

# Congress of the United States

## House of Representatives

Washington, D.C. 20515

April 21, 2020

The Honorable Andrew Wheeler  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Dear Administrator Wheeler:

We are writing to you regarding the U.S. Environmental Protection Agency (EPA) Office of Enforcement and Compliance Assurance's (OECA) recent guidance regarding the relaxations of enforcement of environmental legal obligations during the COVID-19 pandemic. Specifically, we are seeking additional information about the policy, and are requesting you modify the guidance to clarify how it will operate in order to further safeguard public health. While we appreciate EPA's recent bipartisan staff briefing to our committees, key questions were left unanswered. We remain concerned that this guidance, as written, fails to achieve EPA's stated objectives while unnecessarily undermining ongoing compliance with environmental laws.

EPA's mission to protect public health and the environment requires the Agency to implement and enforce our Nation's health and environmental laws. This is particularly important for those communities who have long borne a disproportionate burden of pollution and who, according to multiple reports, are experiencing disproportionate mortality rates from COVID-19.<sup>1</sup> In light of emerging research connecting air pollution to death rates from COVID-19, it is imperative that EPA insist on compliance with our Nation's health and environmental laws during and after the COVID-19 pandemic.<sup>2</sup> While we recognize that the pandemic presents challenges for compliance and reporting obligations, EPA's temporary enforcement policy, as currently written, needlessly weakens protections for human health and the environment at a time when they are needed most. Issued to all government and private sector partners, EPA's March 26<sup>th</sup> policy implements "enforcement discretion" across a wide range of activities fundamental to protecting public health and required by Federal environmental permits, regulations, and statutes.<sup>3</sup>

---

<sup>1</sup> See, e.g., *'Those Numbers Take Your Breath Away': Covid-19 is Hitting Chicago's Black Neighborhoods Much Harder than Others, Officials Say*, Washington Post (Apr. 7, 2020).

<sup>2</sup> *New Research Links Air Pollution to Higher Coronavirus Death Rates*, The New York Times (Apr. 7, 2020).

<sup>3</sup> This includes compliance monitoring, laboratory analysis, reporting and certification, training, integrity testing, and sampling. The policy also relaxes enforcement for reporting milestones and obligations required by settlement and consent decrees, subject to notice

Despite EPA's stated commitment to environmental compliance,<sup>4</sup> we are concerned your policy creates an expectation that companies across the country now have license to violate our environmental laws, and that such violations will be forgiven if the companies argue they were supposedly "caused" by COVID-19. In the meantime, unlawful pollution in response to the policy will lead to public health harms that cannot be undone by future EPA enforcement efforts. At the same time, EPA's current policy resets the default, where instead of an affirmative duty on regulated entities to comply, the burden is now upon EPA to first request information and then determine whether an entity's non-compliance meets EPA's criteria for discretion.

We have serious concerns regarding several key aspects of your policy, as it currently stands.<sup>5</sup> We believe EPA can better support national pandemic response activities and safeguard human health and the environment by modifying its enforcement discretion guidance. We therefore request that the Agency answer the following questions and modify its March 26<sup>th</sup> enforcement policy to address the following concerns. For each of the requested modifications, we request a written explanation as to how EPA plans to modify or adjust its policy directive:

1. End Date and Criteria for Assessing the Continued Need For This Policy: EPA's current guidance does not specify an end date for the policy but indicates the Agency will update the policy as needed and assess the continued need for the policy on a regular basis.<sup>6</sup>

---

procedures. Additionally, the policy addresses enforcement of limitations on water discharges, air emissions, safe drinking water requirements, hazardous waste management requirements, and facility operations that may create an acute risk or imminent threat to human health or the environment. U.S. Environmental Protection Agency, Memorandum from Susan Bodine, Office of Enforcement and Compliance Assurance, to Government and Private Sector Stakeholders on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020).

<sup>4</sup> Since issuing the policy, EPA has repeatedly insisted that the Agency continues to enforce our nation's environmental laws, expects regulated entities to comply with all environmental obligations, and will make compliance determinations on a case-by-case basis after the pandemic is over. U.S. Environmental Protection Agency, *What They Are Saying: Public Officials and Stakeholders Voice Support for EPA's Discretion Policy for COVID-19 Pandemic* (Apr. 3, 2020) (press release); U.S. Environmental Protection Agency, *EPA Corrects the Record After Reckless Reporting on Temporary Compliance Guidance* (Mar. 30, 2020) (press release); see also Letter from Susan Bodine, EPA Assistant Administrator for Compliance Assurance, to Representative Katie Porter (Apr. 2, 2020).

