



March 31, 2020

EPA Issues Enforcement Discretion Policy During COVID-19

The Environmental Protection Agency (EPA) has issued a [memorandum](#) describing how and when the Agency will implement temporary enforcement discretion for certain federal environmental noncompliance during the COVID-19 pandemic. The policy applies retroactively from March 13, 2020, and will cover qualifying events even after the policy is revoked.

Below are several key aspects of the policy. We understand there are any number of compliance situations that arise in the course of daily operations, and the answer to whether or not to invoke the policy may not always be self-evident. For example, how should an entity report and to whom and what are the risks in doing so? What should I do with confidential business information? How might this affect my exposure to citizen suits? What do I do if I am in the middle of a voluntary audit and now cannot meet a compliance schedule? We encourage anyone with questions about what EPA's memorandum means or how it may affect your ongoing operations to contact the Environmental Compliance Response Team, which we have set up specifically to help our clients in answering these and other related questions during this uncertain time.

What is EPA's new policy?

EPA has announced a *temporary* policy to exercise enforcement discretion for certain federal environmental noncompliance events (actions or omissions). This enforcement discretion will not cover all types of noncompliance, as discussed below. EPA will assess the continued need for and scope of the temporary policy, and upon notice will rescind it when conditions warrant.

What does the policy cover?

EPA may choose to forego civil enforcement for certain noncompliance events associated with federal environmental permits, regulations and statutes as well as reporting obligations and milestones set forth in settlements and consent decrees due to the COVID-19 pandemic. The policy treats *routine* noncompliance differently from noncompliant *releases*.

Routine noncompliance includes:

- Routine compliance monitoring (CEMS, stack tests, LDAR monitoring, fence line monitoring, stormwater inspections)
- Integrity testing (tank testing to meet "good pollution control practices")

- Sampling (effluent sampling and testing)
- Laboratory analysis (holding and turnaround times)
- Training (SPCC training, hazardous waste training)
- Reporting or certification (permit or other regulatory reports, GHG inventory)

For these events, entities should use existing procedures to report noncompliance (i.e., those identified in permit, regulation or statute). Generally, facilities will not be asked to “catch up” on routine monitoring and reporting obligations if the underlying requirement applies to intervals of less than three months.

The policy also covers *releases* (emissions exceedances, discharges to water). Contrary to routine noncompliance, entities reporting releases must do so “as quickly as possible” and must carefully and thoroughly document information surrounding the release. Companies with noncompliance events falling into this category should expect EPA to coordinate/consult with states and tribes and can generally expect heightened scrutiny.

*Note – there will be unique considerations for RCRA hazardous waste generators, animal feeding operations, public water systems, and critical infrastructure.

What does the policy *not* cover?

- Criminal violations
- Conditions of probation in criminal sentences
- Activities carried out under CERCLA or RCRA Corrective Action enforcement instruments (these will be the subject of separate EPA communications)
- Imports (pesticide products entering the United States)

What information should I collect if faced with COVID-19-related noncompliance?

Entities seeking to invoke the temporary policy regardless of whether it is routine or not, should be prepared to demonstrate, in detail, the following:

- It made every effort to comply;
- Noncompliance was (or will be) caused by COVID-19-related circumstances;
- It minimized the *effects and duration* of any noncompliance;
- The specific nature, dates and duration of noncompliance;
- The decisions and actions taken in response, including best efforts at compliance;
- Steps taken to come into compliance at the earliest opportunity; and
- A return to compliance as soon as possible.

Generally speaking, the more information about and rationale for the noncompliance event the better.

Settlements and Consent Decrees

The policy summarized above will apply in a similar manner to *administrative* settlements with EPA. Importantly, however, it does not apply to consent decrees entered with the EPA and the Department of Justice, which remain under court jurisdiction.

What about state requirements?

EPA’s policy *only* covers federal noncompliance (i.e., federal permits, regulations or statutes). Below are links to various analogous state resources addressing similar enforcement discretion and general agency responses to COVID-19.

California

California GEM Division – Public health rulemaking community meetings postponed; statewide stay-at-home order in place; business being conducted remotely.

California Air Resources Board – Board hearings cancelled through March; business to be transacted remotely.

Colorado

Colorado Oil and Gas Conservation Commission – Staff working remotely, but business continues; Mission Change rulemaking on pause and scheduled to be revisited the week of April 13; no compliance or enforcement discretion/flexibility guidance issued to date.

Colorado Department of Public Health and Environment – **Notice of pause** on certain regulatory and policy work, but majority of work continues; **Air Pollution Control Division** provided guidance on permit applications and other submittals and inspection and compliance extension requests; **Water Quality Control Division** released **Frequently Asked Questions** document addressing ongoing compliance, emergency planning and resource shortages.

New Mexico

New Mexico Oil Conservation Division – Information on electronic submittals, regulatory extension requests, and shut-in wells due to economic hardship; the division's **April 2 hearing** is cancelled.

New Mexico Environment Department – Emergency public health order in effect.

North Dakota

North Dakota Division of Mineral Resources – Offices closed until at least April 6; services being conducted remotely; hearings will continue as scheduled via temporary remote procedures.

North Dakota Department of Environmental Quality – Offices closed until at least April 6.

Nevada

Nevada Division of Minerals – Offices closed until further notice; Carson City office will remain open with limited staff to process permit applications and sundries; other business conducted remotely.

Nevada Department of Conservation and Natural Resources – Offices closed until further notice and business being handled remotely.

Oklahoma

Oklahoma Corporation Commission – All offices closed until further notice; business to be conducted remotely.

Oklahoma Department of Environmental Quality – All offices closed until further notice; business being conducted remotely; regulatory compliance flexibility.

Texas

Texas Railroad Commission – Telecommuting implemented; no in-person filings; hearings postponed and to be held remotely; case-by-case **regulatory waivers** available; Statewide Rule 32 deadline extension. Link to the **Amended COVID-19 Emergency Response Order**.

TCEQ – Administrative relief and enforcement discretion for reporting requirements and other COVID-19 guidance documents.

Utah

Utah Department of Natural Resources – Staff teleworking; work is proceeding remotely.

Utah Department of Environmental Quality (Air Quality Division) – Staff working remotely; case-by-case, regulatory exemptions being considered; electronic submittal instructions. More information about [operations during COVID-19](#).

Wyoming

Wyoming Oil and Gas Conservation Commission – April hearings postponed; business being handled remotely.

Wyoming Department of Environmental Quality (Air Quality Division) – Certain adjustments to avoid in-person meetings.

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This document is intended to provide you with general information regarding the EPA's temporary enforcement discretion for certain federal environmental noncompliance during the COVID-19 pandemic. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.