

Environmental Enforcement In A Pandemic

On March 26, 2020 USEPA issued a Memorandum titled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program.” The 7-page document lays out EPA’s enforcement policy, retroactive to March 13, during the current pandemic of COVID-19 caused by novel coronavirus, SARS-CoV-2. This policy is temporary and, much to the horror of left-leaning activists, has no sunset.

Of course, fake news outlets and social media have been abuzz with dire prognostications, decrying the move as a gutting of environmental statutes and giving industry a license to pollute. Nothing could be further from the truth.

EPA recognizes that enforcement discretion is necessary as state environmental agencies and regulated industry cope with travel, social distancing, and business operating restrictions as well as quarantine requirements imposed by government trying to control the spread of COVID-19. Although not explicit, the policy also recognizes that USEPA and state agency personnel as well as industry environmental and laboratory staff may be unable to fulfill their duties due to sickness with COVID-19 or, worse, death.

EPA’s goal is to focus its resources mostly on situations that may create an acute risk or imminent threat to public health or the environment, and to ensure protection against such risk or threat. The agency is continuing all current enforcement matters.

Not A Suspension

The policy is clearly not a suspension of environmental regulation, let alone enforcement. It explicitly does not apply to any criminal violations or conditions of probation in criminal sentences. Moreover, it does not apply to activities carried out under enforced Superfund and RCRA Corrective Action measures. In addition, the policy makes it clear that enforcement discretion will not apply to accidental releases, such as those under the various statutes USEPA administers or authorizes:

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.

Policy is Conditional

USEPA emphasizes that all enforcement discretion predicated on the temporary COVID-19 policy is based on two necessary conditions:

- 1) Parties “should make every effort to comply with their environmental compliance obligations”; and,
- 2) If compliance during the pandemic is “not reasonably practicable, facilities with environmental compliance obligations should” undertake five steps specified by the policy and included *verbatim* below.
 - 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.”

Should reporting not be “reasonably practicable” due to COVID-19, facilities should maintain the above information internally, making it available to EPA upon request.

Guidance Only

Note the repeated use of “should” in the USEPA policy. This term indicates that the provisions in the policy are not mandatory. Indeed, at the end of the document EPA states:

This memorandum does not alter any provision of any statute or regulation that contains legally binding requirements, and it is **not itself a regulation**. (Emphasis added.)

Thus, this memorandum is essentially a guidance document.

Broad Coverage

For the most part, as long as the COVID-19 policy is in effect, EPA does not expect to seek penalties for violations of the following:

- 1) Routine compliance monitoring
- 2) Integrity testing
- 3) Sampling
- 4) Laboratory analysis
- 5) Training
- 6) Reporting or certification obligations.

All with the proviso that Conditions 1 and 2 above are met.

It should be emphasized, however, that the policy can be quite different in states where USEPA has authorized the administration of federal programs, e.g., the Clean Air Act and Clean Water Act, as amended. (See ‘Michigan Much Tougher’ below.)

Some Examples

EPA gives a few specific examples for each of these six categories. Routine compliance monitoring can include CEMS and stack tests, relative accuracy test audits, LDAR monitoring, fence line monitoring, RICE readings and monitoring, tank and piping inspections, assessments, and storm water inspections (in states where EPA administers the program). Integrity testing can include routine tank testing. Sampling includes effluent sampling and testing. Laboratory analysis may include sample holding times and turn-around times. Training may include SPCC training, hazardous waste training, CAA section 129 renewals, and other annual re-certifications. EPA, however, anticipates that online training should not be affected by travel restrictions or social distancing protocols necessitated by COVID-19. Examples of reporting or certification obligations can be reports and certifications associated with delayed activities described above, and various late reports under permit or other regulatory obligations, e.g., TRI and greenhouse gas inventory reporting.

EPA emphasizes that the agency

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**. (Emphasis added.)

If it is not practicable to maintain certifications due to the COVID-19 pandemic, EPA believes that it is more important to keep experienced, trained operators on the job, even if a training or certification is missed. (Michigan may not agree, however- see below.)

