

Environmental Compliance during the COVID-19 Pandemic: Agency Guidance and Industry Considerations

AWMA-UMS

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The following slides are intended for educational purposes only as of the date of their publication and are not intended to constitute legal or technical advice. Readers are encouraged to seek further professional guidance before taking action regarding compliance issues in the midst of the ever-evolving regulatory atmosphere surrounding the COVID-19 pandemic.

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Webinar Objectives



Overview of agency guidance provided to date by EPA and MPCA



Application of guidance to source compliance activities



Legal considerations



Questions

COVID-19 Enforcement Guidance Walk-through



Unprecedented Situation with COVID-19

■ Public health:

- Employees and contractors sick, quarantined, or sheltered
- Lack of PPE
- Threat of further infection



■ Environmental Compliance

- monitoring
- reporting tasks



EPA's March 26, 2020 COVID-19 "Temporary Policy"

- Issued by Office of Enforcement and Compliance Assurance
- Explanation of intent to exercise enforcement discretion for unavoidable noncompliance due to COVID-19
- Retroactive to March 13, 2020; will notify at least seven days before terminating policy
- Civil enforcement only; does not cover criminal violations or citizen suits
- Does not apply to Superfund and RCRA Corrective Action enforcement, imports (i.e., FIFRA)

Scope of EPA COVID-19 Civil Enforcement Discretion

General conditions

Routine monitoring and reporting

Imminent threats and pollution control failures

Future “no action” assurance for critical infrastructure

Administrative and judicial settlements

Public water systems (EPA expects SDWA to be met)

Types of Compliance Activities Addressed in Policy



Monitoring:

CEMS, stack testing, engine readings, LDAR, stormwater inspections



Laboratory analysis



Integrity testing:

tank integrity testing (API 653)



Training:

SPCC, haz waste, Method 9 certification



Sampling:

cooling tower effluent



Reporting or certification:

TRI, Part 98 GHG, Title V deviations

General Condition Language from EPA Policy

Entities should make every effort to comply with their environmental compliance obligations. If compliance is not reasonably practicable, facilities with environmental compliance obligations should:



Act responsibly 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, 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

Document the information, action, or condition

Routine Monitoring and Reporting

No civil penalties where EPA agrees that COVID-19 was the cause and if supporting documentation is provided

Use existing procedures to report noncompliance

If no procedure available or if reporting not reasonably practicable due to COVID-19, maintain info internally

No catch-up required if interval of underlying requirement is less than three months; otherwise, resume compliance ASAP, including conducting late monitoring/reporting

EPA will accept digital signature where a “wet” is required by a responsible official; encourage electronic reporting

Imminent Threats and Pollution Control Failures

In these situations, EPA will consider circumstances when determining enforcement response

If impacted facility operations may create acute risk or imminent threat to human health or environment, then consult EPA in advance

If failure of equipment resulting in exceedance of limit, then notify implementing authority ASAP

Special provisions to address hazardous waste generators and animal feedlots

Future No Action Assurance for Critical Infrastructure

EPA signals willingness to provide case-by-case short-term No Action Assurance, if in public interest

A No Action Assurance provides certainty that enforcement will not be pursued for specific set(s) of violations

Essential critical infrastructure per March 19 CISA memo: *medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works*

Administrative and Judicial Settlements

Administrative settlement agreements: EPA applies same enforcement discretion for routine compliance monitoring and reporting activities as described earlier for regulatory noncompliance

EPA/DOJ consent decrees: Courts retain jurisdiction and may exercise own authority.

Companies shall use notification procedures in these settlements, including use of force majeure as applicable

Immediate Fall-out: Public Response to EPA's Policy

Citing virus
By ELLEN KNICKMEYER

The New York Times

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



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EPA “Corrects the Record” after “Reckless Reporting”

- April 1, 2020 Release from EPA Office of Public Engagement
- The Temporary Policy:
 - Says that EPA will not seek penalties for noncompliance with routine monitoring and reporting on case-by-case basis.
 - Does not say that it will excuse exceedances of pollutant limits.
 - Allows for EPA to prioritize resources to acute risks and imminent threats, instead of case-by-case determinations on routine obligations.
- “EPA expects regulated facilities to comply with requirements where reasonably practicable and to return to compliance as quickly as possible once the COVID-19 threat is over.”

NGO Emergency Rulemaking Petition

- April 1 petition from NRDC et al in response to EPA policy
- Facility shall immediately notify agency of any noncompliance with detailed justification
- Facility shall immediately notify also when facility returns to compliance
- EPA shall publish online all notifications within one business day
- EPA shall publish rule within seven days as an interim final rule effective immediately without public notice

What If Things Get Worse Before They Get Better...

