

# **Third Quarter 2003 Compliance & Enforcement Handbook Update**

## Substantive Changes

- 1) Chapter 3: Inspection Procedures
  - Procedures in Step 7 modified to require approval by the Division Director or Regional Office Director prior to issuance of a Notice of Violation.
  - Reference to NOV Closure Letter (reserving further action) changed to Compliance Documented Letter.
- 2) Chapter 4: Violation Categories
  - Description of Significant Non-Compliance (SNC) modified to allow a Division Director or Regional Office Director to authorize the issuance of a Notice of Opportunity to Correct for SNC.
  - Procedure for listing a violation as major or minor in footnote modified to require Director approval.
- 3) Chapter 5: Informal Compliance Assurance Tools
  - Description of NOV modified to reflect new issuance process requiring Division Director or Regional Office Director approval.
  - Description of Notice of Environmental Nuisance modified to reflect new issuance process requiring Division Director or Regional Office Director approval.
- 4) Chapter 7: Enforcement Escalation Procedures
  - Procedure for listing a violation as major or minor in footnote modified to require Director approval.
  - Procedure in Step 3 modified to require Division Director or Regional Office Director approval prior to issuance of an NOV.
  - Step 4 added to describe the process for seeking Division Director or Regional Office Director approval prior to issuance of an NOV and the ability of the Division Director or Regional Office Director to change an NOV to an NOC based upon the circumstances of the violation.
  - Step 6 modified to require Division Director or Regional Office Director Approval prior to issuing an NOV Closure Letter that does not reserve further action.
  - Reference to NOV Closure Letter (reserving further action) changed to Compliance Documented Letter.
  - Addition of a new requirement that the Director approve a draft Consent Order via the boilerplate Enforcement Action/Settlement Approval form (B39).
- 5) Chapter 8: Penalty Determinations
  - Added requirement that stipulated penalties and/or liquidated damages be included in all Consent Orders.
- 6) Chapter 9: Enforcement Approval Procedures
  - Description of new enforcement approval procedures added to introduction. Includes process for obtaining the Director's verbal approval.

- Added reference to two new tables (one for the Phoenix office and one for the regional offices that reflect the enforcement approval procedures.
  - Modified NOV/NEN approval procedure to require the Division Director or Regional Director approval prior to issuance.
  - Added procedure for Notice of Violation Closure Letter (with no further action) issuance which requires Division Director or Regional Office Director Approval.
  - Modified Consent Order, Abatement Order, and Compliance Order approval processes to differentiate between the Phoenix office and the Regional Offices. Draft Orders by the Phoenix office must be approved by the Director via the Enforcement Action/Settlement Approval form prior to being sent to the responsible party. The Decision on whether to pursue an Order will be made by the appropriate Division Director, even for those cases originating in a Regional Office. Draft Orders by the Regional Offices must be routed through the appropriate Division Director to the Director for approval using the Enforcement Action/Settlement Approval form.
  - Procedure for issuing a Compliance Order with Civil Administrative Penalty under the drinking water program modified to allow the Division Director to issue such orders without the Director's approval under certain circumstances based upon the size and type of drinking water system and the size of the penalty.
  - Procedure for suspending or revoking a license modified to require the Director's approval using the Enforcement Action/Settlement Approval form.
  - Added procedure for Termination of an Administrative Order which requires approval by the appropriate Division Director.
  - Added procedure for Civil Settlements which requires the Director's approval of all civil settlements using the Enforcement Action/Settlement Approval form. The new procedure allows for settlement discussions without advanced approval so long as the responsible party is informed from the outset that the Director's approval is required before final settlement.
  - Modified Criminal Referral procedures to include review by the Director and remove review by the Office of Special Counsel. Removed reference to an expedited process due to new process for obtaining the Director's verbal approval.
  - Modified Board of Technical Registration Referral procedures to include review by the Director and remove review by the Office of Special Counsel.
- 7) Chapter 14: Special Enforcement Considerations for the UST Corrective Action Section
- NOV issuance process modified to include need for Division Director approval.
  - Reference to UST Corrective Action boilerplate NOV Closure letter (reserving further action) changed to UST Corrective Action Compliance Documented Letter (reserving further action).
- 8) Chapter 15: Special Enforcement Consideration for Spills and Participation in the VRP
- Modified Step 4 to require Division Director or Regional Office Director approval prior to issuance of an NOV.
  - Reference to NOV Closure Letter (reserving further action) changed to Compliance Documented Letter.
- 9) Boilerplate Case Development Memorandum for Filing a Civil Complaint (B3)

