



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

May 13, 2020

The Honorable Letitia James
Attorney General of New York
The Capitol
Albany, New York 12224

Dear Madam Attorney General:

I am writing in response to your letter dated April 15, 2020, regarding the Agency's work to protect human health and the environment during the COVID-19 public health emergency. I am sorry that you have been misled by inaccurate characterizations of EPA's policy on "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" (Temporary Policy). I urge you to read the policy for yourself, as a lawyer. Please be assured that EPA continues to enforce environmental laws and protect human health and the environment nationwide during these unprecedented times.

In doing so, EPA is mindful of the health and safety of the public, as well as American workers, our staff, and the staff of our co-regulators. We also are mindful that the COVID-19 public health emergency may affect facility operations and the availability of key staff, contractors, and others involved in the important work of complying with the nation's environmental protection laws. Finally, we are mindful that the COVID-19 public health emergency represents an imminent threat to every American, particularly those workers who cannot telework from the safety of their homes and are on the job, keeping our infrastructure running and monitoring environmental compliance.

The number of deaths in the United States from COVID-19 has now passed 80,000 and over 1,300,000 persons have tested positive for the virus. These statistics underscore the need to find a responsible path forward, one that allows facilities providing essential services (and thus exempt from the stay at home orders that many governors have issued) to stay operational while also protecting their workers and the public. The imminent health risk American workers may face was demonstrated recently by the dramatic spread of COVID-19 among the workforce at meat processing facilities in Pennsylvania, Colorado, South Dakota, Iowa, and Minnesota.

EPA's Temporary Policy appropriately balances these considerations and provides a transparent statement of how and when EPA will consider exercising enforcement discretion.

Even though it is likely that not all are currently operating, there are over 1,100,000 facilities that have environmental responsibilities and are identified as active facilities in EPA's Enforcement and Compliance History Online (ECHO) database. Given the size of this universe, under the EPA's

Temporary Policy a facility does not have to wait for EPA approval to implement worker protections that could impact compliance with routine monitoring and reporting requirements. However, the Temporary Policy also clearly states that regulated parties must “make every effort to comply with their environmental compliance obligations.” The burden is on the regulated entity to demonstrate that its noncompliance was caused by the COVID-19 public health emergency. The Temporary Policy also specifies entities should use existing procedures to report noncompliance with routine activities pursuant to an applicable permit, regulation, or statute. An example of such a procedure is the reporting requirement in all Clean Air Act Title V permits found in 40 C.F.R. 70.6(c)(5)(iii). Further, on March 31, EPA issued an advisory for NPDES permittees on how to report COVID-19 related noncompliance in their discharge monitoring reports.

For operational failures that could result in an exceedance of an enforceable limitation, whether in a fence line community or not, EPA is not turning “a blind eye.” The Temporary Policy calls for notification to regulators (state, tribal, or federal) to allow interventions to minimize any impacts. Where noncompliance has impacts, enforcement discretion, if any, will be determined on a case-by-case basis, depending on the circumstances. The same is true for acute risks or imminent threats. Finally, the Temporary Policy offers no leniency for those who exhibit an intentional disregard for the law or for accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, or other pollutants.

As I have discussed with the Environmental Council of the States, EPA’s Temporary Policy notes that states have the flexibility to issue their own policies, tailored to the specific challenges each state is facing, as well as the number of regulated facilities in the state and state capacities. Over 40 state environmental agencies are similarly balancing the acute risk posed by COVID-19 with a short-term recognition that complete compliance with all environmental obligations, particularly routine monitoring and reporting, may not be possible at this time. Many of those policies also apply retroactively and have no expiration date. EPA’s Temporary Policy is directly responsive to many questions that states have asked EPA. See <https://www.ecos.org/wp-content/uploads/2020/04/EPA-Responses-to-State-COVID-19-Questions-4.24.pdf>.

Examples of state specific responses abound. On March 9, Governor Murphy issued an executive order giving blanket authority to New Jersey agencies “to waive, suspend, or modify any existing rule, where the enforcement of which would be detrimental to the public welfare during this emergency, notwithstanding the provisions of the Administrative Procedure Act or any law to the contrary for the duration of this Executive Order.” See <https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf>.

