Mark Gordon, Governor

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

DEQ

Todd Parfitt, Director

MEMORANDUM

SUBJECT: COVID-19 Wyoming DEQ's Temporary Guidance on Enforcement and Compliance Assurance Programs

FROM: Todd Parfitt, Director

TO: All Governmental and Private Sector Partners

DATE: April 10, 2020

We are all working to adapt to the challenges presented by the COVID-19 outbreak. As we take measures to protect the health and safety of our workforce, sister federal and state agencies, the public and the regulated community, the Wyoming Department of Environmental Quality (DEQ) continues to perform all of the necessary functions of our mission as an agency.

DEQ is currently transitioning toward teleworking where possible. In response to COVID-19, industry may implement changes to health and safety policies. DEQ is aware that the current enforcement and compliance practices may be altered to help prevent the spread of COVID-19. However, certain measures must remain in place to provide compliance assurance for public health and safety.

Within the authorities of the Environmental Quality Act, I announce the following **temporary** policy regarding DEQ enforcement of environmental legal obligations during this unprecedented time. This policy is consistent with EPA's March 26, 2020 Memorandum *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* and guidance provided by the Office of Surface Mining Reclamation and Enforcement (OSMRE) and the Nuclear Regulatory Commission (NRC).

Due to the COVID-19 pandemic, the DEQ may exercise temporary administrative relief and enforcement discretion for various reporting requirements by regulated entities. The DEQ will exercise the enforcement discretion specified below for noncompliance resulting from the COVID-19 pandemic, where the regulated entities take the appropriate steps. **This policy will apply to such noncompliance in lieu of an otherwise applicable enforcement response policy, only under circumstances where the pandemic and its effects have caused temporary non-compliance.**

This policy applies retroactively beginning March 13, 2020 and remains in effect until further notice. The DEQ will assess the need for and scope of this temporary policy on a regular basis and will update as necessary. Prior to terminating this temporary policy the DEQ will post on its website the termination date of the policy.

The DEQ recognizes the travel and social distancing restrictions imposed by both governments and corporations or recommended by the Centers for Disease Control and Prevention to limit the spread of COVID-19. The consequences of the pandemic may affect: facility operations, the availability of key staff and contractors, and the ability of laboratories to timely analyze samples and provide results. Consequently, there may be constraints on a facility or laboratory to carry out activities required by our environmental permits, regulations, and statutes. These consequences may affect reporting obligations and milestones set forth in settlements and consent decrees. Finally, these consequences may affect the ability of an operation to meet enforceable limitations on air emissions, wastewater discharges, requirements for the management of hazardous waste, and physical onsite inspections.

This policy does not apply to any criminal violations.

This policy does not apply to activities that are carried out under Superfund and RCRA Corrective Action enforcement instruments.

This policy does not apply to the failure to obtain required permits for the regulated activity.

I. Enforcement Discretion (Civil Violations)

All enforcement discretion is conditioned on the following:

1. Entity has made 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 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, 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; and

    e. Document and self-report to DEQ the information, action, or condition specified in a. through d.

II. Routine Compliance Monitoring and Reporting by Regulated Entities

The consequences of the pandemic may constrain the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, reporting or certification, and physical onsite inspections.

Entities should use existing procedures to report noncompliance with such routine activities, pursuant to an applicable permit, regulation, or statute. If no procedure is applicable, or if reporting is not reasonably practicable due to COVID-19, regulated entities should maintain this information internally and make it available to the DEQ upon request. In general, the DEQ will not seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the DEQ agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the DEQ upon request.

After this policy is no longer in effect, the DEQ expects full compliance going forward. In general, absent exceptional circumstances, the DEQ will not ask 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, the 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 indicates why it has not conducted the required sampling and monitoring. The DEQ expects facilities to include such information when submitting any late reports.

Many training classes are offered on-line and 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, the DEQ believes it is more important to keep experienced, trained operators on the job, even if a training or certification is missed.

If a submission to the DEQ requires a "wet" signature of a responsible official, the 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 that the regulated community use the DEQ's approved electronic reporting mechanisms. For enforcement purposes, the DEQ will accept emailed submissions even if a paper original is required.

III. Settlement Agreement and Consent Decree Reporting Obligations and Milestones

For DEQ settlement agreements, if, as a result of COVID-19, parties to 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. For DEQ administrative settlement agreements, the DEQ may treat routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and associated reporting or certification obligations in the manner described above and may not seek stipulated or other penalties for noncompliance. The notification should provide the information required by the agreement, and steps taken to minimize effects and duration of any noncompliance caused by COVID-19, and the information specified in Section I above. DEQ staff will review these

notifications and may contact a party to seek adjustments to a proposed plan of action, pursuant to the agreement.

