

Environmental Compliance During COVID-19: Federal and State Agency Guidance on Enforcement & Practical Tips for Businesses

Karen Winters, Kendra Sherman & Allen Kacenjar

April 14, 2020



- **US EPA's Memo on COVID-19 Implications for Enforcement**
 - Scope, What Is Covered and Not Covered
 - Conditions
 - Other Important Issues
- **US EPA's Response to Reckless Reporting**
- **NRDC's Petition for Emergency Rulemaking**
- **Additional Program-Specific Enforcement Guidance by US EPA**
- **Environmental Enforcement Discretions by Select States**
 - Ohio, Indiana, Texas, Pennsylvania, California
- **Practical Tips & Strategy**
- **Other Legal Considerations**
- **Q&A**

US EPA Administrator Andrew Wheeler:

“EPA is committed to protecting human health and the environment, but recognizes challenges resulting from efforts to protect workers and the public from COVID-19 may directly impact the ability of regulated facilities to meet all federal regulatory requirements.”

- US EPA Press Release, March 26, 2020



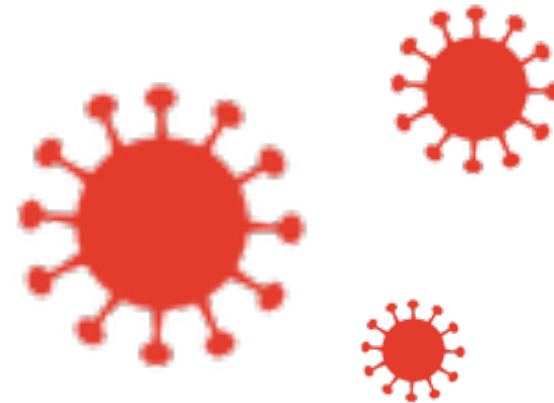
US EPA Enforcement Discretion Policy: Overview

On March 26, 2020, U.S. EPA issued guidance entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” (“Temporary Policy”)

- Issued as a memorandum from Susan Parker Bodine, EPA's Assistant Administrator for Enforcement and Compliance Assurance (OECA) to “All Governmental and Private Sector Partners”
- Provides guidelines covering challenges in maintaining environmental compliance obligations during the coronavirus pandemic using a “force majeure” model
- Retroactive to March 13, 2020

EPA outlines potential legitimate causes for failure to comply:

- Worker shortages
- Travel restrictions and social distancing restrictions imposed by governments or recommended by the CDC
- Unavailability of key staff and contractors
- Unavailability of laboratories
- Resource shortages



What Is Covered?



- Acts or omissions that occur while the Policy is in effect
- Civil violations, penalties or “catch up” for:
 - Routine compliance monitoring and reporting by regulated entities
 - Compliance monitoring, integrity testing, sampling, lab analysis, training, and reporting or certification (Examples are provided in the Temporary Policy)
 - Settlement agreement and consent decree reporting obligations and milestones
 - Certain facility operations
 - Failure of air emission control or wastewater or waste treatment systems or other facility equipment
 - Transfer of hazardous waste off-site
 - Transfer of animals off-site

What Is NOT Covered?

- Criminal violations or conditions of probation in criminal sentences
- Activities carried out under Superfund or RCRA Corrective Action Enforcement instruments
- No relief from general responsibility to prevent, respond to, or report accidental releases
- Imports
 - e.g., Pesticide Products; and
 - Products claiming to address COVID-19 impacts



There are conditions attached for obtaining enforcement discretion:

- Demonstrate all efforts have been made to comply with environmental obligations;
- Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- Identify the specific nature and dates of the noncompliance;
- 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;
- Return to compliance as soon as possible; and
- Document the information, action, or condition specified above.

EPA Prioritizing Full Compliance for:

- Public Systems Regulated under the Safe Drinking Water Act
 - Continued monitoring required by:
 - National Primary Drinking Water Regulations to protect against microbial pathogens; and
 - Nitrate/nitrite and Lead and Copper Rule
- Essential Critical Infrastructure
 - EPA may consider a more tailored short-term No Action Assurance with conditions to protect the public

EPA reserves the right to terminate the policy as appropriate, but will provide seven days' advance notice before doing so.

