or conditions negotiated between the Department and the violator to resolve violations. A COBC is often used when the violator agrees to perform tasks in order to continue to operate while coming into compliance. A COBC also contains a stipulated penalty clause for missed deadlines, permit violations, or avoidable delays in correcting violations. COBCs are effective for a set number of years until they can be terminated.

**Compliance Order (CO)** under AS 46.03.850 is an administrative order that establishes steps that the violator must undertake in order to abate a violation. The compliance order is a unilateral, non-judicial enforcement tool that differs from the COBC in that it is not consensual.

**Nuisance Abatement Order** under AS 46.03.800 is an administrative order that allows the Department to require a person guilty of creating or maintaining a water nuisance to abate the nuisance. If a person neglects or refuses to follow the abatement order, the Department may charge them with a class A misdemeanor.

**Emergency Order (EO)** under AS 46.03.820 is an administrative order that temporarily abrogates the rights of the person upon whom the order is served. An Emergency Order will immediately stop an activity that presents an imminent danger to human health or welfare or that is likely to cause serious damage to natural resources or the environment.

**Permit revocation or modification** under AS 46.03.120 is an enforcement action that may be pursued instead of or in addition to other administrative remedies when appropriate. For use as an enforcement tool, staff must first consult with the Attorney General's Office (AGO) before proceeding to ensure that the permittee is given due process.

**A Civil Suit** under AS 46.03.760 is an enforcement action that causes a violator to be liable to the State for a sum to be assessed by the court. A civil action is filed by an Assistant Attorney General in consultation with the Department. There must be sufficient evidence available to prove the case in court.

**A Consent Decree** under AS 46.03.020 is a judgment enforced by the court that addresses serious civil violations and can include stipulated penalties, response actions, cost recovery provisions, and payment of damages and civil assessments by the violator. A consent decree is very similar to a COBC except that the consent decree is filed in court, and once approved by the court as an agreed upon settlement, is enforceable as a Court Order.

**Temporary Restraining Order (TRO) and Preliminary Injunction** under AS 46.03.765 are extraordinary court orders that the court modifies to specific situations that may require certain actions be taken by the defendant, standards be met, or acts not be performed during the period prior to a trial. These orders are available as part of a civil suit that is sought before trial to protect human health or the environment.

**A Criminal Complaint** will be considered where proof of a violation is very strong, there is evidence of negligence or intent, and the identity of the violator is clear. In criminal cases, fines can be assessed by the court and violators can be imprisoned. All allegations of environmental crimes are referred by the Department to the Environmental Crimes Unit (ECU). The Department's *Enforcement Manual* (October 2005) describes the procedures to refer a potential criminal action to ECU.

In situations where violations are repeat violations from prior inspections, Departmental outreach notifications (such as DMR nonreceipt or SNC status), or based on the number of violations discovered, the inspector may utilize a higher-level enforcement action if appropriate. Additionally, if the inspector discovers that a system of treatment requires significant improvements, a higher level of enforcement might be necessary, but this should be considered alongside other contextual factors (such as if the facility is rural, past compliance history, etc).

Table 1 outlines the preferred response to violations. In utilizing the table, an 'observation' describes a violation, the 'frequency' describes the number of occurrences, and the 'range of response' outlines the preferred compliance action. As stated elsewhere in this document, and Table 1 footnote 1, the Department reserves the option to deviate from the range of responses outlined below as appropriate and in consideration of extenuating circumstances to either utilize a higher or lower-level compliance action.

The inspector/enforcement officer should consult with their supervisor and the Enforcement Section Supervisor/Program Manager prior to initiating formal enforcement referrals or ECU referrals.

**Table 1**

Observation	Frequency	Range of Response <sup>2</sup>
<b>Discharge violations</b>		
Discharge without a permit	Any occurrence	Notice of Violation to Formal Enforcement
Effluent violation	Isolated or infrequent	Compliance Letter or Notice of Violation
	Frequent, non-SNC	Compliance Letter or Notice of Violation
	Frequent, SNC	Notice of Violation or Formal Enforcement
Narrative violation of Water Quality standard (ex. “no foam”, foam present)	Isolated or infrequent with no actual or potential harm	Compliance Letter
	Frequent without likely harm	Compliance Letter or Notice of Violation
	Frequent with actual or potential harm <sup>3</sup>	Notice of Violation or Formal Enforcement
Unauthorized discharge (but with an APDES permit – such as a SSO)	Any occurrence	Notice of Violation or Formal Enforcement
Grind size exceedance (see AKG521 GP Appendix G or other permit specific sampling instructions)	<10 pieces over the size limit / sampling event—infrequent	Compliance Letter
	<10 pieces over the size limit / sampling event—frequent or repeat violation	Compliance Letter or Notice of Violation
	>10 pieces over size limit / sampling event—infrequent	Compliance Letter
	>10 pieces over size limit / sampling event—excessive, frequent or repeat violation	Notice of Violation
<b>Failure to Comply</b>		
Failure to conduct routine inspection (daily, weekly, monthly, quarterly)	Isolated or infrequent	Compliance Letter
	Frequent due to lack of training, turnover, etc.	Compliance Letter or Notice of Violation
	Frequent or repeated violation (addressed in previous inspections or compliance assistance, evidence of environmental harm due to negligence, etc.)	Notice of Violation or Formal Enforcement
Failure to conduct annual routine inspection	Isolated or infrequent	Compliance Letter
	Frequent due to lack of training, turning, etc.	Compliance Letter to Notice of Violation
	Frequent or repeated violation (addressed in previous inspections or compliance assistance, evidence of environmental harm due to negligence, etc.)	Notice of Violation or Formal Enforcement

<sup>2</sup> The Department reserves the right to exercise enforcement discretion in response to an APDES Program violation, including its right to depart from the approach set out in this Enforcement Response Guide, if circumstances warrant such departure.

