

## **EPA's COVID-19 Temporary Policy**

On March 26, 2020, EPA issued temporary guidance regarding “EPA’s enforcement of environmental legal obligations” during the COVID-19 pandemic. This temporary policy applies (in lieu of otherwise applicable EPA guidance) to noncompliance that occurs at time that the policy is in effect, and **that results from the COVID-19 pandemic**. The policy applies retroactively to March 13, 2020. The EPA will coordinate with other federal agencies where there is shared jurisdiction over a regulated entity’s environmental obligations.

Importantly, EPA expects this policy only to cover situations that may occur as a result of the COVID-19 pandemic, including potential worker shortages, reduced availability of staffing and key personnel, and the impacts of travel and social distancing restrictions that may cause constraints on a facility or laboratory to carry out certain activities required by federal permits, regulations, and statutes. This enforcement discretion policy applies generally to those making good faith efforts to comply with obligations, but EPA specifically excludes applicability to any criminal violations, conditions of probation in criminal sentences, activities carried out under Superfund and RCRA Corrective Action Enforcement instruments, and/or imports (of particular concern is pesticide products claiming to address COVID-9 impacts).

**General Conditions of the Policy.** EPA encourages regulated entities to make every effort to comply with their environmental compliance obligations in permit, rule and statute. If compliance is not “reasonably practicable” due to COVID-19 related issues, an entity should:

- Act responsibly to minimize effects and the duration of any noncompliance with environmental compliance obligations.
- Identify and document the specific nature and dates of noncompliance.
- Identify and document how COVID-19 caused the noncompliance, as well as 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.

**Routine Compliance Monitoring and Reporting by Regulated Entities.** EPA does not expect to pursue penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations **if the EPA agrees that COVID-19 was the cause of noncompliance** (EPA may request supporting documentation). EPA requests entities to use existing procedures to report noncompliance pursuant to the applicable permit, regulation, or statute, however, if no such procedure is applicable, or if reporting is not reasonably practicable due to COVID-19, regulated entities should maintain this information internally and make it available to the applicable permitting authority upon request.

- **Missed Monitoring/Reporting Obligations** - EPA does not plan (absent exigent circumstances) to ask facilities to “catch-up” with missed monitoring or reporting if the underlying requirement applies to intervals of less than 3 months. For bi-annual or annual monitoring or reporting requirements, EPA expects facilities to take reasonable measures to resume compliance activities as soon as possible when this policy is no longer in effect. This includes conducting late monitoring or submitting late reports. When submitting, entities should indicate why the required sampling or monitoring was not done in the required timeframe.

- **Missed Certifications and “Wet” Signatures** - If training or certification is not available due to the COVID-19 pandemic, EPA believes it is more important to keep experienced, trained operators on the job, even if training or certification is missed. In addition, if a submission to the EPA requires a “wet” signature from a responsible official, EPA will accept a digital or other electronic signature, or an emailed submission (if a paper original was otherwise required), however, EPA will not consider the mere inability to obtain a “wet” signature a justification for failure to make a paper submission or certification. Again, it appears that EPA will require “proof” that COVID-19 pandemic created the inability to sign and/or submit as required by the permit, rule or statute.

#### **Settlement Agreements and Consent Decree Reporting Obligations and Milestones.**

- **Administrative Settlement Agreements** - If, as a result of COVID-19, parties to settlement agreements anticipate missing enforceable milestones set forth in the agreements, the parties should use the notice procedures set forth in the agreement. EPA does not intend to seek stipulated or other penalties for noncompliance with routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and associated reporting or certification obligations. Again, regulated entities should expect that any noncompliance will have to be proven to be a result of COVID-19. Any notification should provide, at least, the information required by the agreement, as well as the information required under the “General Conditions” section of the policy.
- **Consent Decrees** - While EPA states they will work with DOJ on enforcement discretion, Courts retain jurisdiction and may exercise their own authority. Again, if there is any noncompliance with the terms of the consent order, an entity should use notice procedures contained in the document, provide information required by the agreement, as well as the information required under the “General Conditions” section of the policy.

**Facility Operations.** EPA expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment. If facility operations are impacted by the COVID-19 pandemic, and may create an acute or an imminent threat to human health or the environment, a regulated entity should contact EPA immediately. EPA will consider whether enforcement is appropriate, depending on the circumstances (and will proceed in accordance with the July 11, 2019 memorandum on Enhancing Effective Partnerships Between EPA and States in Civil Enforcement and Compliance Assurance Work.) Working with EPA as early as possible should minimize impacts to the public and the environment, and will hopefully have a positive impact EPA’s enforcement discretion.

- **Generators of Hazardous Waste** - If hazardous waste generators cannot transfer the waste off-site within the time periods required under RCRA to maintain generator status, the facility should continue to properly label and store such waste and take the documentation steps as stated in the “General Conditions” section of the policy. EPA will continue to treat such entities as hazardous waste generators, and not treatment, storage, and disposal facilities, if generation is properly documented under this temporary policy. EPA plans to treat RCRA Very Small Quantity Generators and Small Quantity Generators as retaining that status even if hazardous waste stored on-site exceeds a regulatory volume threshold due to the generator's inability to arrange for shipping of hazardous waste off-site.
- **Animal Feeding Operations** - If, solely due to disruptions caused by COVID-19, a facility is unable to transfer animals off-site, EPA will not treat such operations as concentrated animal feeding operations (CAFOs) (or will not treat small CAFOs as medium CAFOs and so forth). A facility must document as stated in the “General Conditions” section of the policy.