If, due to COVID-19, a facility is unable to transfer hazardous waste off-site within the required time periods required under RCRA to maintain its generator status, the facility should follow the above five steps. If the steps are met, EPA will not consider such generators as treatment, storage or disposal facilities. EPA will also allow Very Small Quantity Generators and Small Quantity Generators to retain their status, even if the amount of hazardous waste stored on site exceeds the applicable regulatory threshold if timely arrangements for waste shipment cannot be made due to the COVID-19 pandemic.

Once the COVID-19 policy has been terminated, EPA expects facilities to take “reasonable measures to resume compliance activities as soon as possible.” This means conducting late monitoring or submitting late semiannual or annual reports, e.g., ROP certifications or TRI reports, respectively.

If due to COVID-19, parties to EPA administrative orders or settlement agreements anticipate missing enforceable milestones established in those documents, they should use the notice procedures specified in the document, including *force majeure* notification. EPA generally will not seek stipulated or other penalties for noncompliance with the order regarding the six obligations listed above. It should be emphasized, however, that notification must meet the requirements of the order or agreement. In addition, notification should include actions taken to minimize the effects and duration of any noncompliance caused by COVID-19, as well as addressing each of the above five steps of the EPA policy.

Regarding joint EPA and Department of Justice (DOJ) consent orders, parties should again use the notice procedures set forth in the order, including notification of a *force majeure*, as applicable, with respect to any noncompliance alleged to be caused by COVID-19. EPA will coordinate with DOJ.

Facilities should contact EPA or the authorized state agency if facility operations impacted by COVID-19 could result in an acute risk or imminent threat to public health or the environment. If equipment failure stemming from COVID-19 could result in exceedances of permit limits established for air emissions or wastewater discharges, the facility should notify EPA or the state as quickly as possible. In addition to any information specified in the five steps above, the notification

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.

In both cases EPA will coordinate with the state in accordance with the July 11, 2019 memorandum titled “Enhancing Effective Partnerships Between EPA and States in Civil Enforcement and Compliance Assurance Work.” According to the discretion policy, “EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.”

Michigan Much Tougher

The COVID-19 enforcement discretion policy issued on March 31, 2020 by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) is much narrower and stricter than that of EPA.

During the COVID-19 response, regulated entities are expected to maintain compliance with environmental regulations and permit requirements to protect Michigan's environment and public health. EGLE understands that disruptions to standard operations may create challenges for regulated entities to meet some legal obligations.

Facilities who face “unavoidable noncompliance **directly** due to the COVID-19 emergency” (emphasis added) can send “requests for regulatory flexibility” to EGLE by electronic mail at EGLE-EnforcementDiscretion@mi.gov.

According to EGLE,

Requests must include:

- 1) The specific regulatory requirement in question, including identification of any permit, order, or agreement that applies to the entity's obligations;
- 2) A concise statement describing the circumstances preventing compliance and how the compliance issue is impacted by the COVID-19 response;
- 3) The steps taken to avoid the compliance issue, including whether you contacted EGLE for assistance and why the compliance issue was not reasonably avoidable;
- 4) The anticipated duration of the compliance issue and whether it may create an acute risk or imminent threat to human health or the environment (but emergency situations should be reported to the PEAS Hotline at 800-292-4706);
- 5) Mitigative measures planned to protect Michigan's environment and public health during the period in which the requirement cannot be met; and
- 6) A central point of contact for the regulated entity, including an email address and phone number.

It should be emphasized that each request to the EGLE email above will meet the notice or reporting requirement for noncompliance in an applicable permit, order, or other agreement provided the request: a) clearly identifies the specific governing document, and, b) “meets any timing and substantive requirements” of the applicable permit, order, or agreement.

EGLE will review each request and respond “in a timely manner.” If EGLE authorizes alternative compliance actions, the facility

must maintain records adequate to document activities related to the noncompliance and details of the [facility's] best efforts to comply. (Emphasis added.)

The differences between EGLE's policy and EPA's are stark. This fact may be due to the great animosity the Michigan governor's office has towards virtually anything the Trump administration proffers, but more likely is due to the environmental bias of the current Michigan administration.

