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

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

March 26, 2020

MEMORANDUM

SUBJECT: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program

FROM: Susan Parker Bodine

TO: All Governmental and Private Sector Partners

As all of us at the U.S. Environmental Protection Agency adjust to the evolving COVID-19 pandemic, we are first and foremost mindful of the health and safety of the public, as well as our staff, and those of Federal Agencies, State and Local Governments, Tribes, Regulated Entities, Contractors, and Non-governmental Organizations. The agency must take these important considerations into account as we all continue our work to protect human health and the environment. Accordingly, we are announcing the following temporary policy regarding EPA enforcement of environmental legal obligations during this time.

The EPA will exercise the enforcement discretion specified below for noncompliance covered by this temporary policy and resulting from the COVID-19 pandemic, if regulated entities take the steps applicable to their situations, as set forth in this policy. For noncompliance that occurs during the period of time that this temporary policy is in effect, and that results from the COVID-19 pandemic, this policy will apply to such noncompliance in lieu of an otherwise applicable EPA enforcement response policy.

APPLICABILITY

This policy will apply retroactively beginning on March 13, 2020. Authorized states or tribes may take a different approach under their own authorities. The EPA will undertake to coordinate with other federal agencies in situations where the EPA shares jurisdiction over a regulated entity's environmental compliance obligations.

The EPA will assess the continued need for and scope of this temporary policy on a regular basis and will update it if the EPA determines modifications are necessary. In order to provide fair and sufficient notice to the public, the EPA will post a notification here https://www.epa.gov/enforcement/enforcement-policy-guidance-publications, at least seven days prior to terminating this temporary policy.

The EPA will apply this policy to actions or omissions that occur while this policy is in effect even after the policy terminates.

SCOPE

At the EPA, we are cognizant of potential worker shortages due to the COVID-19 pandemic as well as

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 and the availability of key staff and contractors and the ability of laboratories to timely analyze samples and provide results. As a result, there may be constraints on the ability of a facility or laboratory to carry out certain activities required by our federal 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 and water discharges, requirements for the management of hazardous waste, or requirements to ensure and provide safe drinking water. These are very distinct situations that the EPA plans to manage differently, as described below.

The enforcement discretion described in this temporary policy do not apply to any criminal violations or conditions of probation in criminal sentences. Appropriate consideration of potential criminal liability is discussed separately, below.

This policy does not apply to activities that are carried out under Superfund and RCRA Corrective Action enforcement instruments. Such matters will be addressed in a separate communication.

This policy does not apply to imports. We also are especially concerned about pesticide products entering the United States, or produced, manufactured, distributed in the United States, that claim to address COVID-19 impacts. The agency expects to focus on ensuring compliance with requirements applicable to these products to ensure protection of public health. Information relating to FIFRA import requirements can be found here: https://www.epa.gov/compliance/importing-and-exporting-pesticides-and-devices. This website will be updated to provide information on how to submit information via email, as may be necessary during the COVID-19 pandemic.

Finally, we realize that the general statements contained in this policy may not address every potential civil violation that may arise as a result of COVID-19. As such, the EPA may provide additional enforcement guidance applicable to specific programs on an ongoing basis and the EPA's self-disclosure program remains available.[1]

ENFORCEMENT DISCRETION

I. Civil Violations

A. General conditions

All enforcement discretion set forth in this temporary policy is conditioned on the following.

1. Entities should make every effort to comply with their environmental compliance obligations.

[1] Regulated entities who voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent recurrence of potential violations may be eligible for a reduction or elimination of any civil penalties that otherwise might apply. Most violations can be disclosed and processed via the EPA's automated online "eDisclosure" system (*see* https://www.epa.gov/compliance/epas-edisclosure). To learn more about the EPA's violation disclosure policies, including conditions for eligibility, please review the EPA's Audit Policy website at https://www.epa.gov/compliance/epas-audit-policy. Many states also offer incentives for self-policing; please check with the appropriate state agency for more information.

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2. If compliance is not reasonably practicable, facilities with environmental compliance obligations 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 a. through d.

B. 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,[2] integrity testing,[3] sampling,[4] laboratory analysis,[5] training,[6] and reporting or certification.[7]

Entities should use existing procedures to report noncompliance with such routine activities, such as pursuant to an applicable permit, regulation or statute. If no such 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 EPA or an authorized state or tribe upon request. In general, the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.

After this policy is no longer in effect, the EPA expects full compliance going forward. In general, absent exigent circumstances, the EPA does not plan to 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, such as those required on a bi-annual or annual basis, when this policy is no longer in effect, the EPA 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 may indicate why it has not conducted the required sampling and monitoring, and the EPA encourages facilities to include such information when submitting any late reports.

