

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) Program compliance and enforcement officials responsible to determine the appropriate enforcement response to a specific violation of an APDES 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 APDES Program 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 the enforcement response 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 variance 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 enforcement actions taken against the violator, and
- the deterrent effect of the response on the violator and on the similarly situated regulated community.

II. Timing of Enforcement Response

All significant noncompliance (SNC) must be responded to in a timely and appropriate manner by the Department. The response should reflect the nature and severity of the SNC violation, and unless there is supportable justification, the response must be a formal enforcement action and/or must require a return to compliance by the permittee generally within one quarter from the date that the SNC violation is first reported on the Quarterly Noncompliance Report (QNCR). The Department is expected to take a formal enforcement action before the violation appears on the second QNCR, generally within 60 days of the first QNCR. In the instances when formal enforcement action is not taken, the Department will keep a written record that clearly justifies why the alternative action (e.g. informal enforcement or permit modification) was the more appropriate action to take.

There is no specific timeframe established to initiate and complete an enforcement response. However, the Department's general guideline is that within 45 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 an APDES Program violation: no action, informal response, or formal response. The Department must review the violation and determine the appropriate response.

A. NO ACTION

Depending on the circumstances of the violation, the Department's response may be no action necessary at this time.

B. INFORMAL RESPONSES

1. Compliance Assistance

Verbal Notification/Request (phone call) is used by the Department to inform a permittee of a problem and to informally request correction of a violation.

Compliance Letter is a letter that notifies the permittee that a compliance matter requiring corrective action has been discovered. This letter is normally used to give the responsible party an opportunity to correct the situation.

C. FORMAL RESPONSES

1. Administrative Remedies

Notice of Violation (NOV) under AS 46.03.761 is a notice to a person that documents that a violation has occurred. The majority of enforcement work starts with an NOV. Staff are not required to issue an NOV every time a violation is observed. An NOV is not an order.

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 can contain a stipulated penalty clause for missed deadlines, avoidable delays, or exceedances of interim discharge limitations.

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.

Settlement Agreement under AS 46.03.020 is a legally binding contract between the violator and the state to settle an action before or after filing a civil complaint and is generally used when further remedial actions are unnecessary to resolve a case and when filing a consent decree is not warranted.

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.

2. Civil Remedies

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.

3. Criminal Remedies

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.

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APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
Sampling, Monitoring, and Reporting			
	Failure to sample, monitor or report (routine reports, DMRs)	Isolated or infrequent (depending on circumstance)	Phone call ² Compliance Letter or Notice of Violation (NOV). Request that a report be submitted immediately
		Permittee does not respond to NOV, does not follow through on verbal or written commitments, or commits frequent violations	Consider Compliance Order by Consent (COBC) or Compliance Order (CO), depending on circumstance ³ Judicial action if failure to comply with COBC or CO Consider criminal prosecution
	Failure to sample, monitor, or report [CWA §308 request; 18 AAC 83.405(i); 18 AAC 83.425(d)]	Any instance	COBC, CO, or judicial action (Consent Decree)
	Failure to sample, monitor or report (one time requirement)	Any instance	Compliance Letter, NOV, COBC, CO, or judicial action (Consent Decree)
	Failure to perform biological testing as required	Isolated or infrequent	NOV or COBC
		Frequent or continued	COBC, CO, or judicial action (Consent Decree)

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
	Failure to report biological testing results	Submitted within 30 days of due date	NOV
		Submitted 30 days or more late	NOV, COBC, CO, or judicial action (Consent Decree)
	Failure to submit final TRE planning or implementation report as required	Submitted within 30 days of due date	NOV
		Submitted 30 days or more late	NOV, COBC, CO, or judicial action (Consent Decree)
	Failure to file 24-hour report for effluent violations required by 18 AAC 83.410(f)	No known harm	NOV, COBC, or CO
		Known harm	Consider criminal prosecution. If not, judicial action [Consent Decree including temporary restraining order (TRO)].
	Failure to submit report with DMRs that explains other violations	Isolated or infrequent	Phone call, Compliance Letter, or NOV
		Frequent or continued violations	COBC or CO
	Minor sampling, monitoring, or reporting deficiencies	Isolated or infrequent	Phone call, Compliance Letter, or NOV. Corrections to be made in next submittal.
		Frequent or continued violations	NOV, CO, or COBC with penalty
	Major or gross sampling, monitoring, or reporting deficiencies	Isolated or infrequent	NOV, COBC, or CO. Corrections to be made in the next submittal.
		Frequent or continued violations	COBC, CO, or judicial action (Consent Decree)
	Reporting false information	Any instance	Consider criminal prosecution. If not, judicial action (Consent Decree).

