



Commonwealth of Virginia

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

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TO: DEQ Compliance, Permitting and Enforcement Staff, Regulated Community

FROM: Jeffery A. Steers, Director of Central Operations

A handwritten signature in blue ink that reads 'Jeffery A. Steers'.

SUBJECT: COVID-19 Implications for DEQ's Enforcement Program

DATE: March 31, 2020

On March 12, 2020, Governor Northam signed Executive Order 51 declaring a State of Emergency in the Commonwealth of Virginia due to COVID-19. EO 51 provides agencies with regulatory flexibility. DEQ may exercise the enforcement discretion specified below for noncompliance resulting from the COVID-19 pandemic, if regulated parties take the steps applicable to their situations, as set forth in this approach. For noncompliance that occurs during the period of time that this temporary approach is in effect, and that results from the COVID-19 pandemic, this will apply to such noncompliance in lieu of an otherwise applicable DEQ enforcement response.

APPLICABILITY

This approach will apply retroactively beginning on March 13, 2020. DEQ will coordinate with other federal agencies in situations where the jurisdiction is shared over a regulated party's environmental compliance obligations.

DEQ will assess the continued need for and scope of this temporary approach on a regular basis and will update it if modifications are necessary. In order to provide fair and sufficient notice to the public, DEQ will post a notification on our web site at least seven days prior to termination. DEQ will apply this approach to actions or omissions that occur while this approach is in effect even after its termination.

SCOPE

DEQ acknowledges that we are in unprecedented times and balances the need to protect public health with environmental protection. DEQ expects responsible parties to comply with their Consent Order/Consent Decree/LOA requirements. However, if public health recommendations such as social distancing or self-quarantine interfere with a Responsible Party's ability to

comply, DEQ will consider those issues on a case-by-case basis and exercise enforcement discretion as needed. DEQ advises Responsible Parties to keep documentation of any contracts for service as well as cancellation or delay correspondence (emails/phone logs) to support good faith efforts to comply. The consequences of the pandemic may affect facility operations and the availability of key staff and contractors and the ability of laboratories to timely analyze samples and provide results. As a result, there may be constraints on the ability of a facility or laboratory to carry out certain activities required by the commonwealth's environmental permits, regulations, and statutes. These consequences may affect reporting obligations and milestones set forth in settlements and consent decrees.

Finally, DEQ realizes that the general statements contained in this policy may not address every potential civil violation that may arise as a result of COVID-19. As such, DEQ may provide additional enforcement guidance applicable to specific programs on an ongoing basis and DEQ's self-disclosure program remains available.

ENFORCEMENT DISCRETION

I. Civil Violations

A. General conditions

1. Entities should make every effort to comply with their environmental compliance obligations.
2. If compliance is not reasonably practicable, facilities with environmental compliance obligations 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 decisions 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;
 - e. Document the information, action, or condition specified in a. through d; and
 - f. Maintain documentation for at least three (3) years on site.

In general, DEQ does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where DEQ agrees that COVID-19 was the cause of the noncompliance and the responsible party provides supporting documentation to DEQ upon request.

After this approach is no longer in effect, DEQ expects full compliance going forward. In general, absent exigent circumstances, DEQ does not plan to require facilities to "catch-up" with missed monitoring or reporting if the underlying requirement applies to intervals of less than three months. For other monitoring or reports, such as those required on a bi-annual or annual basis, when this policy is no longer in effect, DEQ expects facilities to take reasonable measures to resume compliance activities as soon as possible, including conducting late monitoring or submitting late reports. In some programs, there are sections or codes in the reporting form in which a facility may indicate why it has not conducted the required sampling

and monitoring, and DEQ encourages facilities to include such information when submitting any late reports.

Many training classes are offered online and such online training generally should not be affected by travel and social distancing constraints. If practicable, sectors mandated to function with certified operators should maintain normal certification and training practices. If not practicable due to the COVID-19 pandemic, DEQ asserts that it is more important to keep experienced, trained operators on the job, even if a training or certification is missed.

If a submission to DEQ requires a “wet” signature of a responsible 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. We strongly encourage the regulated community use DEQ’s approved electronic reporting mechanisms. For enforcement purposes, DEQ also will accept emailed submissions even if a paper original is required.

C. Consent Orders and other administration agreements and consent decree reporting obligations and milestones

1. With respect to **DEQ administrative agreements** reporting obligations and milestones, if, as a result of COVID-19, parties to such settlement agreements anticipate missing enforceable milestones set forth in those documents, parties should utilize the notice procedures set forth in the agreement, including notification of a force majeure, as applicable. DEQ notification should provide the information required by the agreement, which typically will include steps taken to minimize the effects and duration of any noncompliance caused by COVID-19. DEQ staff will review these notifications and may contact a responsible party to seek adjustments to a proposed plan of action, pursuant to the agreement.
2. With respect to **consent decrees entered into with Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ)**, these documents are agreements and court orders. DEQ staff will coordinate with DOJ and EPA to exercise enforcement discretion with regard to stipulated penalties for the routine compliance obligations and will also consult with any co-plaintiffs to seek agreement to this approach. Courts retain jurisdiction over consent decrees and may exercise their own authority. Parties should utilize the notice procedures set forth in the consent decree, including notification of a force majeure, as applicable, with respect to any noncompliance alleged to be caused by COVID-19.
3. Parties should proceed as proposed in their notice to DEQ (and to EPA/DOJ for consent decrees) unless and until contacted by the agency (if a DEQ administrative settlement) or DOJ/EPA (if a judicial consent decree).

D. Facility Operations

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.

1. Facilities should contact DEQ if **facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or**

the environment. 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 or discharges to water, or land disposal, or other unauthorized releases, the facility should notify the implementing authority (EPA regional office or authorized state or tribe) as quickly as possible. The notification also should include information on the pollutants that may be or have been emitted, discharged, discarded, or released; the comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s); and the expected duration and timing of the exceedance(s) or releases. EPA will consult with authorized states or tribes, as applicable, in accordance with the July 11, 2019 memorandum on [Enhancing Effective Partnerships Between EPA and States in Civil Enforcement and Compliance Assurance Work](#) to determine the appropriate response. Where EPA implements the program directly, EPA will evaluate whether the risk posed by the exceedance, disposal, or release is acute or may create an imminent threat to human health or the environment and will follow the steps set forth under paragraph 1.b. above.

2. If facility operations result in **noncompliance are not already addressed by DEQ above**, regulated entities should take the steps to document as listed above in Part I(2).
3. 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 RCRA to maintain its generator status, the facility should continue to properly label and store such waste and take the steps identified under Part I.A, above. If these steps are met, as an exercise of enforcement discretion, DEQ will follow EPA's direction, and 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 on site 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.

II. DEQ Enforcement Actions

During the pendency of the current COVID-19 exigency, DEQ expects to focus its resources largely on situations that may create an acute risk or imminent threat to public health or the environment, to ensure protection against such risks or threats. All ongoing enforcement matters are continuing.

III. Accidental Releases

Nothing in this approach relieves any entity from the responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by state law, or should be read as a willingness to exercise enforcement discretion in the wake of such a release.