Many training classes are offered on-line and such on-line training generally should not be affected by

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[2] If affected by COVID-19, this category may include, for example, CEMS and stack tests, relative accuracy test audits, LDAR monitoring, fence line monitoring, RICE readings and monitoring, tank and piping inspections, assessments, or stormwater inspections.
[3] If affected by COVID-19, this category may, for example, include tank integrity testing (e.g., API 653) for compliance with certain "good air pollution control practices."
[4] If affected by COVID-19, this category may include, for example, effluent sampling and testing, as well as cooling tower sampling.
[5] If affected by COVID-19, this category may include, for example, laboratory holding times and turn-around times.
[6] If affected by COVID-19, this category may include, for example, SPCC training, hazardous waste trainings, CAA section 129 renewals, and other annual re-certifications.
[7] If affected by COVID-19, this category may include, for example, reports and certifications associated with delayed activities described above, and late reports under permit or other regulatory obligations, including TRI and greenhouse gas inventory reporting.

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

C. Settlement agreement and consent decree reporting obligations and milestones

1. With respect to **EPA administrative settlement agreement** reporting obligations and milestones, if, as a result of COVID-19, parties to such 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 EPA administrative settlement agreements, the EPA intends to treat routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and associated reporting or certification obligations in the manner described above and will generally not seek stipulated or other penalties for noncompliance with such obligations. The notification should provide the information required by the agreement, which typically will include steps taken to minimize the effects and duration of any noncompliance caused by COVID-19, as well as the information specified under subpart A, above. EPA staff will review these notifications and may contact a party to seek adjustments to a proposed plan of action, pursuant to the agreement.
2. With respect to **consent decrees entered into with the EPA and the U.S. Department of Justice**, these documents are agreements and court orders. EPA staff will coordinate with DOJ to exercise enforcement discretion with regard to stipulated penalties for the routine compliance obligations described in paragraph 1 and will also consult with any co-plaintiffs to seek agreement to this approach. 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.
3. Parties should proceed as proposed in their notice to the EPA (and to DOJ for consent decrees) unless and until contacted by the agency (if an EPA administrative settlement) or DOJ (if a judicial consent decree).

D. Facility operations

The EPA 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.

1. Facilities should contact the appropriate implementing authority (EPA region, authorized state, or tribe) if **facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment.** Even in authorized programs, the EPA strongly encourages facilities, states, and tribes to consult with their EPA regional office on acute risks and imminent threats. If an entity contacts the EPA due to noncompliance that could result in an acute risk or an imminent threat to human health or the environment, the EPA will act as follows.

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a. The EPA's first step will be to consult with the state or tribe, if an authorized program, to discuss measures to minimize or prevent the acute or imminent threat to health or the environment from the COVID-19-caused noncompliance. State or tribal permits or regulations may have provisions that address the situation and result in a return to compliance. Consultation with authorized states or tribes will proceed in accordance with the July 11, 2019 memorandum on *Enhancing Effective Partnerships Between EPA and States in Civil Enforcement and Compliance Assurance Work*.
b. In cases where the EPA implements the program directly:
    i. The EPA regional office will evaluate whether an applicable permit, statutory, or regulatory provision addresses the situation. The EPA's Office of Enforcement and Compliance Assurance (OECA) will work with program offices on nationwide issues that may arise.
    ii. If there is no permit/regulatory provision that addresses the situation, the EPA 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.
    iii. The EPA will inform the relevant state or tribe of any acute threats and actions taken in response to the noncompliance.
    iv. The EPA 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 air emission control or wastewater or waste treatment systems or other facility equipment** that may result in exceedances of enforceable limitations on emissions to air or discharges to water, or land disposal, or other unauthorized releases, the facility should notify the implementing authority (EPA regional office or authorized state or tribe) as quickly as possible. The notification also should include information on the pollutants emitted, discharged, discarded, or released; the comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s); and the expected duration and timing of the exceedance(s) or releases. The EPA will consult with authorized states or tribes, as applicable, in accordance with the July 11, 2019 memorandum on *Enhancing Effective Partnerships Between EPA and States in Civil Enforcement and Compliance Assurance Work* to determine the appropriate response. Where the EPA implements the program directly, the EPA 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 paragraph 1.b. above.

3. If facility operations result in **noncompliance are not already addressed by the EPA above**, regulated entities should take the steps identified under Part I.A. The EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether enforcement response is appropriate.