<sup>5</sup> Briefing by U.S. Environmental Protection Agency Office of Enforcement and Compliance Assurance, to House Committee on Energy and Commerce Staff, House Committee on Transportation and Infrastructure Staff, and House Committee on Appropriations Staff (Apr. 3, 2020).

<sup>6</sup> U.S. Environmental Protection Agency, Memorandum from Susan Bodine, Office of Enforcement and Compliance Assurance, to Government and Private Sector Stakeholders on

Instead, we believe there is greater clarity for the regulated community and other stakeholders if EPA establishes a public schedule for periodically reviewing the need for the policy and include a date certain by when EPA will either formally extend its enforcement discretion policy or otherwise terminate. This should include sharing with the public some of the factors you plan to use in evaluating whether to extend or terminate the policy.

2. Notification if Facility Operations Create Risk or Imminent Threat to Human Health or the Environment: EPA's temporary enforcement policy specifies that facilities should contact the appropriate implementing authority (EPA regional office, authorized state, or tribe) if facility operations impacted by COVID-19 may create an acute risk or an imminent threat to human health or the environment.<sup>7</sup> EPA staff explained in a recent briefing for committee staff that there is no requirement this notification occur prior to conditions that represent risk or threat to human health or the environment.<sup>8</sup>
  - a. We request EPA modify the policy to require, if possible, that facilities contact the appropriate implementing authority (EPA region, authorized state, or tribe) prior to the facility operations creating an acute risk or an imminent threat to human health or the environment, so that there is sufficient time for appropriate response measures to be discussed, identified, and implemented as necessary to prevent risks and threats to human health and the environment.
  - b. If advance notice is impossible, notice must go to the appropriate government authority immediately; failure to provide immediate notice should not be subject to enforcement discretion.
  - c. The policy should be clarified to clearly, unequivocally and unconditionally state that EPA reserves all legal and equitable remedies to address any imminent threat or acute risk to public health or welfare arising at or caused by any facility, whether or not the risk is created by actions covered by the policy.
3. Transparency: We appreciate EPA's commitment in its briefing to our staff that the OECA Assistant Administrator will make EPA approval of no action assurances publicly available on EPA's website.<sup>9</sup> During the briefing, EPA staff were not able to confirm

---

COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020).

<sup>7</sup> *Id.*

<sup>8</sup> Briefing by U.S. Environmental Protection Agency Office of Enforcement and Compliance Assurance for Energy and Commerce Committee, Transportation and Infrastructure Committee, and House Appropriations Committee (Apr. 3, 2020).

<sup>9</sup> *Id.*

whether other documents modifying existing compliance obligations would also be made publicly available, including invocations of force majeure provisions and modifications to administrative orders and judicial consent decrees.<sup>10</sup> We request that EPA commit to posting these documents on the Agency's website, in addition to other documents extending compliance deadlines and documents modifying:

- a. Imminent and substantial endangerment findings or orders, administrative orders, judicial consent decrees, and response guidance;
  - b. The exact scope of monitoring, reporting, and other compliance requirements covered by the terms of this policy;
  - c. Any additional self-monitoring or reporting requirements, or other compliance measures, along with appropriate EPA or State verification and transparency processes, that regulated facilities are required to take to ensure compliance with Federal law for the duration of this policy; and
  - d. Additional enforcement guidance applicable to specific programs, including guidance for facilities that are critical infrastructure or are providing essential services.
4. Modifications to Ensure EPA is able to Assess Compliance: The policy outlines broad guidelines as to what information noncompliant facilities should retain for their records but does not require this information be reported to EPA unless requested nor explain what data or information is needed to demonstrate how COVID-19 caused noncompliance.<sup>11</sup> In its recent bipartisan briefing to our staffs, EPA staff acknowledged this policy could result in situations where enforcement staff may lack sufficient information to determine whether a facility was in compliance.<sup>12</sup> In order to ensure agency enforcement staff have sufficient information to determine whether COVID-19 was the cause of any non-compliance, EPA should:
- a. Modify the March 26<sup>th</sup> policy to require facilities failing to comply with any applicable statutory or regulatory requirement to affirmatively notify EPA

---

<sup>10</sup> *Id.*

<sup>11</sup> U.S. Environmental Protection Agency, Memorandum from Susan Bodine, Office of Enforcement and Compliance Assurance, to Government and Private Sector Stakeholders on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020).