On March 12, Governor Larry Hogan issued an order authorizing the extension of license and permit coverage in Maryland. See <https://governor.maryland.gov/wp-content/uploads/2020/03/Licenses-Permits-Registration.pdf>. Maryland’s Department of the Environment (MDE) is prioritizing “enforcement on the most mission-critical matters affecting Marylanders’ public health and environment.” Maryland also closed its vehicle inspection stations and repurposed some for COVID-19 testing. The Maryland Secretary of the Environment thanked “the U.S. EPA for working with MDE to accommodate the temporary pivot under the Clean Air Act so as to make the best of a bad situation and advance an even more urgent type of testing for public health protection.” MDE has announced that “[d]ue to the additional demands of responding to the current crisis, the department understands there may be a need to exercise some discretion and flexibility in enforcement of environmental regulations during the state of emergency, but this will only be done on a limited, case-by-case basis.” Like the general conditions of EPA’s Temporary Policy that apply to any exercise of enforcement discretion, including routine monitoring and reporting, Maryland has announced that “[a]ll regulated entities must

make every effort to comply with their environmental obligations and responsibilities, take steps to minimize the effects of any noncompliance and act to return from noncompliance as quickly as possible once the emergency ends. These obligations include monitoring and reporting requirements, which are integral to public health and environmental protection.” See <https://mde.maryland.gov/Pages/MDE-COVID-19-Update.aspx>. Maryland has fewer than 25,000 facilities listed as active in ECHO.

On March 20, the Iowa Department of Natural Resources (DNR) issued a “COVID-19 Enforcement and Compliance Protocol.” The Iowa protocol describes the enforcement discretion the DNR will provide “in an attempt to balance the need to protect and maintain Iowa’s natural resources against the need to protect people from infection. See <https://www.iowadnr.gov/about-dnr/social-media-press-room/disaster-assistance#3057321-covid---19-outbreak>. Iowa has fewer than 11,500 facilities listed as active in ECHO.

On March 23, the Commissioner of New York State’s Department of Environmental Conservation issued an emergency declaration that, among other things, allowed its regional staff to “issue emergency authorizations to allow for changes in operations of existing facilities to control and combat the COVID pandemic.” See https://www.dec.ny.gov/docs/permits_ej_operations_pdf/covid19emergdec.pdf. New York has fewer than 51,100 facilities listed as active in ECHO.

In conjunction with Governor Kate Brown’s March 23 stay-at-home order, the Oregon Department of Environmental Quality (DEQ) announced it “will continue to exercise reasonable enforcement discretion within its authority in making decisions regarding violations that occurred on or after March 16, 2020, caused by pandemic-related disruptions.” This discretion is offered in recognition that “DEQ must balance its vital obligation to enforce the law and protect the environment with a consideration of the dramatic disruptions to public health and the economy caused by the COVID-19 outbreak.” Further, “DEQ strives to be a full partner in the global effort to stop the spread of the virus and recognizes that the outbreak may affect some regulated entities’ ability to comply with certain DEQ requirements in rules, permit conditions, and orders.” “Some entities may experience staff shortages, service provider interruptions, or other pandemic-related disruptions.” Like the section of EPA’s Temporary Policy applicable to routine monitoring and reporting requirements, “DEQ requests that regulated entities document any pandemic-related disruptions to their operations and explain how these disruptions have caused non-compliance. DEQ will use this documentation in making enforcement-related decisions when violations occur.” See <https://www.oregon.gov/deq/Pages/covid-19.aspx>. Oregon has fewer than 9,000 facilities listed in as active ECHO.

To address “an unavoidable noncompliance situation, directly due to impact from the coronavirus,” the Minnesota Pollution Control Agency (MPCA) established an email box to accept requests for the Commissioner of the MPCA “to consider providing regulatory flexibility, where possible, to assist entities in alternative approaches to maintaining compliance, such as extending reporting deadlines, extensions of operator certifications and other forms of regulatory flexibility.” See <https://www.pca.state.mn.us/covid-19/covid-19-and-regulatory-flexibility>. Minnesota has fewer than 32,900 facilities listed as active in ECHO.

