

Enforcement Response Guide – Response to Comments

June 14, 2016

DEQ received and appreciates the comments on the IPDES Enforcement Response Guide from EPA and MWH Global Inc. The following table provides a list of each specific comment received and DEQ’s response to those comments.

Comment	DEQ’s Response
EPA	
General Comment - Please remove references to the quarterly noncompliance report (QNCR), as it does not exist anymore. See 40 CFR 123.45.	The guide has been revised to reflect the noncompliance reporting name change to NPDES noncompliance reports (NNCR).
Section 3. Technical Assistance as a Conjunctive Tool – EPA suggests omitting the beginning of the first sentence of the second paragraph (“Where enforcement actions have proven onerous or hinder a return to compliance...”). This section appears to be an explanation of how technical assistance may support a facility’s efforts to return to compliance.	The sentence was revised to reflect EPA’s recommendation. The sentence now reads, “While a permitted facility may request technical assistance at any time, the IPDES Program may request a technical assistance inspection of a permitted facility by regional DEQ engineering staff to determine the cause of a chronic violation.”
Section 4.1. Escalating Enforcement Response – EPA suggests omitting the statement “For those noncompliance events identified as insignificant, DEQ may offer technical assistance and may deploy an escalating informal response process to bring permittees back into compliance.” The previous section explained how technical assistance may be utilized and did not limit the use of technical assistance to a category of violations (e.g. significant). When the program is fully phased, IDEQ will be responsible for over 500 facilities. EPA is concerned about IDEQ’s capacity to effectively implement its compliance and enforcement program (compliance assistance, inspections, and enforcement) while utilizing the escalating informal enforcement response process as proposed.	DEQ believes informal enforcement actions are appropriate for those noncompliance events with no known harm to human health or the environment. The purpose of escalating informal responses is to raise awareness by informing the regulated entity and to provide an opportunity to return to compliance in a timely manner. For those permittees with multiple or reoccurring noncompliance, informal responses may not be appropriate. DEQ expects to notify permittees immediately upon learning of a noncompliance event. The initial notification often will be via phone and email, with discretion to issue a written response where appropriate. The word ‘technical’ has been replaced with ‘compliance’.
Section 4.3.1 Compliance Assistance – The last sentence in this section describes compliance assistance activities, including “operator training.” Is this an activity to be completed by IDEQ compliance and enforcement staff? This seems like a technical assistance activity and for	DEQ agrees that distinguishing between technical assistance and compliance assistance is necessary. Formal operator training will continue to be the responsibility of the Idaho Bureau of Occupational Licenses. The stating of operator training has been removed.

<p>purposes of this guide, it's important to keep compliance assistance efforts and technical assistance separate.</p>	
<p>Section 4.3.2 Notice of Noncompliance – The NPDES Program is a self-monitoring, self-reporting program with paperwork as a fundamental cornerstone. EPA finds the statement “A NONC is best suited for addressing paperwork-related noncompliance.” to be broad. What type of paperwork-related noncompliance is IDEQ referring to in this statement? If a facility failed to develop a quality assurance plan, a best management practices plan, or stormwater pollution prevention plan, issuance of NONC may not be an appropriate enforcement response.</p>	<p>DEQ agrees that a NONC may not be appropriate when a facility has failed to develop a plan as required by a permit. The utility of this informal response will be limited to those first time violators where the alleged violation does not cause actual harm to human health or the environment. Additional clarification was added to distinguish between developing a required plan and submitting notification the plan has been updated or completed.</p> <p>The sentence now reads, “A NONC is best suited for addressing paperwork-related noncompliance, not including failure to develop a plan as required by a permit condition. For example, a permittee may miss a deadline for notifying DEQ that a particular plan has been updated; DEQ may attempt to contact the facility, and where the permittee developed the plan but neglected to notify, DEQ may issue a NONC.”</p>
<p>Section 4.3.4 Notice of Intent to Enforce – Please more fully describe this tool, including the purpose of this informal enforcement action.</p>	<p>A notice of intent to enforce letter is the most serious of the three noncompliance letters. The purpose of this letter is to facilitate the transition from an informal response to a formal enforcement action. Additional information has been added to the guide for clarification.</p>
<p>Attachment A. Permit Compliance Schedule, missed final date – The force majeure provision</p>	<p>The guide does provide for this provision: “Violation due to act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy.” However, the term ‘force majeure’ has been added to the narrative.</p>
<p>Attachment A. Compliance Evaluation Inspection – For this heading, EPA suggests changing it to “Compliance Inspection” to allow for flexibility regarding the type of inspection conducted.</p>	<p>The term ‘evaluation’ has been removed from the heading.</p>
<p>Attachment A. Noncompliance events, circumstances, and range of responses – In numerous instances, IDEQ has identified “noncompliance letter” in the range of responses for violations, which EPA believes may not be appropriate responses to violations. These include:</p> <ul style="list-style-type: none"> a. Failure to report biological testing results, submitted within 30 days of due date. b. Failure to submit final toxicity reduction evaluation (TRE) planning or implementation report as required. c. Effluent limit exceedance, isolated or infrequent minor violation. d. Exceeding interim effluent limits, no known harm. 	<p>DEQ will use informal noncompliance letters, specifically the notice of intent to enforce, similar to EPA’s notice of violation informal enforcement response. Idaho statute 39-108(3)(a) identifies an Idaho NOV as commencing an administrative action or a formal enforcement response as detailed in the guide. Therefore, DEQ believes a noncompliance letter may be an appropriate response option to these noncompliance events.</p>

<p>e. Failure to meet interim whole effluent toxicity testing limits, isolated or infrequent with no known harm.</p> <p>f. Minor violation of sampling or analytical procedure (e.g., failure to update quality assurance project plan), one instance or as many as three unrelated instances.</p> <p>g. Major violation of sampling or analytical procedure (e.g., failure to follow quality assurance project plan), no evidence of intent.</p> <p>h. 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.</p>	
<p>Attachment A. "Pretreatment Program: POTW Implementation" – For nonsubmittal of required pretreatment reports, should "NONC" be NOV?</p>	<p>DEQ will use informal noncompliance letters, specifically the notice of intent to enforce, similar to EPA's notice of violation informal enforcement response. Idaho statute 39-108(3)(a) identifies an Idaho NOV as commencing an administrative action or a formal enforcement response as detailed in the guide. Therefore, DEQ believes a noncompliance letter may be an appropriate response option to these noncompliance events.</p>
<p>MWH Global Inc.</p>	
<p>Section 3: Definition of technical assistance:</p> <p>"This seems unclear as to what scenarios that the State will provide assistance and could be a significant and very technical obligation."</p>	<p>DEQ agrees technical assistance can be significant and require significant obligations. This activity may be appropriate where a facility continues to exceed an effluent limit resulting from improper operations of the treatment works. A general example is provided as a scenario where DEQ may conduct a technical assistance inspection.</p>
<p>Attachment A. Range of responses.</p> <p>"Seems that 'judicial action' covers this entire statement and considering criminal prosecution would be included. Suggest some clarification as to what 'judicial action' includes (criminal and civil action?) Same comment for similar range of responses below."</p>	<p>A footnote has been added to clarify that judicial actions include civil and criminal remedies. The footnote states, "Judicial action includes those civil and criminal remedies DEQ may pursue in district court."</p>