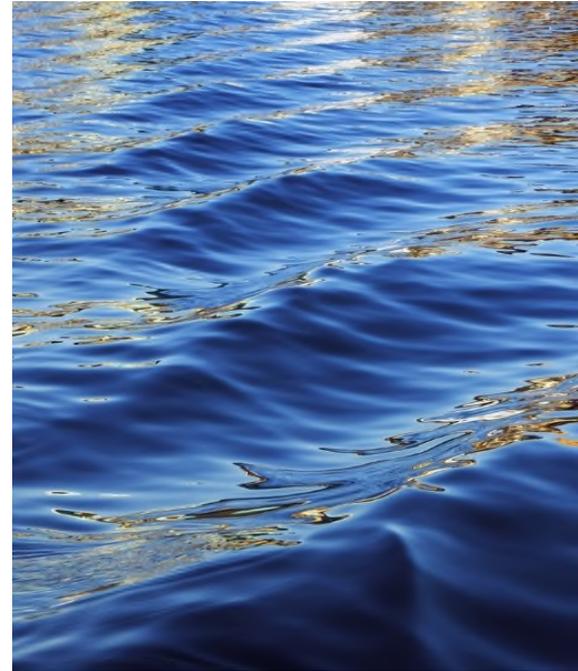


Environmental Compliance in the COVID-19 Pandemic

The U.S. Perspective – Michelle Diffenderfer, Vice
Chair - ABA SEER



Declaration of a U.S. National Emergency

- January 31, 2020 US declares a public health emergency pursuant to the Public Health Service Act, 42 U.S.C. Section 247d
- March 11, 2020 WHO characterizes COVID-19 as a pandemic due to rate of spread and severity
- American Hospital Association, American Medical Association and American Nurses Association write to VP Pence asking for White House to declare a National Emergency
- March 13, 2020 US declares a national emergency beginning on March 1, 2020 pursuant to the National Emergencies Act and the Stafford Act to respond to the COVID-19 pandemic

U.S. EPA Enforcement & Compliance Memo

- March 26, 2020 EPA issues a memorandum: “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” to be applied retroactively to March 13, 2020, terminates with 7 days notice
- March 30, 2020 EPA issues clarifying statement that the Memorandum is not a license to pollute
- EPA will exercise “enforcement discretion” as to assessment of civil penalties for noncompliance with federal environmental permits, regulations, and statutes that occur as a result of the coronavirus pandemic
- Does not apply to imports (especially pesticides), CERCLA or RCRA corrective action instruments, criminal violations or conditions of criminal sentences
- Does not relieve entities from responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants
- Does not apply to intentional disregard for the law; federal environmental statutes authorize criminal penalties for knowing conduct that violates the law

U.S. EPA Enforcement & Compliance Memo – General Procedure

- Entities are to make every effort to comply with their environmental compliance obligations
- Several steps are outlined for facilities to take if not “reasonably practicable” to comply with environmental compliance obligations and to avoid civil penalties:
 - Act responsibly under the circumstances to minimize the effects of noncompliance
 - Identify nature and dates of noncompliance
 - Identify how COVID-19 was the cause, and decisions/actions taken in response
 - Return to compliance as soon as possible, and
 - Document the information, action, or condition
- Facilities are to notify EPA if any noncompliance results or may result in a release to the environment

U.S. EPA Enforcement & Compliance Memo - Routine Compliance Monitoring and Reporting

- EPA notes that entities may be constrained from routine compliance monitoring, integrity testing, sampling, lab analysis, training, reporting and certification – not looking to penalize entities for violations of this process where EPA agrees that COVID-19 was the cause and entity provides supporting documentation
- Use existing procedures to report noncompliance with routine activities, by permit, regulation or statute. If not practicable or no procedure exists maintain the information internally and make available to EPA or state or tribe upon request (accepting digital signatures)
- Settlement Agreements – use process in those agreements to notice EPA and parties if anticipate missing milestones
- Consent Decrees – EPA to coordinate with DOJ and any co-plaintiffs to exercise enforcement discretion with regard to penalties for missing routine compliance; courts exercise their own authority; review force majeure provisions

U.S. EPA Enforcement & Compliance Memo – Facility Operations

- All facilities are expected to manage and operate their facilities in a manner that is safe and protects the public and environment
- Contact EPA Region, state or tribe if facility operations impacted by COVID-19 may create an acute risk of an imminent threat to human health or the environment; once contacted EPA will act as follows:
 - As to authorized programs, EPA will consult with states and/or tribes to discuss measures to minimize or prevent the acute or imminent threat to health or the environment (state or tribal permits, regulations may have provisions that address return to compliance)
 - If EPA implements the program directly; EPA Region will determine if there is an applicable permit, statutory or regulatory provision that addresses the situation and will work with Office of Enforcement and Compliance Assurance (OECA) on any nationwide issues; If no permit/regulatory provision applies EPA will work with the facility to minimize the threat and return to compliance; EPA will consider COVID-19 circumstances when determining whether an enforcement response is appropriate