On March 31, Vermont’s Agency of Natural Resources (ANR) issued a “COVID-19 State of Emergency Enforcement and Compliance Guidance Document.” The Guidance states “ANR does not expect permittees or contractors who provide services to permittees who are not otherwise designated as critical to continue operation for the sole purpose of complying with the terms of a permit, certification, order, or rule.” ANR also states that if a permittee cannot comply with the terms of a permit, certification, or rule during the COVID-19 State of Emergency, the Agency may consider exercising enforcement

discretion on a case-by-case basis. Like the section of EPA's Temporary Policy applicable to routine monitoring and reporting, ANR's conditions for enforcement discretion include an after the fact demonstration that the noncompliance is attributable to the COVID-19 pandemic. See <https://anr.vermont.gov/sites/anr/files/emergencyinfo/enforcement-discretion-covid-19-guidance.pdf>. Vermont has fewer than 5,000 facilities listed as active in ECHO.

On March 31, Michigan's Department of Environment, Great Lakes, and Energy (EGLE) issued a "Process for Handling Enforcement Discretion Due to COVID-19" in recognition that following the governor's stay at home order, "disruptions to standard operations may create challenges for regulated entities to meet some legal obligations." Michigan's process is an email to EGLE requesting enforcement discretion. According to its website, through May 7, EGLE has received only 110 such requests. Further, in granting enforcement discretion for routine compliance testing, EGLE has relied on EPA's Temporary Policy. See <https://www.michigan.gov/egle/0,9429,7-135--523592--,00.html>. Michigan has fewer than 30,000 facilities listed as active in ECHO.

On March 27, Washington State's Department of Ecology announced it would exercise enforcement discretion, stating "we recognize the public health crisis and economic disruptions related to the COVID-19 outbreak may temporarily affect some of the regulated entities' ability to comply with all state requirement." "All applicable state requirements remain in effect, but Ecology will exercise reasonable discretion within our authority when deciding whether to pursue potential violations that may be linked to the current COVID-19 pandemic." See <https://ecology.wa.gov/About-us/Get-to-know-us/Coronavirus-Updates/Compliance-assistance>. Washington has fewer than 11,500 facilities listed as active in ECHO. EPA's Temporary Policy clearly served as model for Ecology's policies. For example, Ecology, like EPA, has offered relief for hazardous waste generators, stating:

We will allow small quantity generators (SQGs) and medium quantity generators (MQGs) to retain their status, even if the amount of dangerous waste stored on-site exceeds a regulatory threshold because of a generator's inability to arrange for shipping of dangerous waste due to the COVID-19 outbreak.

Further, Ecology's policy lifts language directly from EPA's Temporary Policy:

If this situation applies to your site, you 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; and*
- e. Document the information, action, or condition specified in steps a through d (above).*

See <https://ecology.wa.gov/Waste-Toxics/Business-waste/Manage-your-waste/covid-19-dw-compliance>.

Pennsylvania Department of the Environment (PADEP) has established a process to request a temporary suspension of regulatory requirements and/or permit conditions. In addition, PADEP references EPA's Temporary Policy. See <https://www.dep.pa.gov/Pages/AlertDetails.aspx>. Pennsylvania has fewer than 53,000 facilities listed as active in ECHO.

Rhode Island's Department of Environmental Management (DEM) has announced that it intends "to recognize the conditions and limitations that currently exist and provide flexibility and relief where needed and appropriate while still maintaining a high level of protection." "Some of those conditions may include difficulties securing equipment, maintaining staffing levels and professional support, and conducting some monitoring activities." DEM's process is to consider requests on a case-by-case basis. See <http://www.dem.ri.gov/programs/media/covid19.php#bep>. Rhode Island has fewer than 4,200 facilities listed as active in ECHO.