- Added Deputy Director to routing.
  - Added Section for describing the environmental penalty history for the facility, the company, and the types of violations at issue in the case.
- 10) Boilerplate Case Development Memorandum for Negotiating a Civil Settlement (B4)
- Added Deputy Director to routing.
  - Added Section for describing the environmental penalty history for the facility, the company, and the types of violations at issue in the case.
- 11) Boilerplate Consent Order (B10)
- Added provision for stipulated penalties for violation of Consent Order.
- 12) Criminal Information Transmittal Memorandum (B11)
- Added Deputy Director to routing.
- 13) Boilerplate Notice of Violation Closure Letter (Reserving Further Action) (B20)
- Changed name of letter to Compliance Documented Letter (Reserving Further Action).
  - Removed all reference to “closure” and “closed” to emphasize that even though the terms of the NOV have been met, ADEQ is reserving further action.
- 14) Boilerplate Notice of Inspection Rights Form (B23)
- Web link to Arizona Revised Statutes changed to reflect new address.
- 15) Boilerplate Request for Assignment of an Assistant Attorney General (B24)
- Added Deputy Director to routing.
- 16) Boilerplate UST Corrective Action NOV Closure Letter (Reserving Further Action) (B27)
- Changed name of letter to UST Corrective Action Compliance Documented Letter (Reserving Further Action).
  - Removed all reference to “closure” and “closed” to emphasize that even though the terms of the NOV have been met, ADEQ is reserving further action.
- 17) Boilerplate Notice of Violation Closure Letter (for Participation in the Voluntary Remediation Program) (B33)
- Changed name of letter to Compliance Documented Letter (for Participation in the Voluntary Remediation Program).
  - Removed all reference to “closure” and “closed” to emphasize that even though the terms of the NOV have been met, ADEQ is reserving further action.
- 18) Boilerplate Enforcement Action/Settlement Approval Form
- Added as B39.
  - Required for obtaining the Director’s approval of formal enforcement actions and civil settlements.
- 19) Summary of Enforcement Approval Procedures - Phoenix Office
- Added as M8.
  - Summarizes in table form, the approvals needed to initiate and close both informal and formal enforcement actions by ADEQ’s Phoenix Office.
- 20) Summary of Enforcement Approval Procedures - Regional Offices
- Added as M9.
  - Summarizes in table form, the approvals needed to initiate and close both informal and formal enforcement actions by ADEQ’s Regional Offices.

Non-Substantive Changes

1) Appendix Table

- Added new boilerplates and modified version dates to reflect changes made in this update.

## **CHAPTER 3: INSPECTION PROCEDURES**

Although the primary purpose of an ADEQ inspection is to evaluate compliance with environmental laws, including rules and permits, it also serves as an opportunity for ADEQ to promote pollution prevention and compliance by offering technical assistance. As a result, ADEQ strives not only to identify all instances of non-compliance, but also to identify opportunities for pollution prevention and actions that might be taken to avoid future non-compliance. ADEQ will differentiate between requirements and recommendations both during the inspection and within the inspection report.

**Appendix:** A table describing ADEQ's authorities to conduct inspections can be found as Appendix M5.

**Policy:** The Inspection Procedures Policy can be found as Appendix P8.

**Policy:** The Drinking Water Program Sanitary Survey Policy can be found as Appendix P12.

By law,<sup>1</sup> the inspection procedures described in [A.R.S. § 41-1009](#) and outlined below do not apply to:

- Inspections where ADEQ has a reasonable suspicion to believe that the regulated person is engaged in criminal activity.
- Inspections that are not necessary for the issuance of a license, or to determine compliance with licensure requirements.

