

Understanding EPA's Enforcement and Compliance Policy During the COVID-19 Pandemic

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Helia Bidad, Natasha Brunstein, Jayni Hein & Alisa White

On March 26, 2020, the U.S. Environmental Protection Agency (“EPA”) issued a new enforcement and compliance policy (“Policy”) in light of COVID-19 that applies to a wide array of regulated entities and facilities.¹ EPA stated that it issued this temporary Policy due to potential worker shortages and social distancing restrictions that could affect the availability of key staff, facility operations, and laboratories.² This issue brief summarizes the new EPA Policy, describes its significance, and clarifies its contours. The Policy opens the door to potentially problematic and harmful actions, especially on a short-term basis.

Overview of the Enforcement and Compliance Policy

The Policy applies to five major areas of EPA action: (1) routine compliance monitoring and reporting by regulated entities, (2) settlement agreement and consent decree reporting obligations and milestones, (3) facility operations, (4) public water systems, and (5) critical infrastructure.³ In all five areas, the Policy gives EPA discretion to consider present circumstances, including COVID-19, to determine if enforcement is appropriate.⁴ The Policy applied retroactively beginning on March 13, 2020, and does not have a set termination date.⁵

The Policy states that if compliance is “not reasonably practicable,” entities should minimize the effects and duration of any noncompliance caused by COVID-19 and return to compliance as soon as possible.⁶ In addition, EPA calls upon noncompliant facilities and entities to document the nature and dates of their noncompliance, how COVID-19 was the cause, and any actions they took in response, including efforts to come into compliance as soon as possible.⁷

EPA states that it does not expect to seek penalties for violations of routine compliance monitoring and reporting due to COVID-19 (including those under settlement agreements and consent decrees), in situations where EPA agrees that COVID-19 was the cause of the noncompliance.⁸ EPA also states that it does not expect facilities to “catch up” on missed monitoring that lasts for less than three months.⁹ Routine compliance monitoring and reporting may include: stack tests on power plants, leak detection and repair monitoring, effluent sampling and testing, and greenhouse gas inventory reporting.¹⁰

If facility operation affected by COVID-19 may create an imminent threat to human health or the environment, EPA states that it will work with such entities to minimize or prevent the threat and obtain a return to compliance as soon as possible.¹¹ Due to COVID-19, if generators of hazardous waste cannot transfer waste off-site within the time periods required by law to maintain generator status, the facility should continue to properly label and store such waste and EPA will treat such entities to be hazardous waste generators, rather than treatment, storage and disposal facilities.¹² A similar allowance is made for animal feeding operations that, due to disruptions caused by COVID-19, are unable to transfer animals off-site and thereafter meet the regulatory definition of concentrated animal feeding operation (“CAFO”); as an exercise of enforcement discretion, EPA will not treat such animal feeding operations as CAFOs.¹³

Public water systems under the Safe Water Drinking Act are subject to a “heightened responsibility” to protect public health, and EPA expects operators of such systems to continue normal operations and maintenance, as well as required sampling and assessment by laboratories, to ensure the safety of drinking water supplies.¹⁴ Finally, the policy expresses that where a facility is essential infrastructure, EPA may issue a short-term “No Action Assurance” if there are conditions in place to protect the public.¹⁵

Implications and Risks of the Policy

Many experts sharply criticized the Policy as unreasonable and unprecedented,¹⁶ arguing that it exceeds reasonable and measured relief in response to COVID-19 and debilitates important environmental regulations and reporting requirements.¹⁷

One of the most alarming aspects of the Policy is the agency’s relaxation of enforcement of routine monitoring and reporting. Tens of thousands of facilities are subject to the self-monitoring and disclosure requirements affected by the Policy.¹⁸ As a result, if a regulated entity acts in bad faith and pollutes more than it is allowed, EPA, state agencies, and the public will not know the extent of the entity’s emissions. Moreover, even where a regulated entity acts in good faith, it will be unknown whether, or to what extent, the entity has surpassed pollution limits. This lack of transparency is particularly concerning when considering how it could minimize deterrence and shield bad-faith actors. Two former EPA Assistant Administrators, Steven Herman and Cynthia Giles, wrote that the Policy “throws open the doors to widespread violations, with the possibility that no one will ever know how bad they were.”¹⁹

