



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

June 29, 2020

The Honorable Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the U.S. Environmental Protection Agency, I am writing in response to your letters dated April 21, 2020 and June 10, 2020, to Administrator Andrew Wheeler regarding the temporary policy I issued on March 26, 2020, entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" (Temporary Policy).

I am concerned that even after your staff received two briefings on the Temporary Policy and EPA's enforcement program by senior officials from the Office of Enforcement and Compliance Assurance (OECA) your letters continue to reflect a fundamental misunderstanding of both.

EPA's enforcement program remains very active during the current public health emergency, even as most of our staff, like yours, have been working from their homes. From March 16 to June 25, 2020, the Agency opened 87 criminal enforcement cases, charged 27 defendants, initiated 275 civil enforcement actions, concluded 296 civil enforcement actions, secured \$25.4 million in Superfund response commitments, and obtained commitments from parties to clean up 130,783 cubic yards of contaminated soil.

EPA's Temporary Policy has not weakened protections for human health and the environment. Under Administrator Wheeler's leadership, EPA is rising to the challenge before us regarding COVID-19 and is working to meet our mission of protecting human health and the environment. EPA shares your concern for protecting all Americans, including not only those EPA staff and Congressional staff who have been teleworking, but also the workers across America who have been keeping electricity, water, gasoline, food, and other products available to the rest of us who were able to work from home under applicable stay-at-home orders. EPA believes that the regulated community and the contractors who support them should be able to protect their workers. EPA strongly believes that complying with guidelines issued by the Centers for Disease Control and Prevention (CDC) enhances, not weakens, protection of human health, without impairing EPA's ability to protect the environment.

The Temporary Policy is not a "license to violate our environmental laws." As my staff informed your staff, the Temporary Policy communicates to states, the regulated community, and the public how EPA intends to evaluate claims that noncompliance is caused by the current public health emergency. The Temporary Policy is not self-implementing. The burden is on the regulated entity to prove to EPA that compliance is not reasonably practicable due to COVID-19. As stated in the Temporary Policy, EPA is cognizant of potential worker shortages due to COVID-19, as well as the travel and social distancing

restrictions imposed by local governments or recommended by the CDC, to help limit the transmission and spread of the disease. These conditions could affect facility operations, the availability of key staff and contractors, and the ability of laboratories to timely analyze samples and provide results. Your question about record retention further underscores your misunderstanding of the Temporary Policy. As the facility has the burden of persuading EPA that any noncompliance for which it is seeking relief was caused by COVID-19, it is in the facility's interest to retain proof of that assertion for the duration of the applicable statute of limitations. Indeed, the Temporary Policy specifically states that regulated entities should provide documentation to EPA upon request. Absent such proof, the considerations in the Temporary Policy for enforcement discretion would not be met.

As clarified in the Frequently Asked Questions (FAQs) posted on EPA's COVID-19 Enforcement and Compliance Resources website (<https://www.epa.gov/enforcement/covid-19-enforcement-and-compliance-resources>), the enforcement discretion articulated in the Temporary Policy does not apply to noncompliance that results from money-savings practices undertaken by a facility in response to the economic impacts of COVID-19. Nothing in the Temporary Policy allows any emissions increases. If emissions do increase as a result of COVID-19, the Temporary Policy says that EPA will consider that fact only if the facility satisfies other conditions of the Temporary Policy, including whether the facility notified the appropriate implementing authority about the equipment failure "as quickly as possible" and provided the additional information specified in the Temporary Policy, including information that the facility was "act[ing] responsibly under the circumstances" and "mak[ing] every effort to comply" with environmental compliance obligations. As clarified in our FAQs, these conditions require a facility to make sure it knows if equipment is operating properly or within applicable parameters. Of course, EPA reserves the right to take whatever action it deems appropriate to address emissions increases or other threats to human health and the environment.

EPA has sufficient information to determine whether a facility is in compliance with federal environmental laws. Nothing in the Temporary Policy has impacted EPA's ability to assess noncompliance. EPA retains all of its information gathering authorities. EPA continues to target facilities for compliance evaluations based on EPA's priorities and in consultation with authorized states. The suggestion otherwise in your letter demonstrates a fundamental misunderstanding about how EPA conducts compliance monitoring. EPA does not need to ask facilities to tell the Agency when they fail to report monitoring data or other information required by federal environmental statutes, regulations, or permits. The Agency can identify a failure to report by examining its own databases.

The most timely reports received by EPA are the electronic discharge monitoring reports submitted by Clean Water Act permit holders to authorized states or, in states that use EPA's database and areas where EPA implements the permit program, directly to EPA. These data are available to the public through EPA's Enforcement and Compliance History Online (ECHO) website. If a discharger fails to submit a report for a non-excusable reason, the discharger is automatically identified in ECHO as in noncompliance. On March 31, 2020, EPA offered dischargers an alternative to use a COVID-19 No Data Indicator Code in their reports to indicate that the public health emergency was the cause of the lack of data. See <https://netdmr.zendesk.com/hc/en-us/articles/360041746231-Temporary-Advisory-for-National-Pollutant-Discharge-Elimination-System-NPDES-Reporting-in-Response-to-COVID-19-Pandemic>. To date, out of over 49,600 facilities with a Clean Water Act discharge permit, only about 300 facilities have used the COVID-19 code. That is about six tenths of one percent. EPA also has received reports from a handful of other permit holders indicating a natural disaster was the reason for missing data.