Pursuant to ADEQ policy, though, the inspection procedures described in [A.R.S. § 41-1009](#) and outlined below apply to all instances where an ADEQ employee will be conducting an inspection to determine:

- Compliance with a license (permit);
- Eligibility for a license (permit); and
- Compliance with environmental statutes, rules, orders, judgments or decrees.<sup>2</sup>

**Appendix:** A list of those agency activities that are exempt from ADEQ's policy of following the [A.R.S. § 41-1009](#) inspection rights procedures can be found as Appendix M1.<sup>3</sup>

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<sup>1</sup>See [A.R.S. § 41-1009\(J\)](#)

<sup>2</sup>As mentioned previously in the discussion of regulatory reform, [A.R.S. § 41-1009](#), does not apply to compliance and enforcement inspections that do not concern license compliance or eligibility (see [A.R.S. § 41-1009\(J\)](#)). As a matter of policy, though, ADEQ believes that it is in the best interests of the public and the agency that all ADEQ compliance and enforcement inspections conform with [A.R.S. § 41-1009](#).

<sup>3</sup>Other exempt activities may be added to the list by filing a written request with the Office of Special Counsel.

Although intended to provide consistency, these procedures are not intended to limit the enforcement discretion of ADEQ. Case-specific deviations from these procedures are permitted with prior approval from the appropriate ADEQ division director. Failure to follow these procedures will not prevent ADEQ from bringing an enforcement action that is otherwise appropriate to the violation.

### **STEP 1: Inspection Preparation**

Prior to conducting an inspection at a facility, the inspector must review the facility's file(s) and the ICE database for all compliance related information, including associated correspondence. The inspector must also determine whether a facility-specific inspection checklist has been developed. If a checklist has already been developed the inspector must review the checklist and make any necessary changes. If a checklist has not already been developed, the inspector must develop a checklist based upon the statutes, rules, permits, administrative orders, and civil judgments that apply to the facility prior to conducting the inspection. The checklist may also contain preventative measures or recommendations that are not based upon legal requirements, but must be noted as such in the checklist and any reports or other correspondence based upon the checklist.

**ICE:** Once the file review has been completed, the inspector must enter *Pre-Inspection File Review Completed* as an action in the Inspection Screen.

### **STEP 2: Inspection Scheduled**

While some ADEQ programs schedule inspections with the facility, others find it more effective to conduct inspections without prior notification of the facility.<sup>4</sup>

**ICE:** Regardless of whether the facility is notified beforehand, *Inspection Scheduled* must be entered as an action in the Inspection Screen. The date to be entered will be the date the facility inspection is to be initiated.

### **STEP 3: Identification**

Immediately upon entering the facility, the inspector must present an ADEQ photo identification badge to the regulated person or the authorized facility representative.

#### ***If a person/representative is not present at the site:***

The inspector must attempt to contact an authorized representative via telephone prior to entry of the facility. If this is unsuccessful, the inspector must note this on the Notice of Inspection Rights form and place a copy in the facility file. The inspector may then proceed with the inspection.

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<sup>4</sup>Pursuant to [A.R.S. § 49-203\(B\)\(1\)](#) which applies to water quality control related inspections, prior notice is required unless ADEQ determines that "reasonable grounds exist to believe that such notice would frustrate enforcement of water quality control laws." If such a determination is made, a description of the grounds must be documented in the Inspection Screen of ICE.

***If the person/representative refuses entry:***

The inspector should identify ADEQ's legal authority for conducting the inspection and explain that ADEQ will immediately contact the Attorney General's Office to obtain a search warrant.<sup>5</sup> The inspector must then immediately find the closest public right-of-way and contact his or her supervisor to explain the situation. The supervisor should then contact the Attorney General's Office with assistance from ADEQ's Office of Special Counsel for the purpose of seeking a search warrant. The inspector should remain at the closest public right-of-way until receiving the search warrant. Immediately upon receipt of the search warrant, the inspector will conduct the inspection with the assistance of the appropriate local law enforcement authority.