**Public Water Systems Regulated Under the Safe Drinking Water Act.** EPA expects operators of public water systems to continue normal operations and maintenance and required sampling to ensure the safety of

drinking water supplies. If worker shortages occur, EPA has prioritized tiers of compliance monitoring to assure the safety of drinking water supplies and prevent acute risks. Public systems are strongly encouraged to communicate with the State and EPA regional offices immediately if delivery of safe drinking water becomes compromised due to the COVID-19 pandemic.

**Accidental Releases.** This policy does not relieve any entity from responsibility to prevent, respond to, or report accidental releases as required by federal law.

### **ADEQ's Memorandum of Compliance and Enforcement Implementation during COVID-19**

On March 31, 2020, ADEQ issued a guidance policy, which relies greatly on EPA's guidance issued on March 26, 2020 (EPA's policy). This guidance policy "explains ADEQ's use of compliance and enforcement discretion to implement relief measures for the regulated community in light of COVID-19, Executive Order 2020-17, and EPA's March 26, 2020 memorandum." ADEQ explains that its historic approach to compliance management focusses on "compliance assistance and informal enforcement, reserving escalated enforcement and penalties for only the most severe non-compliance." While ADEQ is not as clear as EPA in the scope of its guidance, it can be assumed that any compliance relief measures implemented by ADEQ will at ADEQ's discretion and only be due to COVID-19 related noncompliance and based on the documentation provided by a regulated entity. It seems that the best approach for regulated entities would be to identify and document any noncompliance due to COVID-19 as stated in EPA's policy.

ADEQ has divided its guidance by each issue/section represented in the EPA guidance. ADEQ has summarized key points from each section of EPA's policy, appearing to accept the majority, if not all, of the guidance provided in EPA's policy.

**General Conditions for Noncompliance Caused by COVID-19.** Regulated entities should identify and document noncompliance due to COVID-19 similarly as stated under EPA's policy.

**Routine Compliance Monitoring and Reporting.** ADEQ will accept emailed submissions in lieu of original documents and electronic and scanned signatures.

**Enforcement and Penalties for Compliance Monitoring and Reporting.** ADEQ will provide inspection reports and informal notices detailing deficiencies requiring correction.

**Operator Certifications.** In accordance with Executive Order 2020-17, ADEQ will provide 6 months deferment for required certifications, training, exams and professional development hours.

**Enforcement and Penalties for Settlement Agreements.** ADEQ will work with regulated entities to amend agreement schedules when appropriate.

**Facility Operations.** Same as the current compliance and enforcement approach. If a "permit exceedance" does not pose an acute risk to human health or the environment, ADEQ will "generally" address the issue through informal enforcement.

**Hazardous waste.** ADEQ will require documentation regarding noncompliance due to COVID-19.

**Animal Feeding Operations.** ADEQ will require documentation regarding noncompliance due to COVID-19.

**Public Water Systems Regulated under the Safe Drinking Water Act.** Same as the current compliance and enforcement approach.

**Critical Infrastructure.** ADEQ will address any issues on a case-by-case basis.

**Inspections.** Inspections will be prioritized based on citizen complaints, known or imminent threats to human health or the environment, and the risk and compliance history. ADEQ inspectors will adhere to CDC and ADHS recommendations.

**Accidental Releases.** Same as the current compliance and enforcement approach.

**Criminal Violations.** Same as the current compliance and enforcement approach.

### **NMED Guidance for COVID-19**

NMED issued several policy guidance documents for different categories of environmental businesses. Below is a summary of some key environmental categories.

#### **Public Drinking Water Systems and Utility Operators**

NMED has issued several guidance documents regarding drinking water system regulations and safety in light of COVID-19, largely relying on EPA's policy for this topic. Generally, NMED expects operators of such systems to continue normal operations and maintenance, including required sampling, to ensure the safety of our drinking water supplies. NMED expects laboratories performing analysis for water systems to continue to provide timely analysis of samples and results. In the event of worker shortages, NMED will consider continued operation of drinking water systems to be the highest priority. In anticipation of possible worker shortages and laboratory capacity problems, NMED will consider the following tiers of compliance monitoring to assure the safety of our drinking water supplies and prioritize prevention of acute risks:

- Monitoring required under National Primary Drinking Water Regulations to protect against microbial pathogens;
- Nitrate/nitrite and Lead and Copper Rule monitoring; and
- Contaminants for which the system has been non-compliant.