On April 8, 2020, the Massachusetts Department of Environmental Protection (MassDEP) issued a "Hazardous Waste Management Guidance During State of Emergency for COVID-19 Pandemic." Like EPA's Temporary Policy, under the Massachusetts guidance 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 MassDEP will still consider the facility to retain its generator status. Like EPA's Temporary Policy, MassDEP's policy says that the generator should continue to properly label and store such waste. The Massachusetts guidance requires an email notification, but no upfront review or approval is required. See <https://www.mass.gov/doc/guidance-on-managing-hazardous-waste-during-the-covid-19-emergency/download>. On April 17, the Massachusetts Department of Environmental Protection issued the "MassDEP COVID-19 FAQs for Public Water Suppliers." The guidance makes recommendations on sampling. However, the guidance also correctly notes that EPA's Temporary Policy does not offer enforcement discretion to public water systems. As noted in the MassDEP guidance, "[a]t this time, EPA is urging that all regulatory requirements be met. Failure to collect required samples will result in a violation that triggers public notice. Contact your MassDEP regional Office about the specifics your situation. MassDEP will consult with USEPA on the implementation of the newly issued federal enforcement policy." See <https://www.mass.gov/doc/massdep-covid-19-faqs-for-public-water-suppliers-0/download>. Massachusetts has fewer than 24,100 facilities listed as active in ECHO.

The Illinois Environmental Protection Agency (IEPA) has issued a "Compliance Expectations Statement" in response to the current public health emergency. Like EPA's Temporary Policy, the statement says "[a]ll regulated entities are expected to take every possible step to ensure ongoing compliance with environmental requirements, including all terms and conditions contained in permits, so that all regulated facilities or activities are operated and maintained in a manner safe for human health and the environment." Referencing the governor's stay at home order, IEPA also states that "[s]hould those current health and safety restrictions also result in an inability to comply with environmental requirements, the Agency will exercise enforcement discretion when appropriate." "This approach is only applicable to situations brought on by, and directly related to, responses to COVID-19 that will not create or result in harm or risk to human health or the environment. One example of such a situation is difficulty in submitting routine reporting or monitoring information." See https://www2.illinois.gov/epa/topics/Documents/Agency_Compliance_Expectations_Statement.pdf. IEPA also encourages regulated entities to contact them. Illinois has fewer than 43,000 facilities listed as active in ECHO.

Virginia's Department of Environmental Quality (DEQ) has announced that it "recognizes that the COVID-19 outbreak is affecting the ability of some regulated entities to comply with DEQ requirements, statutes, regulations and permit conditions." DEQ also announced they "will exercise reasonable enforcement discretion within its authority when deciding whether to pursue potential violations caused by pandemic-related disruptions." DEQ's process includes communication with the agency and documentation and explanation of the pandemic-related events that affect their operations or

ability to comply with requirements. See <https://www.ecos.org/wp-content/uploads/2020/03/Virginia-COVID-19compliance.pdf>. With respect to stormwater, “DEQ has advised local governments that administer Virginia’s erosion and sediment control program, some of which serve also as a Virginia stormwater authority, to exercise judgement during this pandemic and determine the best course of action for their own locality.” See <https://www.deq.virginia.gov/COVID19UpdatesinVA.aspx>. Virginia has fewer than 20,000 facilities listed as active in ECHO.

Wisconsin Department of Natural Resources (DNR) issued a statement that “[u]nder Gov. Evers’ Safer at Home emergency order, the DNR is committed to balancing its obligation to the law and to protect public health and the environment. We recognize that the outbreak may impact some regulated entities’ ability to comply with all statutes, rules and permit or license conditions.” DNR’s process is a case-by-case grant of regulatory flexibility. See <https://dnr.wi.gov/emergency/COVID19Compliance.html>. Wisconsin has fewer than 26,000 facilities listed as active in ECHO.

There are many more examples that demonstrate the measures in EPA’s Temporary Policy are consistent with state responses to this public health emergency, considering the different numbers of regulated entities. The situation continues to evolve as states respond to specific inquiries. Like state policies, EPA’s policy is temporary and will be lifted as soon as normal operations can resume, which may occur sooner in some locations than others.

During this challenging time, I am especially mindful of the close working relationships that EPA’s enforcement and compliance staff shares with their state counterparts and our shared mission of protecting public health and the environment. If you have further questions, you may contact me, or your staff may contact Carolyn Levine in the EPA’s Office of Congressional and Intergovernmental Relations at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,



Susan Parker Bodine