**Policy:** The Site Access Policy can be found as Appendix P9.

**STEP 4: Inspection Rights Explained**

Upon entering the facility, the inspector must explain the following to the regulated person or authorized facility representative:

- The purpose of the inspection
- The legal authority for conducting the inspection
- Any applicable fees that may be charged for the inspection
- That the regulated person or the authorized facility representative is entitled to accompany the inspector during the inspection, including being present for any interview, except confidential interviews
- That if requested by the regulated person or authorized facility representative, ADEQ will provide copies, free of charge, of any original documents taken by ADEQ during the inspection
- The regulated person or the authorized facility representative is entitled to a split of any sample(s) taken during the inspection unless the split of the sample(s) would prohibit the analysis from being conducted or render the analysis inconclusive
- The regulated person or the authorized facility representative is entitled to copies of any analysis performed on samples taken during the inspection. ADEQ will provide such copies at its expense

**STEP 5: Inspection Rights Form Presented for Signature**

Once the inspector has explained the inspection rights, he or she must provide the regulated person or the authorized facility representative with a Notice of Inspection Rights form and review it with the regulated person or authorized facility representative. After answering any questions, the ADEQ employee must request that the regulated person/representative sign the form.

**Boilerplate:** The boilerplate Notice of Inspection Rights form can be found as Appendix B23.

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<sup>5</sup>See Appendix M5 for a table describing ADEQ's authorities for conducting inspections.

***If the person/representative signs the form:***

One copy will be provided to the regulated person or authorized facility representative and another copy will be placed in the facility file.

***If the person/representative declines to sign the form:***

The inspector must note that decision on the form and provide a copy to the person/representative and place another copy in the facility file. The inspector may still proceed with the inspection.

**STEP 6: Inspection Performed**

Inspections performed by ADEQ will be based upon the checklist developed specifically for the facility as described in Step 1. During the course of the inspection, ADEQ will inform each person whose conversation with the inspector is tape recorded that the conversation is being recorded. Furthermore, before interviewing any person during an inspection, ADEQ will inform the person to be interviewed that statements made by that person may be included in the inspection report.<sup>6</sup>

**ICE:** Upon completion of the inspection, the inspector must enter *Inspection Conducted* in the Inspection Screen.

**STEP 7: Inspection Report/Informal Compliance Assurance Documents Created**<sup>7</sup>

After completion of the inspection, the inspector must generate a report summarizing the inspection and identifying those items that were evaluated during the course of the inspection. The inspection report must also set forth all violations or potential violations identified during the inspection. The report may also include ADEQ recommendations, but must clearly differentiate them from violations.

***If there are no violations found during the course of the inspection:***

The inspection report must state in specific terms what the inspection covered and in general terms what it did not (based upon the checklist used to conduct the inspection). The inspection report must also include a statement that no ADEQ action will result from the inspection.

***If there are violations that do not constitute SNC found during the course of the inspection that are corrected before ADEQ leaves the site:***

The violation(s) will be noted in the inspection report and no enforcement will be taken. Although ADEQ will not initiate enforcement, the violation must still be logged in the ICE database because if the same violation is discovered in another inspection of the facility within a two year period, it will be considered Significant Non-Compliance (SNC) and will result in the

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<sup>6</sup>As a matter of policy, ADEQ will not include confidential interviews in the inspection report.

<sup>7</sup>This section identifies the compliance assurance document that will be used for a particular category of violation. Chapter 4 (Violation Categories) explains how to determine which category applies. Chapter 5 (Informal Compliance Assurance Tools) explains how to prepare the document.

preparation of a Notice of Violation (NOV) for approval by the appropriate Division Director or Regional Director.

**ICE:** If violations are discovered, the inspector must enter *Case Recommended* as an action in the Inspections Screen and enter the alleged violations, description of facts, compliance documentation requirements and the date corrected (i.e., the date of the inspection under this scenario) in the Case Screen.

***If there are violations that do not constitute SNC found during the course of the inspection that are not corrected prior to ADEQ leaving the site:***

ADEQ will issue the responsible party a letter known as a Notice of Opportunity to Correct (NOC) allowing an opportunity to correct deficiencies.