U.S. EPA Enforcement & Compliance Memo

- Air Emissions, Wastewater, or Waste Treatment Systems exceedances – notify applicable EPA Region, State or Tribe quickly and include information on pollutants emitted, discharged, discarded or released; comparison between the expected and any applicable limitations; and duration and timing of exceedance
- Generators of Hazardous Waste – if unable to transfer waste off site within time period required under RCRA, should continue to properly label and store waste and take steps described in general section for all facilities; if these steps are taken EPA will treat them as hazardous waste generators and not treatment, storage and disposal facilities
- CAFOs – animal feeding operations unable to transfer animals offsite will not bump them up into the next size category so long as comply with documentation
- Public Water Supply – heightened expectations to continue normal operations, sampling and testing; prioritizes levels of monitoring if there are impacts due to worker shortage

U.S. EPA Enforcement & Compliance Memo

- Essential Critical Infrastructure facilities can be looked at on a case by case basis for tailored short term No Action Assurance letters with conditions to protect the public (EPA later stated would publish any letters issued)
- Warns that states and tribes that have their own authority or that have been authorized to administer environmental regulations may take a different approach to enforcement that may be more stringent
- Does not protect against the potential for citizen suits alleging facilities are in violation of environmental laws or their permit requirements

U.S. EPA Site Field Work Decisions Guidance

- April 10, 2020 EPA issues Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19
- Supplements March 19, 2020 Office of Land and Emergency Management (OLEM) Considerations and Posture for COVID-19 Pandemic guidance
- Provides interim guidance to the EPA Regional offices for new and ongoing cleanup activities (response activities) where EPA is the lead agency or has direct oversight of or responsibility for the work being performed
- Covers programs under the following EPA authority: Superfund, RCRA corrective actions, TSCA PCB cleanup provisions, the Oil and Pollution Act, and the Underground Storage Program (UST) program
- Also applies to emergency responses to releases or substantial threats of releases into the environment of chemicals, oil, and other hazardous materials/substances, as well as pollutants or contaminants that may present an imminent and substantial danger to the public health or welfare

U.S. EPA Site Field Work Decisions Guidance

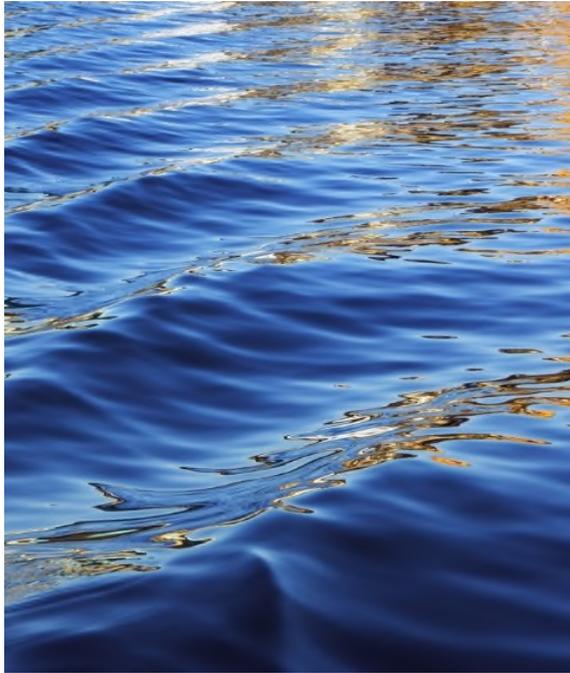
- Regional decisions on continuing, reducing or pausing field work are to be made on a case by case basis and in consultation with other EPA offices, as applicable
- Regions to evaluate status of ongoing response work and impact of COVID-19 on sites, surrounding communities, EPA personnel and response/cleanup partners in consideration of federal, state, tribal and local health declarations
- Decide whether to continue site operations or secure a site until public health threat is resolved
- In situations without issued health declarations EPA Regions should still consider safety and availability of work crews, EPA, state or tribal staff, critical nature of the work, logistical challenges and other site factors
- Parties who believe that COVID-19 restrictions may delay their performance of obligations should consult the applicable enforcement instrument, including provisions allowing for schedule adjustment; which will be made at discretion of EPA project manager and/or force majeure provisions
- Keep communication going with EPA project managers about status of sites and field work and any anticipated challenges