4. 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 the steps identified under Part I.A, above. If these steps are met, as an exercise of enforcement discretion, the EPA 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 EPA will treat Very Small Quantity Generators and Small Quantity Generators as

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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.

5. If a facility is an **animal feeding operation**, and, due to disruptions caused by the COVID-19 pandemic, is unable to transfer animals off-site and, solely as a result of the pandemic, meets the regulatory definition of concentrated animal feeding operation (CAFO), as an exercise of enforcement discretion, the EPA 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 under Part I.A, above.

E. Public water systems regulated under the Safe Drinking Water Act

Public water systems have a heightened responsibility to protect public health because unsafe drinking water can lead to serious illnesses and access to clean water for drinking and handwashing is critical during the COVID-19 pandemic. Accordingly, the EPA has heightened expectations for public water systems. The EPA expects operators of such systems to continue normal operations and maintenance as well as required sampling to ensure the safety of our drinking water supplies. The EPA expects laboratories performing analysis for water systems to continue to provide timely analysis of samples and results. States play the lead role on drinking water issues, but the EPA also has important drinking water enforcement and oversight responsibilities, including direct implementation responsibilities in some locations.

In the event of worker shortages in the water sector, the EPA will consider continued operation of drinking water systems to be the highest priority. In anticipation of worker shortage and laboratory capacity problems, the EPA considers the following tiers of compliance monitoring to assure the safety of our drinking water supplies and prioritize prevention of acute risks. Of highest priority is monitoring required under National Primary Drinking Water Regulations to protect against microbial pathogens. Additional priorities include nitrate/nitrite and Lead and Copper Rule monitoring followed by contaminants for which the system has been non-compliant. States may wish to adopt similar priorities.

The EPA is working closely with our federal partners, states, and other organizations to ensure resources and personnel are available to assist facilities facing staffing and contractor challenges during this period of COVID-19 response and the Office of Water plans to launch a website with this information. Accordingly, the EPA strongly encourages public water systems to consult with the state and EPA regional offices without delay if issues arise that prevent the normal delivery of safe drinking water and encourages states to continue to work closely with the EPA on measures to address the potential impacts of COVID-19. The EPA also encourages certified drinking water laboratories to consult with the state and the EPA if issues arise that prevent laboratories from conducting analyses of drinking water contaminants.

The EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether any enforcement response is appropriate at public water systems acting in accordance with this subpart.

F. Critical infrastructure

In situations where a facility is essential critical infrastructure, the EPA may consider a more tailored short-term No Action Assurance, with conditions to protect the public, if the EPA determines it is in the

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public interest. Such determinations are made by the OECA Assistant Administrator on a case-by-case basis. The EPA will consider essential the facilities that employ essential critical infrastructure workers as determined by guidance issued by the Cybersecurity and Infrastructure Security Agency.

II. State Oversight

The EPA will continue State Review Framework reviews, and other state program oversight, as practicable, taking into consideration priority work in response to COVID-19. Until such time as dictated by travel and social distancing restrictions, the EPA believes states should take into account the safety and health of their inspectors and facility personnel and use discretion when making decisions to conduct routine inspections, notwithstanding any applicable compliance monitoring strategy. The EPA will take the COVID-19 pandemic into consideration in any review of a state compliance and enforcement program, such as the State Review Framework.

III. EPA Actions

During the pendency of the current COVID-19 exigency, the EPA expects to focus its resources largely on situations that may create an acute risk or imminent threat to public health or the environment, to ensure protection against such risks or threats. All ongoing enforcement matters are continuing.

IV. Accidental Releases

Nothing in this temporary policy relieves any entity from the responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by federal law, or should be read as a willingness to exercise enforcement discretion in the wake of such a release.

V. Criminal Violations

The considerations described above apply to the vast majority of people and businesses who are making good faith efforts to comply with their obligations in this difficult time. Federal environmental statutes generally authorize criminal penalties for knowing conduct that violates the law. In screening cases to determine when to seek prosecutorial assistance from DOJ, the EPA will distinguish violations that facilities know are unavoidable as a result of COVID-19 restrictions from violations that are the result of an intentional disregard for the law. EPA's Criminal Investigative Division remains vigilant and is prepared to pursue violators who demonstrate a criminal *mens rea*.

This temporary policy makes EPA offices and the EPA's governmental and private sector partners, as well as the general public, aware of how the EPA intends to exercise its enforcement discretion with respect to certain compliance situations during the exigencies of the COVID-19 pandemic. This memorandum does not alter any provision of any statute or regulation that contains legally binding requirements, and it is not itself a regulation.

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