A coalition of environmental groups has petitioned EPA for increased transparency of the processes around the Policy, including timely public disclosure of when and why polluters stop monitoring and reporting their emissions.²⁰ On

April 16, 2020, environmental groups filed a lawsuit against EPA for not responding to the aforementioned petition in a timely manner.²¹ The lawsuit requested that EPA publish a rule requiring polluters who stop monitoring and reporting to provide written notice and justification that is publicly available.²²

As noted in the ongoing litigation, lack of monitoring and reporting will create data and knowledge gaps that can impair future policymaking and rulemaking.²³ Lack of data can also negatively affect emergency planning (e.g., chemical emergency plans created by local emergency managers who use data from industrial facilities).²⁴

Moreover, the Policy itself provides no specific justification for what amounts to a broad waiver of routine compliance and enforcement, and breaks from EPA's long tradition of disfavoring "no action" assurances like the general one pronounced in the Policy.²⁵ In fact, EPA adopted a formal "Policy Against 'No Action' Assurances" in 1984, which remains in effect today.²⁶

The Policy also has concerning environmental justice implications. A group of state chief law enforcement officers wrote to EPA Administrator Wheeler on April 1, 2020 highlighting the Policy's "overbroad scope, retroactivity, and lack of expiration date" and requesting EPA to rescind it.²⁷ The group noted the potential effects of the policy on public health, especially for low-income and minority communities, which face greater risks from both COVID-19²⁸ and environmental pollution.²⁹ One of the types of monitoring at risk under the Policy is fence-line monitoring.³⁰ Fence-line monitoring helps track the air quality around high-polluting industrial facilities, which are often located near low-income and minority communities.³¹ Long-term exposure to air pollution, which occurs in many of these communities, is associated with increased morbidity risk from COVID-19.³² Not only is lack of monitoring inherently harmful to these communities because it inhibits their access to accurate information on facility compliance, but excessive pollution from bad-faith actors could exacerbate the vulnerability of these communities to public health risks during a global pandemic. Furthermore, affected communities were not consulted or notified about the Policy.³³

In addition, the Policy has potentially concerning consequences for hazardous waste generation sites, animal feeding operations, and other facilities, which could discharge toxic materials into waterways, negatively affecting water quality and public health.³⁴ If a hazardous waste generation facility cannot transfer hazardous waste offsite due to COVID-19, it will not be considered a treatment, storage, and disposal facility under the Policy. The effects are potentially far-reaching and problematic. Resource Conservation and Recovery Act ("RCRA") permits for hazardous waste generation facilities do not have all of the same safety standards, facility performance requirements, and groundwater monitoring requirements that permits for treatment, storage, and disposal facilities do.³⁵ For instance, hazardous waste treatment, storage, and disposal facilities must comply with specific permit conditions designed to protect groundwater near their facilities, whereas generators lack such permit conditions.³⁶ This could have ramifications for hazardous waste contamination.³⁷

The Policy appears to be responsive to the interests of the American Fuel and Petrochemical Manufacturers and American Petroleum Institute, which have both requested that the Trump EPA waive particular testing and reporting requirements.³⁸ While providing relief to polluters, EPA has not provided a timely response to environmental groups' concerns, nor extended public comment periods on proposed rules.³⁹ Rather, the Policy may conflict with the mission of EPA itself: to protect human health and the environment.⁴⁰

What the Policy Does Not Do

While the Policy opens the door to actions that may harm the environment and public health, it also has important limitations in both scope and subject matter and maintains some level of EPA enforcement. As former EPA Regional Administrator Felicia Marcus explained, the Policy is “not a free pass or get out of jail free card” for polluters.⁴¹