U.S. EPA Site Field Work Decisions Guidance

- Gives site specific factors for Regions to consider in making field work decisions to continue, reduce or pause work
 - Locals have requested suspension of work
 - Workers have tested positive for COVID-19 or exhibited symptoms
 - Local, state or tribal travel restrictions or quarantine
 - Social distancing not possible, in homes, constrained areas
- Weigh against whether failure to continue response actions would pose an imminent and substantial endangerment to human health or environment and whether practical to continue such actions (range of site examples given)
- Non-Field Site Work presumed to be continuing virtually unless work is impacted because supporting operations and materials are unavailable or have been diverted to national interests (consult applicable enforcement instruments)
- When pausing site work EPA vigilance and communication is vital; continue to monitor and plan to resume when appropriate; Regions to utilize – internal EPA document – CERCLA Interim Guidance on Public Engagement During COVID-19 on community involvement at all sites regardless of whether work has paused or continues

U.S. EPA Interim Final Air Monitoring Rule

- April 10, 2020 EPA issues interim final rule and request for comments amending the 40 CFR Part 75 emissions reporting regulations applicable to sources that monitor and report emissions under the Acid Rain Program, the Cross-State Air Pollution Rule, and/or the Nox SIP Call (fossil fuel fired electric generation, grain and oilseed milling, pulp, paper and paperboard mills, petroleum and coal products mfg, chemical mfg, iron and steel mills, colleges, universities and professional schools)
- If an affected unit fails to complete a required quality assurance, certification or recertification, fuel analysis or emission rate test by the applicable deadline under the regs because of travel, plant access, or other safety restrictions implemented to address COVID-19; and if the unit's actual monitored data would have been considered valid if not for the delayed test, the unit may temporarily continue to report actual monitored data instead of substitute data
- Reporting and recordkeeping requirements are outlined in the rule; they are to provide certifications that the source meets the criteria for using the amended procedures (EPA will post on public website)
- Complete delayed tests as soon as practicable
- Emergency Period under the interim rule effective as of March 13, 2020 (pre-publication) and continues for the period of national emergency plus 60 days; rule itself only effective for 180 days after date of publication in FR



Response from States

California

- CalEPA issues April 15, 2020 statement on compliance with regulatory requirements during the COVID-19 emergency
- CalEPA will continue to respond, investigate, and when necessary take action on complaints related to environmental non-compliance
- CalEPA will fill any enforcement gaps left by the USEPA's decision to reduce environmental oversight
- Recognizes regulated entities may need additional compliance assistance as a result of the pandemic; extension of deadlines may be warranted under clearly articulated circumstances but regulated entities that cannot meet a specific regulatory requirement due to emergency government directives or a specific hardship must contact the appropriate CalEPA board, department or office before falling out of compliance; only for time-limited and specific requests
- Water Boards (State water resources and nine Regional water quality) consider compliance an essential function during COVID-19 (would have jurisdiction over water quality and groundwater compliance issues)
- Requires notice to applicable water board if there is a specific order or requirement that cannot be timely met because it would be inconsistent with current governmental directives or guidelines related to COVID-19

Massachusetts

- March 26, 2020 Massachusetts Governor Baker issues Order suspending state permitting deadlines and extending the validity of state permits stating that the Governor has authority during period of emergency to modify the terms and conditions of licenses, permits, or certificates of registration issued by the Commonwealth or any of its agencies or political subdivisions
- No constructive approvals due to failure to act, running of time periods shall resume 45 days after the termination of the state of emergency
- Suspends agency decision deadlines during state of emergency, plus 45 days
- Appeals – extends rights of aggrieved persons to appeal final decisions of agencies
- Tolls permits valid as of March 10, 2020 through the state of emergency, state agency may extend deadlines or waive conditions if not able to comply due to the emergency. Does not apply to people in violation of their permits as of March 10, 2020
- Suspends requirement for a hearing before state adoption of priority list under state revolving fund regs, if publishes draft and accepts comments
- MassDEP also has guidance/resource pages for drinking water and wastewater operations, hazardous waste management, state revolving fund, waste and recycling, waste site cleanup operations, waterways permitting, wetlands and water quality certifications

Florida

- April 1, 2020 Florida DEP issues Emergency Final Order Extends regulatory deadlines by 30 days to accommodate disruptions: monitoring, cleanup, filing extensions, applications, permit duration, expirations, payment of fees
- Applies to any delegated programs from DEP to water management districts, local governments or other entities
- No relief from compliance and enforcement
- DEP will continue to inspect, test, review data and files to ensure full compliance with regulatory and pollution prevention and notice requirements
- Public meetings and hearings are to be held electronically
- Expires May 8, 2020

Arkansas

- Arkansas Department of Energy and Environment Guidance - creates email address for regulated entities that face unavoidable noncompliance situations to request regulatory flexibility and assistance in providing alternative approaches to maintaining compliance, where possible. Including extending reporting deadlines, waiver of late fees, exercise of enforcement discretion
- Sets out minimum information needed for email requests including requirements that cannot be complied with, circumstances preventing compliance and measures being take to protect public health and the environment
- Arkansas Department of Environmental Quality adopts Emergency Order relating to extension of time for professional licensing programs administered by its regulatory programs: Offices of Water Quality, Air Quality and Land Resources



Thank you

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