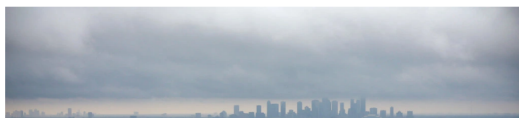
US EPA Policy: Not a License to Pollute

March 30, 2020 US EPA Press Release on “Reckless Reporting” and April 2, 2020 Letter to all Members of US Congress

- Following publication of the Policy, several news outlets ran articles stating that US EPA was providing a temporary license to pollute. In response to what it called “Reckless Reporting”, EPA issued a press release to clarify misconceptions and misreporting.
 - EPA will not seek penalties for failure to perform routine reporting and monitoring **on a case by case basis** and only if the various conditions are met;
 - Exceedances of pollutant limitations in permits, regulations and statutes are **not excused** under the Policy; and
 - Regulated parties **must document** the basis for any claim that the pandemic prevented them from conducting that routine monitoring and reporting.

The New York Times

*E.P.A., Citing Coronavirus, Drastically
Relaxes Rules for Polluters*



**Critics blast EPA move as
license to pollute during
pandemic**

CLIMATEWIRE

Lax pollution enforcement can stress hospitals during virus

AP Citing virus, EPA has stopped enforcing environmental laws

NRDC and Other Environmental Groups File Emergency Petition to US EPA on April 1, 2020

- Petition seeks issuance of an emergency final rule requiring companies to notify EPA when they stop monitoring or reporting their pollution and the EPA would post those notices within one day on its website
- Petitioners seek issuance of the rule in 7 days
- To date, no rule has been proposed
- The California AG sent a letter in support of the rulemaking on April 9, 2020



Additional Program-Specific Enforcement Guidance by US EPA

- **Office of Surface Water**

- [Temporary-Advisory-for-National-Pollutant-Discharge-Elimination-System-NPDES-Reporting-in-Response-to-COVID-19-Pandemic](#)

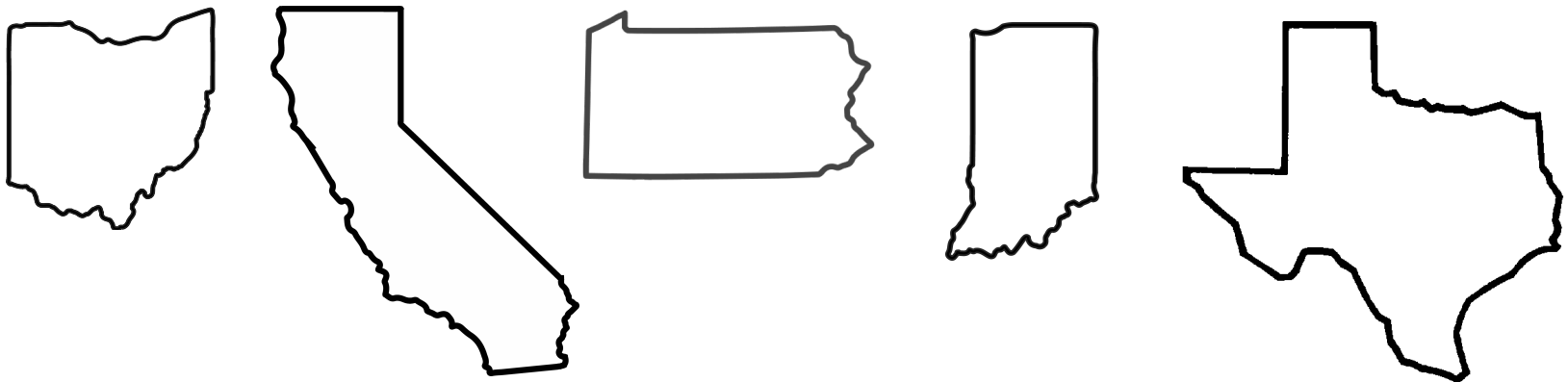
- **Office of Land and Emergency Management**

- [Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19 \(PDF\)](#)



Select State-Level Responses

- Generally, states have taken approaches similar to US EPA's on compliance and enforcement issues during the COVID-19 pandemic.
- Regulated entities are expected to comply with their environmental obligations unless COVID-19 related disruptions make it not reasonably practicable to do so.
- Many state environmental authorities have issued compliance statements or guidance during COVID-19; approaches vary by state.



- Ohio EPA issued guidance stating that it may exercise enforcement discretion “where regulated entities will have an **unavoidable noncompliance situation, directly due to impact from the coronavirus.**”
- How to Request Regulatory Flexibility:
 - Complete a form available on Ohio EPA’s website. You must include:
 - Central point of contact information
 - Specific regulatory or permit requirement which cannot be complied with
 - Description of circumstances preventing compliance due to COVID-19
 - Anticipated duration of noncompliance
 - Mitigation measures that will be taken
 - Adequate recordkeeping is important.
 - Document activities related to the noncompliance and details on best efforts to comply.