First, EPA maintains discretion to decide whether polluters’ noncompliance is a direct result of COVID-19.⁴² The Policy states that where compliance with regulations and obligations is not practicable, facilities should document how COVID-19 was the cause of the noncompliance and what actions they undertook to come into compliance at the earliest opportunity.⁴³ EPA does not expect to seek penalties for violations of routine compliance monitoring only where EPA agrees, on a case-by-case basis, that COVID-19 was indeed the cause of noncompliance.⁴⁴ Entities may also be asked to provide supporting documentation upon EPA’s request.⁴⁵ Moreover, the Policy does not allow entities to indefinitely forgo all reporting obligations. For long-term reporting requirements, such as bi-annual or annual reports, EPA expects facilities to take “reasonable measures to resume compliance activities as soon as possible,” including conducting late monitoring or submitting late reports.⁴⁶

EPA states that it expects facilities “to operate in a manner that is safe and protects the public and the environment,” and the agency retains enforcement discretion where facility operations affected by COVID-19 may cause acute risks or imminent threats.⁴⁷ In these circumstances, entities must immediately notify EPA or the implementing agency.⁴⁸ Where EPA implements the program directly, EPA will work with the facility to minimize the harm, inform the relevant state or tribe, and determine whether an enforcement response is appropriate.⁴⁹ The same process applies in situations where a failure in a facility’s air emission control, wastewater, waste treatment systems, or other equipment could result in unauthorized emissions to air or discharges to water, or land disposal, or other unauthorized releases.⁵⁰ The Policy does not excuse exceedances of pollutant limitations, and EPA will only consider the impacts of COVID-19 in cases where entities notified EPA or the appropriate implementing agency to allow the agency to mitigate the risks or threats.⁵¹ However, as some commentators have noted, “pollutant limitations” may be meaningless absent the monitoring and reporting that EPA and state agencies need to assess compliance, as “there is virtually no way for EPA to find violations once these sources stop reporting their pollution.”⁵² Moreover, the harm from any pollution will have already occurred, even if EPA does take some enforcement action later.

In addition, with respect to consent decrees entered into with EPA and the U.S. Department of Justice (DOJ), EPA will coordinate with DOJ to exercise enforcement discretion with regard to stipulated penalties, and courts retain jurisdiction over consent decrees and may exercise their own authority.⁵³

Lastly, the Policy does not relax laws or penalties in some key areas. The Policy does not apply to criminal violations or liability, activities under Superfund and RCRA Corrective Action enforcement, or imports regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁵⁴ The Policy also does not relieve polluters from the responsibility to prevent, respond to, or report accidental releases of oil or hazardous substances.⁵⁵ In addition, under the Policy, EPA has “heightened expectations” for public water systems during the COVID-19 pandemic.⁵⁶ These systems must maintain normal operations, maintenance, required sampling, and laboratory testing.⁵⁷ However, the Policy still allows EPA to take COVID-19 into consideration in determining enforcement responses for public water systems.

In short, the level of harm caused by the Policy will depend partially on how EPA chooses to implement it, with more lax oversight likely to increase environmental and public health risks.

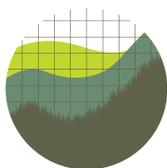
Conclusion

As a whole, the new EPA Policy amounts to a broad waiver on enforcement for routine monitoring and reporting, so long as a facility can claim that COVID-19 caused the noncompliance. While EPA states that it still expects facilities to operate in a manner that is safe and protects the public and the environment, it will be difficult to assess whether facilities flout pollution standards in the absence of reporting and public transparency. However, the Policy does not abandon all environmental enforcement; EPA retains enforcement discretion under the Policy, and the Policy does not apply to several key substantive areas. Nevertheless, as a whole, the Policy could harm vulnerable communities and obstruct long-term efforts to ensure clean air and water in the United States.