Most other reports received by EPA are much less frequent. For example, EPA receives reports of fence line monitoring from refineries subject to 40 CFR Parts 60 and 63 on a quarterly basis. The absence of a report is apparent to EPA and the public on WebFIRE. *See* <https://cfpub.epa.gov/webfire/>. Toxic Release Inventory (TRI) reports are due annually, and the public can determine whether a particular facility reported or not by looking at the data available in the TRI by mid-July. *See* Basics of TRI Reporting, <https://www.epa.gov/toxics-release-inventory-tri-program/basics-tri-reporting>.

In situations where a state is the permitting authority, EPA receives notice from major sources of other noncompliance with Clean Air Act Title V permits annually, through an annual compliance certification. Some states require semi-annual compliance certifications. This information is reported by states to EPA's databases and is available to the public through ECHO.

Drinking water monitoring data is not covered by the Temporary Policy. Public Water Systems submit their compliance data to states. States continue to submit information on violations, including failure to follow established monitoring and reporting schedules, to EPA's website at least quarterly. That data becomes available to the public through ECHO.

Spills and unpermitted releases of hazardous substances over a reportable quantity are expressly excluded from the Temporary Policy. These reports are sent to EPA Regions and are available to the public on the Coast Guard National Response Center website.

Your letter also reveals a misunderstanding of how EPA and authorized states and tribes work cooperatively to monitor compliance. The vast majority of oversight is conducted by states. EPA has recently made the state dashboards displaying air and hazardous waste program information on its ECHO website more user friendly, to increase the public's understanding of this activity. *See* <https://echo.epa.gov/trends/comparative-maps-dashboards/state-air-dashboard>. EPA plans to complete updating the other state dashboards by the end of this year.

EPA reviews state implementation of the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act under the State Review Framework. *See* <https://www.epa.gov/compliance/state-review-framework-0>. These reviews address previous fiscal years (FY), and as such, none of the reviews currently underway address FY 2020. However, EPA also has reviewed state responses to the COVID-19 public health emergency. The state policies in place at the time of EPA's review can be found here. *See* <https://www.epa.gov/enforcement/state-guidances-enforcement-during-covid-19-public-health-emergency>. The vast majority of state policies require some kind of reporting to the state. A handful of states are posting information on enforcement discretion requests on state websites. In states that do not post, that information would be available to the public through state Freedom of Information Act requests.

As you point out, EPA does not require notices of noncompliance beyond those already required by regulations, permits, or statutes, some of which are described above. The Temporary Policy falls squarely within my authority to make states, the regulated community, and the public aware of considerations I plan to use when determining whether to take enforcement action when a violation occurs. However, as the Assistant Administrator for OECA, I cannot change underlying legal requirements through enforcement discretion. The appropriate EPA media program offices would have to change the underlying regulations to create new reporting requirements under each federal environmental law.

By its own terms, the Temporary Policy addresses only situations where certain noncompliance is not reasonably practicable due to COVID-19. As such, if there is any impact on human health and the environment the cause will be the public health emergency, not EPA's Temporary Policy. Moreover, given the continued submission of discharge monitoring reports, it appears that COVID-19 has not had a significant impact on routine compliance monitoring and reporting.

EPA has been reviewing the gradual lifting of restrictions around the country and the reopening of businesses. However, we have observed the reinstatement of some restrictions in some states that had reopened. We also understand that social distancing may continue even after restrictions on facility operations are lifted. Given these facts and observations, and recognizing that there will be a period of adjustment as regulated entities plan how to effectively comply both with environmental legal obligations and with public health guidance from the CDC or other agencies regarding actions suggested to stem the transmission and spread of COVID-19, EPA has established a termination date for the Temporary Policy of August 31, 2020. Of course, EPA retains its authority to evaluate noncompliance, whether COVID-19 related or not, on a case-by-case basis.

Please know that in deciding to both adopt the Temporary Policy and now to terminate it, I did not have any meetings or conversations with external stakeholders. These decisions are very much the result of extensive discussions with EPA staff.

As you can see, EPA is very sensitive to the health and safety of the public, EPA staff, co-regulators, and American workers during this challenging time as we continue to protect human health and the environment. As the public health emergency caused by COVID-19 continues to evolve and as we move to begin reopening America, dedicated EPA staff across the nation have maintained their focus on the Agency's mission and will continue to efficiently and effectively serve the American people.

The EPA recognizes the importance of the Committees' need to obtain information necessary to perform its legitimate oversight functions and is committed to continuing to work with your staff on how best to accommodate the Committees' interests. If you have further questions, you may contact me, or your staff may contact Garrett Kral in EPA's Office of Congressional and Intergovernmental Relations at Kral.Garrett@epa.gov or (202) 564-9114.

Sincerely,



Susan Parker Bodine

cc: The Honorable Greg Walden, Ranking Member