**Boilerplate:** The boilerplate Notice of Opportunity to Correct (NOC) can be found as Appendix B15.

**ICE:** If violations are discovered, the inspector must enter *Case Recommended* as an action in the Inspections Screen and enter the alleged violations, description of facts and compliance documentation requirements in the Case Screen.

***If there are SNC violations found during the course of the inspection:***

ADEQ Staff will issue prepare a Notice of Violation (NOV) to the responsible party and cover letter for approval by the appropriate Division Director or Regional Director.

**Boilerplate:** The boilerplate Notice of Violation (NOV) can be found as Appendix B18.

**Boilerplate:** The boilerplate Notice of Violation cover letter language can be found as Appendix B21.

**Boilerplate:** The boilerplate administrative order Notice of Violation cover letter language can be found as Appendix B26.

**ICE:** If violations are discovered, the inspector must enter *Case Recommended* as an action in the Inspections Screen and enter the alleged violations, description of facts and compliance documentation requirements in the Case Screen.

***If there are violations that constitute SNC and violations that do not constitute SNC (a.k.a. “other”) violations found during the course of the inspection:***

ADEQ Staff will issue prepare a Notice of Violation (NOV) to the responsible party and cover letter for approval by the appropriate Division Director or Regional Director.

**Boilerplate:** The boilerplate Notice of Violation (NOV) with “other” violations can be found as Appendix B17.

**Boilerplate:** The boilerplate Notice of Violation cover letter language can be found as Appendix B21.

**Boilerplate:** The boilerplate administrative order Notice of Violation cover letter language can be found as Appendix B26.

**ICE:** If violations are discovered, the inspector must enter *Case Recommended* as an action in the Inspections Screen and enter the alleged violations, description of facts and compliance documentation requirements in the Case Screen.

**STEP 8: Inspection Report/Informal Compliance Assurance Documents Distributed**

The ADEQ inspector must give a copy of the inspection report to the person or facility representative at the time of the inspection or within 45 calendar days after the conclusion of the inspection. If the report is not provided at the time of the inspection, it must be hand delivered or sent by U.S. mail by the 45th calendar day, following the conclusion of the inspection.

**ICE:** After issuing the inspection report, the inspector must enter *Inspection Report Sent to RP* as an action in the Inspection Screen.

**STEP 9: Action Updates Sent**

At least once every month after the commencement of the inspection and until ADEQ either takes action or decides not to take action, ADEQ must send the responsible party an update letter describing the status of any action resulting from an inspection.

ADEQ must continue to send an action update letter every month until one of the following occurs:

- ADEQ sends the responsible party an inspection report that includes a statement that no further action will be taken based upon the inspection.
- ADEQ sends the responsible party an NOC closure letter for an NOC resulting from the inspection.
- ADEQ sends the responsible party an NOV closure letter (with no further action) for an NOV resulting from the inspection and closes the case.
- ADEQ files a civil complaint for a violation identified during the inspection.
- ADEQ signs a Consent Order for a violation identified during the inspection.
- ADEQ issues a Compliance/Abatement Order for a violation identified during the inspection.

**Boilerplate:** The boilerplate Action Update Letter can be found as Appendix B1.

**Boilerplate:** The boilerplate NOC Closure Letter can be found as Appendix B14.

**Boilerplate:** The boilerplate ~~NOV Closure~~Compliance Documented Letter (reserving further action) can be found as Appendix B20.

**Boilerplate:** The boilerplate NOV Closure Letter (with no further action) can be found as Appendix B19.

**ICE:** After sending an Action Update Letter, the inspector must enter *Action Update Letter Sent to RP* as an action in either the Inspection Screen or the Case Screen (depending on whether a case has been opened). If ~~an NOV Closure~~a Compliance Documented Letter (reserving further action) has been sent, ~~NOV Closure~~Compliance Document Letter Sent to RP must be entered as an action in the Case Screen. If an NOV Closure Letter (with no further action) has been sent,

*NOV Closure Letter Sent to RP ~~and Case Closed with NOV~~ (case closure) must be entered as actions in the Case Screen.*