Endnotes

- ¹ U.S. ENVIRONMENTAL PROTECTION AGENCY, MEMORANDUM ON COVID-19 IMPLICATIONS FOR EPA'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM (Mar. 26, 2020) [hereinafter EPA Enforcement Policy], <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>.
- ² EPA Enforcement Policy, Scope Section.
- ³ See *id.*, Enforcement Discretion Section.
- ⁴ See, e.g., *id.*, Part I(D)(1)(b)(iv); *id.*, Part I(D)(3); *id.*, Part I(E).
- ⁵ *Id.*, Applicability Section.
- ⁶ *Id.*, Part I(A)(2).
- ⁷ *Id.*, Part I(A)(2).
- ⁸ *Id.*, Part I(B).
- ⁹ *Id.*, Part I(B) - (C).
- ¹⁰ See *id.* at 3 nn. 2-7.
- ¹¹ *Id.*, Part I(B).
- ¹² *Id.*, Part I(D).
- ¹³ *Id.*, Part I(D).
- ¹⁴ *Id.*, Part I(E).
- ¹⁵ *Id.*, Part I(F).
- ¹⁶ See Lisa Friedman, E.P.A., *Citing Coronavirus, Drastically Relaxes Rule for Polluters*, N.Y. TIMES (May 1, 2020), <https://www.nytimes.com/2020/03/26/climate/epa-coronavirus-pollution-rules.html>; Patrice Simms, *What EPA's 'Enforcement Discretion' During COVID-19 Really Means*, EARTHJUSTICE (Mar. 27, 2020), <https://earthjustice.org/blog/2020-march/what-epas-enforcement-discretion-during-covid-19-really-means>.
- ¹⁷ See Ellen Knickmeyer, *Citing Virus, EPA Has Stopped Enforcing Environmental Laws*, ASSOCIATED PRESS (Mar. 26, 2020), <https://apnews.com/45fdad55aaa3bccde3d09939c631c208>.
- ¹⁸ See Brief for Cynthia Giles & Steven A. Herman as Amici Curiae Supporting Plaintiffs at 5, Nat. Res. Def. Council v. Bodine, No. 1:20-cv-03058 (S.D.N.Y. Apr. 16, 2020).
- ¹⁹ *Id.* at 12.
- ²⁰ See *Groups Petition EPA Over Reckless Non-Enforcement Policy*, NRDC (Apr. 1, 2020), <https://www.nrdc.org/media/2020/200401>.
- ²¹ See Brief for Plaintiffs at 3-4, Nat. Res. Def. Council v. Bodine, No. 1:20-cv-03058 (S.D.N.Y. Apr. 16, 2020).
- ²² See *id.* at 3.
- ²³ See *id.* at 2; Lisa Friedman, *E.P.A. to Limit Science Used to Write Public Health Rules*, N.Y. TIMES (Nov. 11, 2019), <https://www.nytimes.com/2019/11/11/climate/epa-science-trump.html>.
- ²⁴ See NRDC et al., *Before the Administrator of the United States Environmental Protection Agency: Petition for Emergency Rulemaking*, 5 (Apr. 1, 2020), <https://www.nrdc.org/sites/default/files/petition-emergency-rulemaking-20200401.pdf> (first citing *Tozzi v. EPA*, 148 F. Supp. 2d 35, 38 (D.D.C. 2001); then citing *Atl. States Legal Found., Inc. v. Buffalo Envelope*, 823 F. Supp. 1065, 1070-71 (W.D.N.Y. 1993); then citing *Del. Valley Toxics Coal. v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1139 (E.D. Pa. 1993); and then citing 42 U.S.C. § 11023(h)); Brief for Plaintiffs, *supra* note 21, at 11.
- ²⁵ See Brief for Cynthia Giles & Steven A. Herman as Amici Curiae Supporting Plaintiffs, *supra* note 18, at 8.
- ²⁶ *Id.* (citing EPA, Policy Against 'No Action' Assurances (Nov. 16, 1984)).
- ²⁷ See Letter from Attorneys General of New York, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, to Andrew Wheeler, E.P.A. Adm'r 1-2 (Apr. 15, 2020), https://ag.ny.gov/sites/default/files/2020_0415_final_ag_letter_on_epa_enforcement_discretion_policy_signed.pdf.
- ²⁸ See *id.*
- ²⁹ See Emily Badger, *Pollution Is Segregated, Too*, WASH. POST (Apr. 15, 2014 7:00 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/04/15/pollution-is-substantially-worse-in-minority-neighborhoods-across-the-u-s/>.
- ³⁰ See EPA Enforcement Policy at 3 n.9.
- ³¹ See Brief for Plaintiffs, *supra* note 21, at 3.
- ³² See Xiao Wu et al., Harvard University, *Exposure to Air Pollution and COVID-19 Mortality in the United States: A Nationwide Cross-Sectional Study*, medRxiv 2020.04.05.20054502, <https://projects.iq.harvard.edu/covid-pm>.
- ³³ See Brief for Plaintiffs, *supra* note 21, at 3.
- ³⁴ See *id.* at 14.
- ³⁵ Compare 40 C.F.R. pt. 262 (detailing the standards applicable to generators of hazardous waste) with 40 C.F.R. pt. 264 (detailing the standards for owners and operators of hazardous waste treatment, storage, or disposal facilities). See also 40 C.F.R. § 264.92 (detailing the groundwater protection standard for hazardous waste treatment, storage, or disposal facilities).