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
	Failure to install monitoring equipment	Continued	COBC, CO, or judicial action (Consent Decree)
<p align="center">Permit Compliance Schedules (Construction phases or planning, including required TRE activities) ⁴</p>			
	Missed interim date	Will not cause late final date or other interim dates	Phone call, Compliance Letter, NOV, or CO
		Will result in other missed interim dates but the violation is for good or valid cause	NOV, COBC, or CO. Contact permittee and require documentation or good and valid cause.
		Will result in other missed interim dates. No good or valid cause.	COBC, CO, or judicial action (Consent Decree)
		Will result in missed final date. No good or valid cause.	Judicial action (Consent Decree)
	Missed final date ⁵	Violation due to <i>force majeure</i> (strike, act of God, etc)	Contact permittee and require documentation of good and valid cause and date or schedule for compliance.
		90 days or more outstanding with no good or valid cause.	COBC or judicial action (Consent Decree)
	Failure to make timely corrective control / treatment decisions as part of TRE	Late with good or valid cause	NOV

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
		Continued violation with no good or valid cause	COBC, CO, or judicial action (Consent Decree)
	Failure to undertake TRE control / treatment activities as required	Isolated or infrequent	Phone call, Compliance Letter, NOV, COBC, CO, or judicial action (Consent Decree)
		Frequent or continued	COBC, CO, or judicial action (Consent Decree)
Compliance Order By Consent Schedules (Construction phases, TRE activities)			
	Missed deadline	Contained in COBC previously issued and good or valid cause	CO or Consent Decree. Contact permittee and require documentation of cause, if not already provided by permittee.
		Contained in COBC previously issued and there is no good or valid cause	Judicial action (Consent Decree)
	Reporting false information	Any instance	Consider criminal prosecution. If not, judicial action (Consent Decree).
Permit Effluent Limits			
	Exceeding final limits	Outside permittee's control, e.g. upset or bypass	Contact permittee and require proof of good and valid cause
		Infrequent or isolated minor violation	NOV
		Infrequent or isolated major violations of a single effluent limit	NOV, COBC, CO, or judicial action (Consent Decree)

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
		Frequent violations of effluent limits	CO or judicial action (Consent Decree)
	Failure to meet whole effluent limits	Isolated or infrequent violation with no known harm	NOV or COBC
		Isolated or infrequent with known harm	COBC, CO, or judicial action (Consent Decree)
		Continuing violations with or without harm	CO or judicial action (Consent Decree)
	Exceeding interim limits	Outside permittee's control, e.g. upset or bypass	Contact permittee and require proof of good and valid cause
		No known harm	NOV, COBC, CO, Consent Decree
		Known harm	Judicial action (Consent Decree)
	Failure to meet interim whole effluent limits	Isolated or infrequent with no known harm	NOV, COBC, CO
		Isolated or infrequent with harm	COBC, CO, or judicial action (Consent Decree)
		Continued violation with or without harm	CO or judicial action (Consent Decree or TRO)
	Discharge without a permit	Unintentional. One time without harm.	COBC, CO
		Intentional. One or more times with or without harm.	Consider criminal prosecution. If not, judicial action (Consent Decree)

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
Compliance Order By Consent Interim Limits			
	Exceeding interim limits contained in COBC or CO	Isolated or infrequent violation	Consent Decree on basic violation
	Exceeding interim limits contained in COBC or CO	Frequent or continued violations within the control of the permittee or known environmental damage	Consider criminal prosecution. If not, judicial action (Consent Decree).
Compliance Inspection			
	Minor violation of sampling or analytical procedure	Any instance	NOV
	Major violation of sampling or analytical procedure	No evidence of intent	NOV, COBC, or CO
	Major violation of sampling or analytical procedure	Evidence of negligence or intent	Consider criminal prosecution. If not, judicial action (Consent Decree).
	Violation of permit conditions other than (numerical) effluent, schedule, or reporting requirement (e.g. BMP, O&M, unauthorized discharge or bypass, record detention, or record availability)	No evidence of negligence or intent	NOV, COBC, or CO with immediate correction action required
	Violation of permit conditions other than (numerical) effluent, schedule, or reporting requirement (e.g. BMP, O&M, unauthorized discharge or bypass, record detention, or record availability)	Evidence of negligence or intent	Consider criminal prosecution. If not, judicial action (Consent Decree).
Quality Assurance			
	Non-submittal of DMR / QA data	Isolated or infrequent	NOV, COBC, or CO
		Continued violation	COBC or CO

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
PRETREATMENT PROGRAM			
Industrial Users (State control)			
	Non-submittal of Baseline Monitoring reports and other required pretreatment reports	Late	Phone call, Compliance Letter, NOV, or COBC
		Continuation	NOV, COBC, CO, or Consent Decree
	Failure to sample or analyze or to properly sample or analyze as required, including resampling	Isolated or infrequent	NOV, COBC, or CO
		Frequent or continued	COBC, CO, or judicial action (Consent Decree)
	Failure to submit notice of slug loading or 24-hour report required by 40 CFR §403.12, adopted by reference at 18 AAC 83.010(g)	Single incident	NOV, COBC, or CO
		Multiple incidents	Consider criminal prosecution. If not judicial action (Consent Decree)
	Failure to maintain and have records available	Isolated or infrequent	NOV
		Frequent or continued	COBC, CO, or judicial action (Consent Decree)
	Failure to meet schedule requirements	Violation due to <i>force majeure</i>	If not already provided, contact user and require documentation of good and valid cause and date and schedule for compliance