Documentation Critical

Obviously the importance of documentation for coverage under EPA's and especially EGLE's COVID-19 enforcement discretion policies cannot be overemphasized. The policies do not constitute a *carte blanche* suspension of environmental compliance obligations as some fake news outlets would have you believe. Facilities must document each and every compliance obligation not met due to the COVID-19 pandemic and notify the agency where applicable, to protect themselves from enforcement action. Documentation should include plant shutdown and work furlough notices due to COVID-19; unavailability of contractors due to travel restrictions, shelter-in-place orders, quarantine and/or social distancing restraints during the pandemic; medical or other records of key personnel sick with COVID-19; and, as grim as it sounds, death documentation, e.g., obituaries. Bear in mind that some individuals can be sick with COVID-19 for at least several weeks- a situation that can potentially hamper compliance activities.

Reflections and Recommendations

As can be seen in the case of Michigan, State COVID-19 enforcement discretion policies may be radically different from the USEPA policy. Such state policy provisions may trump those of USEPA. This situation underscores the importance of your ISO 14001 list of compliance obligations. It is essential to refer to this document to identify whether an instance of COVID-19 noncompliance stems from a federal (USEPA) or state requirement in order to make proper notification, if required. E.g., Michigan policy requires notification ("request for regulatory flexibility") of compliance failures where USEPA policy calls simply for internal documentation. It may be advisable to highlight those compliance obligations that have been, or will soon be, impacted by COVID-19, and then determine how best to handle each *vis-a-vis* the USEPA and/or state enforcement discretion policies.

In fact, it may be beneficial as a matter of course to follow both the federal and state policies when noncompliance relates to a program EPA has delegated to the state. E.g., if Michigan EGLE refuses to grant regulatory flexibility (a distinct possibility since the policy requires noncompliance to be "directly" related to COVID-19), the facility may potentially have recourse through appealing to USEPA if its policy has been followed. It may even be worthwhile to contact your State senator.

In addition to knowing what is federally and state mandated, it is also critically important during this pandemic to distinguish between an internal or corporate environmental requirement and a legal or regulatory requirement. Upper management may erroneously think that all compliance obligations can be sidelined during an emergency such as COVID-19 because they are required to be identified by ISO 14001, which is a voluntary standard.

It is important to keep in mind that COVID-19 notifications of noncompliance are subject to the Freedom of Information Act (FOIA). Thus, even proper notification of compliance failures in accordance with EGLE's COVID-19 policy is subject to public scrutiny, potential citizen suit, or, in this age, demonization on social media.

Finally, those responsible for environmental compliance, especially EHS Coordinators, should be sure to designate at least one individual as back-up. In addition, he or she should ensure that his or her supervisor is familiar with the environmental duties performed and the specific compliance obligations to which each relates, as well as the provisions of USEPA and state COVID-19 enforcement discretion policies.

Conclusion

It is ironic that environmental enforcement discretion designed to provide relief to the regulated community during the COVID-19 crisis creates yet more regulatory red tape, as in the case of the Michigan EGLE policy. Facilities must now jump through additional hoops in order to not be penalized for their environmental compliance challenges. E.g., Michigan EGLE makes the process of documenting COVID-19 related noncompliance particularly onerous. Nevertheless, a facility may have little or no choice but to avail itself of enforcement protection under the EPA and/or state COVID-19 policies. Despite any COVID-19 enforcement discretion policy, however, noncompliance is still noncompliance. For this reason, ideally industry environmental personnel should use the regulatory flexibility afforded by either the USEPA or state environmental enforcement discretion policies only as a last resort. Yet COVID-19 has a way of making things much less than ideal.

The author, Michael Carlson, is principal of MEC Environmental Consulting, a small business founded in 1988 and located in Royal Oak, Michigan. MEC Environmental Consulting specializes in environmental regulatory compliance. Functioning during the COVID-19 pandemic, the firm is available to help protect manufacturing facilities from agency enforcement due to COVID-19 related environmental noncompliance. If you have a question about the USEPA or Michigan EGLE policy, desire information about the enforcement discretion policy in another state, or need help determining how best to handle environmental noncompliance during the pandemic, please call Michael Carlson at 248.585.3800.