<sup>12</sup> Briefing by U.S. Environmental Protection Agency Office of Enforcement and Compliance Assurance, to House Committee on Energy and Commerce Staff, House Committee on Transportation and Infrastructure Staff, and House Committee on Appropriations Staff (Apr. 3, 2020).

immediately, in writing and electronically, that they are requesting enforcement discretion pursuant to this policy.

- b. Update the policy to include a much more specific definition of what it means that COVID-19 was the “cause” of noncompliance. A no action assurance should only apply when companies have what is akin to an impossibility defense, e.g., a contractor is unable to supply the necessary materials and another one could not be located, the monitoring cannot be done without violating social distancing orders. For example, EPA should make clear that it is not acceptable to violate environmental requirements simply because the company would prefer to allocate employees to other tasks. Regulated entities could claim the virus “caused” the violation because these parties, facing revenue loss, wanted to cut costs, and environmental compliance costs – and employees – were among those cut. Nothing in EPA’s policy makes clear that such arguments are unacceptable.
- c. Clarify what does and does not qualify as causation, including specific and clear guidance that economic reasons are insufficient to excuse noncompliance. If a company is operating, it must operate in compliance unless external constraints, such as COVID-19 orders or inability to obtain the necessary supplies, make compliance impossible.
- d. Within five business days of receipt of a request identified above in 4a, publish on EPA’s website the list of notifications received, including the entity’s name, facility location, and statutory or regulatory requirement for which enforcement discretion is requested.
- e. Explain standards for retaining information, including length of time information must be retained, and detailing how and what information and data must be provided when notifying EPA that an entity is requesting enforcement discretion pursuant to this policy, including information necessary to demonstrate how COVID-19 was the direct cause of an entity’s non-compliance.
- f. Establish a standardized reporting template for submitting information to EPA in instances where no existing reporting procedure exists or where a facility indicates reporting is not reasonably practicable due to COVID-19. This reporting mechanism should be customized to differentiate between submission of routine monitoring and compliance reports and notification of acute risk or an imminent threat to human health or the environment.

We believe these modifications are in the best interest of a robust and effective enforcement program and are necessary to protect human health and the environment. They will provide additional clarity and certainty to regulated entities, constrain abuse, and reduce resource needs for EPA in carrying out its compliance and enforcement duties, all while better safeguarding public health and the environment.

In addition to modifying its guidance as described, we also request EPA provide the committees with the following information:

1. Public Health Considerations: What analysis has EPA performed to evaluate the effects the new policy will have on human health and the environment? Please provide a copy of any such analyses and explain how any determination to continue this policy will be based on an analysis of human health and environmental impacts. Please also provide any analysis specific to environmental justice communities.
2. Inquiries and Stakeholder Engagement: Please provide information on the number of inquiries received regarding compliance during the COVID-19 pandemic, as well as a list of all meetings and conversations EPA held with stakeholders regarding enforcement discretion related to COVID-19 prior to the March 26, 2020 issuance of this policy.

We request EPA provide our committees a written response and another briefing no later than May 5, 2020, on the implementation of this policy in response to our requests and regarding any additional modifications to enforcement obligations. If you have any questions, please contact Jon Monger with the Committee on Energy and Commerce staff at (202) 225-2927. We look forward to your prompt response.

Sincerely,



Frank Pallone, Jr.  
Chairman  
Committee on Energy and Commerce



Peter A. DeFazio  
Chair  
Committee on Transportation  
and Infrastructure



Betty McCollum  
Chair  
Subcommittee on Interior, Environment,  
and Related Agencies  
Committee on Appropriations

The Honorable Andrew Wheeler

April 21, 2020

Page 7

cc: The Honorable Greg Walden  
Ranking Member  
Committee on Energy and Commerce

The Honorable Sam Graves  
Ranking Member  
Committee on Transportation and Infrastructure

The Honorable David Joyce  
Ranking Member  
Subcommittee on Interior, Environment, and Related Agencies  
Committee on Appropriations