- ³⁶ See 40 C.F.R. § 264.92 (detailing the groundwater protection standard for hazardous waste treatment, storage, or disposal facilities).
- ³⁷ See *id.*; see also Resource Conservation and Recovery Act, Pub L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. § 6901 (2018)); *What Is a Resource Conservation and Recovery Act (RCRA) Permit?*, EPA, <https://www.epa.gov/hwpermitting/what-hazardous-waste-permit#permit>.
- ³⁸ See Mike Soraghan & Corbin Hiar, *Agency Outlines Plans to Ease Enforcement During Pandemic*, E&E News (Mar. 26, 2020), <https://www.eenews.net/eenewspm/stories/1062709381>.
- ³⁹ See Paul Rauber, *EPA Suspends Enforcement of Environmental Laws*, SIERRA (Mar. 28, 2020), <https://www.sierraclub.org/sierra/epa-suspends-enforcement-environmental-laws>.
- ⁴⁰ See Friedman, *supra* note 16; Letter from the House Sustainable Energy and Environment Coalition, to Andrew Wheeler, EPA Adm'r (Mar. 13, 2020), <https://lowenthal.house.gov/sites/lowenthal.house.gov/files/SEEC%20Leadership%20Letter%20re%20EPA%20Enforcement%203.31.pdf>.
- ⁴¹ See Susanne Rust, Louis Sahagun & Rosanna Xia, *Citing Coronavirus, EPA Suspends Enforcement of Environmental Laws*, L.A. TIMES (Mar. 27, 2020 5:23 PM), <https://www.latimes.com/environment/story/2020-03-27/epa-suspends-enforcement-amid-coronavirus>.
- ⁴² EPA Enforcement Policy, Part I(A)(1) - (2).
- ⁴³ *Id.*, Part I(A)(1) - (2).
- ⁴⁴ *Id.*, Part I(B); Letter from Susan Bodine, Assistant Adm'r, to Senator Diane Feinstein 2 (Apr. 2, 2020), https://www.epa.gov/sites/production/files/2020-04/documents/2020-04-02_epa-feinstein_epa_temporary_enforcement_compliance_guidance.pdf.
- ⁴⁵ EPA Enforcement Policy, Part I(B).
- ⁴⁶ *Id.*, Part I(B).
- ⁴⁷ *Id.*, Part I(D).
- ⁴⁸ *Id.*, Part I(D)(1).
- ⁴⁹ *Id.*, Part I(D)(1)(b).
- ⁵⁰ *Id.*, Part I(D)(2).
- ⁵¹ Letter from Susan Bodine, *supra* note 44, at 2.
- ⁵² Brief for Cynthia Giles & Steven A. Herman as Amici Curiae Supporting Plaintiffs, *supra* note 18, at 6.
- ⁵³ EPA Enforcement Policy, Part I(C).
- ⁵⁴ *Id.*, Scope Section.
- ⁵⁵ *Id.*, Part IV.
- ⁵⁶ *Id.*, Part I(E).
- ⁵⁷ *Id.*, Part I(E).



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Policy Integrity
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For more information contact Derek Sylvan – derek.sylvan@nyu.edu

Institute for Policy Integrity
New York University School of Law
Wilf Hall, 139 MacDougal Street, New York, New York 10012
policyintegrity.org