- IDEM has not issued general waivers but will exercise enforcement discretion where noncompliance **“is unavoidable directly due to impacts from COVID-19.”**
- IDEM is authorized to extend non-essential deadlines for a period of no longer than 60 days “if deemed necessary . . .”
- Requests for extensions should include:
 - Concise statement describing how the COVID-19 outbreak contributes to the need for an extension
 - Identification of the current deadline and number of additional days requested
 - Citation of rule/permit provision for which an extension is sought
- If a permit applicant cannot meet public notice and meeting requirements due to COVID-19, the applicant should note this in the application and include specific information outlined on the IDEM website

- TCEQ extended deadlines for certain reporting requirements normally due March 31 to April 30, 2020.
- TCEQ will consider exercising enforcement discretion for violations that were **“unavoidable due to the pandemic or where compliance would create an unreasonable risk of transmitting COVID-19 or otherwise impede an appropriate response to the pandemic.”**
- Guidance sent directly to regulated entities indicates that requests will be considered “where noncompliance is unavoidable **directly due to impact from the coronavirus.**” Requests should include:
 - Concise statement supporting request for enforcement discretion
 - Anticipated duration of need for enforcement discretion
 - Citation of rule/permit provision for which enforcement discretion is requested

- Regulated entities may submit a request to temporarily suspend regulatory and other legal obligations **“where strict compliance will prevent, hinder, or delay necessary action in coping with the COVID-19 emergency.”**
- The request form available online requires the following:
 - How strict compliance will prevent, hinder, or delay necessary action in coping with COVID-19
 - How COVID-19 has restricted the entity’s ability to comply with the environmental regulatory requirement, permit condition or other requirements for which it is seeking a suspension
 - Alternate compliance options explored
 - Duration of expected noncompliance
 - How it will account for reporting obligations during the period of noncompliance
 - Whether the requested suspension will result in an increased risk to public health and the environment, including identification of specific pollutants that could be emitted in increased amounts if applicable
- Suspensions will not be issued initially beyond June 30, 2020

- CalEPA has not issued specific guidance but advised that its enforcement authority “remains intact” in spite of US EPA Temporary Policy on COVID-19. Contact CalEPA before falling out of compliance.
- CARB issued a statement indicating that CARB regulations continue to be in effect and deadlines apply.
- The State Water Resources Control Board issued a statement recognizing that timely compliance may not be possible where it would be inconsistent with governmental directives or guidelines related to COVID-19.
 - In such a case, notify appropriate regional board and describe specific order, regulation, permit, or other requirement that cannot be met and why
- CalRecycle issued guidance regarding emergency waiver of regulatory standards or permit conditions applicable to solid waste facilities.
 - Applies to standards or terms related to origin of waste; rate of inflow for storage, transfer or disposal; type and moisture content of waste; hours of operation; storage times
 - If granted, waiver is effective for 120 days and may be extended

- **Plan and Prepare**

- Read each policy carefully! Understand scope and limitations in the federal and state policies.
- Outline each potential area of non-compliance and determine what can be done to comply.
- If compliance isn't possible, identify options to see how close you can get.
- Be aware of changes and updates to policies

- **Communicate**

- With your counsel.
- With your internal team.
- With agencies (carefully!) and stakeholders (maybe?)

- **Document, Document, Document**

- Explain why each change is necessary to address COVID problems
- Detail all efforts to mitigate or shorten noncompliance
- Periodically update to continue explaining duration of necessary violations

- Prepare your “return to compliance” plan – identify why any transition time is needed.

- **Enforcement discretion ≠ 100% Protection**
 - Risk of “20-20 hindsight”, full scrutiny of your request, and FOIAs
 - Overfiling risks
 - Citizen Suits

- **Even if imperfect, extenuating circumstances can still be compelling**
 - Legal defenses in limited circumstances
 - Mitigating factors in some penalty calculations
 - Powerful practical tools to use with judges and juries
 - Know your prior compliance record and posture before COVID-19

- **Risks of “knowing” violations**

Questions?

Contacts



Karen A. Winters
Partner
+1 614 365 2750
karen.winters@squirepb.com



Allen A. Kacenjar
Partner
+1 216 479 8296
allen.kacenjar@squirepb.com



Kendra S. Sherman
Partner
+1 614 365 2726
kendra.sherman@squirepb.com