Complete information can be found at: [https://www.env.nm.gov/drinking\\_water/covid-19-public-water-systems/](https://www.env.nm.gov/drinking_water/covid-19-public-water-systems/)

#### **Solid Waste Facilities**

- Any waste materials generated by a medical facility and suspected or known to be contaminated with COVID-19 are to be managed as an infectious waste as defined in the NM Solid Waste Rules, 20.9.2.7.1 NMAC.
- No solid waste facility shall accept infectious waste without the appropriate permit for disposal, transfer, processing, or transformation. [NM Solid Waste Act and NM Solid Waste Rules, 20.9.8.9 NMAC]
- Any solid waste facility permitted by NMED to accept infectious waste shall continue to comply with the terms and conditions of the facility's permit, including the facility's Operations Plan.
- The generator of infectious waste (classified as "special waste") must assure the waste is:
  - Disposed of at a solid waste facility permitted to accept the special waste, or
  - Treated at a permitted facility to render it a non-special waste prior to disposal, including assuring that it is no longer infectious post-treatment (at which time it may be disposed of at a municipal solid waste landfill). [NM Solid Waste Rules, 20.9.8.8 NMAC]
- A solid waste facility may request to alter a facility's normal days or hours of operation in response to the COVID-19 situation or other considerations.
- All household-generated waste (including waste known or suspected of contamination with COVID-19) is



handled using standard best management practices for municipal solid waste, as such waste is not considered regulated infectious waste unless the waste was generated within the residence by a professional home health care provider.

### **Surface Water Quality, Wastewater and Treated Effluent Facilities**

NMED relies heavily on EPA COVID-19 policy guidance in the area. NMED (and EPA) believe that wastewater treatment systems should continue all routine operations and compliance monitoring based on state and federal regulations. NMED states that facilities should continue to monitor wastewater quality, collect routine compliance samples, and provide sample results to the EPA. Facilities should also communicate with labs to ensure routine samples can be analyzed and locate a second accredited laboratory as a back-up. Facilities should conduct an inventory of essential chemicals for your wastewater system's treatment process or other essential equipment and ensure that a sufficient supply of these chemicals and/or equipment is available, understanding that shipping and courier services may be delayed due to COVID-19.

### **Oil and Gas Industry, Air Quality Compliance**

- NMED can now accept electronic pre-submittals of permitting and related documents (i.e., Notices of Intent, GCP registrations, and permit applications), however, documents may still be mailed as normal.
- NMED is working on providing an electronic payment service.
- If requesting an extension to a permit or other regulatory requirement, contact NMED directly. NMED will handle on a case-by-case basis.
- NMED is not routinely performing regular air quality field inspections at this time.
- For violations of air quality permits or regulations issued under the laws of New Mexico, owners or operators claiming that the COVID-19 public health emergency directly or indirectly caused or contributed to the violation must demonstrate to NMED:
  - That compliance with a Public Health Emergency order rendered compliance with the air quality permit/rule effectively impossible, and
  - That proactive and timely steps were taken to minimize risk or harm to public health and the environment resulting from the violation. NMED will evaluate such claims on a case-by-case basis under NMED's existing regulations and policies to determine what enforcement relief, if any, is warranted.
- Similar to EPA's policy, facilities in New Mexico should promptly notify NMED under the following circumstances:
  - Impacts of the COVID-19 public health emergency on facility operations may create a significant risk or an imminent threat to human health or the environment; or
  - The facility suffers a failure of air emission controls or other facility equipment that may result in exceedances of enforceable limitations on air emissions, or other unauthorized emissions.
- If a facility fails to notify NMED under the circumstances set forth above, NMED will not consider relief based on COVID-19 circumstances when determining an appropriate enforcement response.

### **STATE OF NEW YORK ET AL., V. EPA**

On April 1, 2020, a group of non-governmental entities, including the Natural Resources Defense Council, petitioned EPA to file an emergency rulemaking, which would obligate facilities that intend to invoke the COVID-19 defense for non-compliance to formally notify EPA and for EPA to make that information available to the public. Based on the alleged "unreasonable and unlawful" lack of response from EPA, on April 29, 2020, the group of non-governmental entities filed a motion for summary judgment, requesting that the EPA file the emergency rulemaking within five days of the Court's order.

On May 13, 2020, the State of New York, along with the States of California, Illinois, Maryland, Michigan, Minnesota, Oregon, Vermont and the Commonwealth of Virginia, filed a complaint in the U.S. District Court for the Southern District of New York, alleging that EPA has exceeded its authority by issuing the “nonenforcement policy,” and stating that the “broad, open-ended policy that gives regulated parties free rein to self-determine when compliance with federal environmental laws is not practical because of COVID-19.” The complaint goes on to allege that the policy “makes it optional for parties to report that noncompliance to EPA, and to state and local agencies.”

At this point in time, there is no specific termination date for the EPA policy. In addition, ADEQ and NMED have not said when their guidance will no longer be in effect. It appears the economic effects of COVID-19 will continue. For example, while Arizona’s Executive Order 2020-33 expired on May 15, 2020 (extending the expiration date from April 30, 2020 in E.O. 2020-18), many businesses are now opening slowly and with several restrictions. Depending on the outcome of the lawsuits against EPA, and until the economy comes back to a more stable level, these policies ideally should remain in effect to allow agencies some enforcement discretion.