For EPA consent decrees these documents are agreements and court orders. 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.

IV. Facility Operations

The 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.

Facilities must contact the DEQ immediately or as soon as practicable, if facility operations impacted by the COVID-19 pandemic has or may create an acute risk or an imminent threat to human health or the environment. The DEQ will consult with the EPA Region 8 office, OSMRE or NRC, as appropriate, on acute risks and imminent threats. If an entity contacts the DEQ due to noncompliance that could result in an acute risk or an imminent threat to human health or the environment, the DEQ will act as follows:

1. The DEQ will work with the entity to identify measures to minimize or prevent the acute or imminent threat to health or the environment from the COVID -19 caused noncompliance. The State issued permit or State regulations may have provisions that address the situation and result in a return to compliance.

    a. The DEQ will evaluate whether an applicable permit, statutory, or regulatory provision addresses the situation.

    b. If there is no permit/regulatory provision that addresses the situation, the DEQ will work with the facility to minimize or prevent the acute or imminent threat to health or the environment from the COVID-19 caused noncompliance and obtain a return to compliance as soon as possible.

    c. The DEQ will notify EPA Region 8, OSMRE or NRC, as appropriate, and the appropriate county and local officials, of any acute threats and actions taken in response to the noncompliance.

    d. The DEQ will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.

2. If a facility suffers from failure of equipment that may result in exceedances of enforceable limitations on emissions to air, discharges to water, land disposal, or other unauthorized releases, the facility must notify the DEQ as quickly as possible. The notification should include information on:

    a. the pollutants emitted, discharged, discarded, or released;

b. the comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s); and

c. the expected duration and timing of the exceedances(s) or releases.

The DEQ will consult with EPA Region 8, OSMRE or NRC, as appropriate, on the State's response. The DEQ 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 Section IV.1 above.

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 steps as identified in Section I above. If these steps are met, as an exercise of enforcement discretion, the DEQ will treat such entities to be hazardous waste generators, and not treatment, storage and disposal facilities. In addition, as an exercise of enforcement discretion, the 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.

4. If a facility is an animal feeding operation, and is unable to transfer animals off-site and, solely as a result of the COVID-19 pandemic, meets the regulatory definition of concentrated animal feeding operation (CAFO), as an exercise of enforcement discretion, the DEQ will not treat such animal feeding operations as CAFOs (or will not treat small CAFOs as medium CAFOs, or medium CAFOs as large CAFOs). To receive this enforcement discretion an operation must take the steps identified in Section I above.

5. If facility operations result in noncompliance that are not already addressed by DEQ above, regulated entities should take the steps identified under Section I. The DEQ will consider the circumstances, including the COVID-19 pandemic, when determining the appropriate enforcement response.

V. Compliance Inspections

DEQ proposes the following alternatives to maintain compliance while still providing additional protections concerning the COVID-19 outbreak. DEQ believes that one or more of these alternatives (or variations thereof) could be implemented to help prevent the spread of COVID-19. The following hierarchy will be employed. Any delay or alternative suggestion should only be considered after Options #1-3 below are determined not to be feasible.

1. ***Administrative inspections***: The facility operator provides the agency with scans or copies of records representative of the inspection period to be reviewed in the agency offices. This could occur with or without a field visit.

2. ***On-site "distancing" alternative***: The field inspection could occur in a single vehicle or in multiple vehicles to facilitate company or agency "distancing" policies.

3. ***Aerial or photographic inspections:*** The agency could employ flights, drones, aerial imagery to inspect portions of the operation.

4. ***Delayed inspection alternative:*** The agency may agree to delay the inspection until a later time.

5. ***Other suggestions***: DEQ is willing to consider alternate suggestions to accommodate policies regarding health and safety of company and agency personnel while maintaining the integrity of the regulatory programs.

The COVID-19 situation is fluid, and policies will likely change. Therefore, DEQ recommends that industry personnel reach out to their agency permit coordinator at their earliest convenience when they become aware of the necessity to alter current practices. It is expected that these alternative practices would continue to be implemented until COVID-19 health and safety issues are no longer recognized by all parties. Additionally, DEQ recommends that all foreseeable agency and industry working group meetings be held as video call or teleconference as much as possible.