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
		Missed interim date but will not affect meeting final date.	Phone call, Compliance Letter, or NOV
		Missed final date but by less than 90 days.	NOV or COBC
		Missed final date by 90 days or more for no good or valid cause.	CO or judicial action (Consent Decree)
	Violation of general standards, categorical standards, or local limits	Minor or infrequent with no known harm.	Phone call, Compliance Letter, NOV, COBC, or CO
		Frequent violations or known harm	COBC or judicial action (Consent Decree)
		Causes interference or pass through	Consider criminal prosecution. If not, COBC, CO, or judicial action (Consent Decree, including injunction).
	Discharge of slug load	Any discharge	COBC, CO, or judicial action (Consent Decree, including TRO)
POTW Implementation			
	Non-submittal of required pretreatment reports	Late	NOV, COBC, or CO
		Continued non-submittal after notification	COBC, or judicial action (Consent Decree)

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
	Violation of any requirement of an approved pretreatment program, pretreatment regulation, or APDES permit	Minor or infrequent	NOV, COBC, or CO
Major Violations by POTWs			
	Failure to establish SIU mechanism after program approval, as required	Late but corrected	NOV, COBC, or CO
		Continued violation after notification	COBC, CO, or judicial action (Consent Decree)
	Failure to reissue SIU mechanism on a timely basis	Late but corrected	NOV, COBC, or CO
		Continued violation after notification	COBC, CO, or judicial action (Consent Decree)
	Failure to perform at least 80% of required inspections	Continued	COBC, CO, or judicial action (Consent Decree)
	Failure to establish and enforce SIU self-monitoring requirement, as required	Isolated or infrequent	Phone call, Compliance Letter, or NOV
		Continued	COBC, CO, or judicial action (Consent Decree)
	Failure to appropriately enforce pretreatment standards (categorical standards and local limits)	Isolated or infrequent	Phone call, Compliance Letter, or NOV
		Continued non-enforcement against one or more SIUs	COBC, CO, or judicial action (Consent Decree)
	Failure to enforce against instances of pass through or interference	Any instance	CO or judicial action (Consent Decree)

APDES PROGRAM COMPONENT	NONCOMPLIANCE	CIRCUMSTANCES	RANGE OF RESPONSE ¹
	Failure to publish list of significant violators, as required by 40 CFR §403.8(f)(2)(vii)	Late	NOV
		Continued violation	COBC, CO, or judicial action (Consent Decree)
	Failure to comply with compliance schedule	Milestone missed by less than 90 days	NOV, COBC, or CO
		Milestone missed by 90 days or more	COBC, CO, or judicial action (Consent Decree)
	Failure to maintain and update User Inventory	Continued	COBC, CO, or judicial action (Consent Decree)
	Failure to investigate instances of reported or alleged non compliance by IUs	Isolated or infrequent and no known harm	NOV, COBC, or CO
		Continued violation or single violation with known harm	COBC, CO, or judicial action (Consent Decree)
	Combination of any of above violations or other violations of approved program, pretreatment requirements, or APDES permit	Any instance	NOV, COBC, CO, or judicial action (Consent Decree)
		Evidence of negligence or intent	Consider criminal prosecution. If not, judicial action (Consent Decree).
	Obtaining Program Approval		
	Failure to submit an approvable program	First occurrence	COBC, CO, or judicial action (Consent Decree)
		Continued violation	Judicial action (Consent Decree)

Notes:

1. 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.
2. Phone calls should be noted in the DROPS database record and be followed up with compliance letters if reports are not received within the specified timeframe.
3. Consult Assistant Attorney General before proceeding with a Compliance Order.
4. If the compliance schedule is established by a consent decree or other judicial order, the violation should be brought to the attention of the program manager and legal counsel to determine whether the court should be notified. The Department may not excuse or allow a violation of a consent decree or other court order without court approval.
5. The enforcement response chosen for Missed Final Dates must be consistent with the provisions of the National Municipal Policy (1984).

ACRONYMS

AGO	Attorney General Office
APDES	Alaska Pollutant Discharge Elimination System
BMP	Best Management Practices
CFR	Code of Federal Regulation
CO	Compliance Order
COBC	Compliance Order By Consent
CWA	Clean Water Act
DMR	Discharge Monitoring Report
DROPS	Discharge Results and Online Permit System
IU	Industrial User
NOV	Notice of Violation
O&M	Operations and Maintenance
QA	Quality Assurance
QNCR	Quarterly Noncompliance Report
SIU	Significant Industrial User
SNC	Significant Noncompliance
TRE	Toxicity Reduction Evaluation
TRO	Temporary Restraining Order