- Emergency statutory provisions (i.e., Section 110(f) of the Clean Air Act)
- Authorizes the President to declare a national or regional emergency, during which the Governor of an affected state could suspend for up to four months certain provisions for achieving air quality standards, excess emission penalties, and compliance schedules
- President has not yet invoked this authority despite the national emergency declaration

MPCA COVID-19 Regulatory Flexibility

<https://www.pca.state.mn.us/covid-19/covid-19-and-regulatory-flexibility>

If facility “will” have an unavoidable noncompliance directly due to COVID-19, then email mpca.covid19regflex@state.mn.us with detailed request including measures to mitigate/minimize impacts

MPCA will “consider” providing regulatory flexibility (alternative approaches, extending deadlines). Policy does not address public hearings required for permit issuance or variances.

Minimum Information Required for MPCA Request

- Contact information and applicable permit number containing the provision
- Specific statute/rule/permit condition the individual party is looking for flexibility from
- Reasoning/rationale for the request (one-paragraph summary on why the peacetime emergency makes the flexibility sought necessary and what actions the requestor took prior to the request to meet the requirement)
- Bulleted points of what measures will be taken to mitigate/minimize the potential environmental impacts (if any)
- Specific time period that the request is for, including the rationale

Key Differences Between EPA & MPCA COVID-19 Policies

Issue	EPA	MPCA
Notification of noncompliance	Use existing regulatory procedures after-the-fact	Proactively email agency before noncompliance occurs
Alternative measures	Not required; no catch-up provision for < 3-mth interval	Facility must propose bulleted list of measures to mitigate or minimize potential env impacts
Approval timing	Blanket approval for M&R due to COVID; no need to negotiate	Case-by-case negotiations and agency approval required prior to implementing alt measures
Civil penalty relief	No penalties for M&R due to COVID	No relief offered in policy

Examples of Agencies' Regulatory Flexibility Policies

- Compliance is expected for all environmental mandates (California)
- Approval required before noncompliance (Minnesota)
- After-the-fact documentation required (EPA)
- Extensions are proactively provided (Iowa)
- No written public guidance yet (North Dakota, Wisconsin)

Categorize Your Compliance Activities

Determine Which Compliance Tasks are not Reasonably Practicable



Field vs non-field work

Onsite manual inspections vs paperwork exercises using automated DCS data



Potentially endangers safety or environment

Tank integrity inspections, control equipment maintenance



Confirmation of accuracy

CEMS maintenance, engine records



Third-party dependent tasks

RATA, stack tests, LDAR, laboratory analytical measurements

What is “Not Reasonably Practicable”?

- “... should make every effort to comply ...”
- What if the task...
 - takes special skills and experience, and that person is infected or under quarantine?
 - inherently creates a risk of infection to others if the laborers are infected and asymptomatic?
 - requires third-party resources (laboratory, stack testers) that are unavailable to meet the schedule?

Legal Considerations



Existing “Flexibility” Mechanisms

- First Question: Are there existing mechanisms through which you could obtain compliance extensions?
 - Administrative Permit Amendments
 - Enforcement Agreement Provisions
 - Regulatory “Force Majeure” or Similar Provisions, e.g., 40 CFR 60.8(a)
 - Variances, however, not built for quick approval/implementation

Flexibility Policies: Cautions and Limitations

- Be clear on the governing regulatory authority
 - Most states have delegated authority and will make their own calls on noncompliance requests
 - Don't assume EPA's COVID-19 policy standards will govern; policy doesn't affect delegations
 - EPA, p.1: "Authorized states or tribes may take a different approach under their own authorities."
 - Make sure you're properly targeting your request

Flexibility Policies: Cautions and Limitations

- Not a compliance holiday
 - All regulators expect compliance to be maintained
 - Mitigation expected, even in the case of approved flexibility
 - Even EPA makes clear criminal violation standards not relaxed
 - Burden will remain on you to justify noncompliance has COVID-19 basis
 - These determinations may be made in retrospect; if so, risk later determination that standard(s) were not met to justify flexibility

Flexibility Policies: Cautions and Limitations

- Policies don't affect another key enforcement threat: citizens suits
 - Flexibility policies are statements of **regulators'** intent to use enforcement discretion
 - They do not change or waive the underlying requirements, which means citizens can still challenge noncompliance
 - Will courts take circumstances into consideration when determining punishment under suits?

Questions