<sup>3</sup> It is acknowledged that Table 1 assumes that ‘actual and potential’ vs ‘without likely’ harm to human health or the environment will be subjective to interpretation but is included to allow for the distinction to be contemplated between the two categories as opposed to creating one category that can be responded to as either a Noncompliance Letter, Notice of Violation, or Formal Enforcement to aid inspector selection. The EPA itself proposes a difference within the stormwater penalty methodology:

**Table 1**

Failure to conduct inspection timely	Isolated or infrequent	Compliance Letter
	Frequent or repeat violation	Compliance Letter or Notice of Violation
Failure to conduct training	Isolated or infrequent	Compliance Letter
	Frequent or repeat violation	Compliance Letter or Notice of Violation
Failure to sign/certify plan/document	Infrequent	Compliance Letter
	Frequent due to lack of training, turnover, etc	Compliance Letter
	Frequent or repeated violation (addressed in previous inspections or compliance assistance, negligence, etc)	Notice of Violation
Failure to take timely corrective action, good housekeeping violations	Infrequent or isolated	Compliance Letter
	Infrequent or isolated, severe deficiency with potential environmental harm	Compliance Letter or Notice of Violation
	Frequent	Compliance Letter or Notice of Violation
	Frequent or repeated violation (addressed in previous inspections or compliance assistance, evidence of environmental harm due to negligence, etc)	Notice of Violation to Formal Enforcement
Failure to meet permit compliance schedules	Missed interim date <sup>4</sup>	Notice of Violation
	Missed final date <sup>3</sup>	Notice of Violation or Formal Enforcement

**Reporting Violations**

Failure to submit application for permit reissuance timely	Any occurrence	Compliance Letter or Notice of Violation
Failure to submit certification statement or failure to submit certification statement timely	Any occurrence	Compliance Letter
Failure to update permittee contact information	Any occurrence	Compliance Letter or Notice of Violation
Failure to respond to Compliance Letter or NOV timely	Any occurrence	Phone call/email, Notice of Violation, Formal Enforcement

<sup>4</sup> This is an NOV only if missing an interim date won't make the violator miss the final date. If it is likely to have implications on the final compliance date, formal enforcement may be a more appropriate response. For example: missing by 30 days or less or for reasons beyond their control may be appropriately responded to with a NOV. Missing a final date by more than 90 days is likely most appropriately responded to with formal enforcement.

**Table 1**

Failure to submit Annual Report	Inspection completed and documented, but did not submit it to DEC timely	Compliance Letter
	Infrequent or isolated	Compliance Letter
	Frequent	Notice of Violation
Failure to submit verbal or written noncompliance notification	Isolated or infrequent	Compliance Letter
	Frequent	Notice of Violation
Hold time exceedance or failure to follow 40 CFR 136 approved method	Any occurrence	Compliance Letter or Notice of Violation
Failure to sample, monitor, or report (as required by a CWA 308 Information Request, additional monitoring required by the Department, or COBC condition)	Any occurrence	Formal Enforcement or ECU Referral
Reporting false information	Evidence of negligence or tampering	ECU Referral
Late submittal of monitoring information	Isolated or infrequent	Compliance Letter
	Frequent	Compliance Letter to Notice of Violation
	Frequent due to negligence, repeated violation, etc.	Notice of Violation to Formal Enforcement
<b>Record Keeping Violations</b>		
Failure to maintain application documentation (NOI, Authorization, General/Individual Permit)	Any occurrence	Compliance Letter
Failure to maintain log (such as Grading and Stabilization Log or other similar record)	Infrequent	Compliance Letter, Notice of Violation
	Frequent or completely missing	Notice of Violation or Formal Enforcement
Failure to update plan (such as QAPP, SWPPP, BMP...)	Any occurrence	Compliance Letter, Notice of Violation

**Table 1**

Failure to develop plan (such as QAPP, SWPPP, BMP...)	Any occurrence	Notice of Violation or Formal Enforcement
Failure to maintain sample chain of custody documentation	Any occurrence	Compliance Letter, Notice of Violation
Failure to maintain (or have those records readily available upon request) other documents not addressed specifically	Any occurrence	Compliance Letter, Notice of Violation, or Formal Enforcement
<b>Divisional Data Cleanup Efforts</b>		
Divisional data cleanup efforts (such as SNC outreach) <sup>5</sup>	Any occurrence	Phone call/email, Information Requests, Records Requests

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<sup>5</sup> The Division may, from time to time, engage in outreach efforts to the regulated community to ascertain information regarding their compliance status. In this situation, the Division is not required to respond to the information obtained at the time of its receipt. For example, a permittee may be contacted regarding missing Annual Reports requesting that they be submitted. If the Division is informed that a specific Annual Report does not exist, the Division is not required to immediately respond with a Notice of Violation as outlined by Table 1. This is done to encourage constant communication with the regulated community outside regulatory inspections and to foster compliance assistance.

## 1. Acronyms

APDES	Alaska Pollutant Discharge Elimination System
BMP	Best Management Practices
COBC	Compliance Order By Consent
CWA	Clean Water Act
DMR	Discharge Monitoring Report
ECU	Environmental Crimes Unit
EDMS	Environmental Data Management System
NOV	Notice of Violation
QAPP	Quality Assurance Project Plan
SNC	Significant Noncompliance
SSO	Sanitary Sewer Overflow
SWPPP	Storm Water Pollution Prevention Plan
WOTUS	Waters of the United States