

Congress of the United States

House of Representatives

Washington, D.C. 20515

June 10, 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 request additional information regarding the U.S. Environmental Protection Agency (EPA) Office of Enforcement and Compliance Assurance's (OECA) policy on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program. While we appreciate EPA's initial efforts to brief our committees on this matter, to date it has failed to take actions to adequately address our concerns.¹ Moreover, recent statements by EPA officials in a bipartisan briefing to our committees raised additional questions and underscored concerns that this policy unnecessarily undermines compliance with our nation's public health and environmental laws.

In our April 21 correspondence, we expressed concern that EPA's COVID-19 enforcement policy inappropriately places the burden on EPA to proactively request information from regulated industry to help determine whether COVID-19 was the cause of any non-compliance.² We requested a number of modifications which would ensure EPA staff have sufficient information to make this determination while also providing additional clarity and transparency to the public and regulated entities.³ EPA has not yet responded to these requested modifications or other information requests in our correspondence.

Furthermore, OECA staff have made a number of troubling statements which affirm our concern that EPA's COVID-19 enforcement policy creates license for companies to violate our environmental laws. In a May 13 bipartisan briefing to our committees, EPA staff confirmed that, as of that date, it had not received any notifications of facility operations impacted by the COVID-19 pandemic which may create an acute risk or an imminent threat to human health or

¹ Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, Rep. Peter DeFazio, Chair, House Committee on Transportation and Infrastructure, and Rep. Betty McCollum, Chair, House Committee on Appropriations Subcommittee on Interior, Environment, and Related Agencies to Andrew Wheeler, Administrator, U.S. Environmental Protection Agency (Apr. 21, 2020).

² *Id.*

³ *Id.*

the environment pursuant to section D of the policy.⁴ Additionally, OECA staff stated that EPA does not intend to conduct a comprehensive review following the conclusion of the COVID-19 pandemic emergency to determine compliance with environmental laws.⁵ EPA further explained it does not see value in requiring notification if a regulated entity intends to avail itself of enforcement discretion pursuant to this policy, because it would not make use of such information.⁶

During the May 13 briefing, EPA failed to provide a persuasive rationale for this position. According to EPA, requiring notification would create a backlog of information to review and require an upfront case-by-case determination which could distract from ongoing response efforts.⁷ To clarify, in our April 21 letter, we did not request that EPA make an upfront, case-by-case determination as to whether enforcement discretion would or would not be granted. Instead, we requested EPA modify its policy to simply require affirmative notification from regulated entities requesting enforcement discretion pursuant to this policy so that EPA would have sufficient information to later determine whether COVID-19 was the cause of any non-compliance.

EPA also suggested that compliance information is submitted in a number of other ways, citing various existing EPA and state environmental agency reporting mechanisms.⁸ While states are key partners when it comes to enforcing environment and human health protections, it is EPA's responsibility to make certain states are executing their delegated authorities in accordance with federal law so as to ensure a consistent minimum level of protection nationwide, particularly where states are "philosophically opposed" to enforcement action.⁹ Significant decreases from 2008 to 2018 in funding and staffing levels at many state environmental agencies further underscores the need for robust federal oversight of state enforcement programs.¹⁰

⁴ Briefing by John Irving, Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance and Rosemarie Kelley, Director, Office of Civil Enforcement, U.S. Environmental Protection Agency, to House Committee on Energy and Commerce staff, House Committee on Transportation and Infrastructure staff, and House Committee on Appropriations staff (May 13, 2020).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ U.S. Environmental Protection Agency, Office of Inspector General, *EPA Must Improve Oversight of State Enforcement* (Dec. 9, 2011) (Report No. 12-P-0113).

¹⁰ Environmental Integrity Project, *The Thin Green Line: Cuts in State Pollution Control Agencies Threaten Public Health* (Dec. 5, 2019).

In briefing our committees, EPA would not say when the policy would expire.¹¹ However, EPA explained that it is considering modifications to the policy in response to the evolving COVID-19 risk in different areas of the country, and that EPA expected to decide by the end of May whether it may lift the COVID-19 enforcement policy in certain states where COVID-19 stay-at-home orders are being lifted.¹² More recently, EPA issued additional enforcement guidance easing signature requirements for hazardous waste programs in response to requests from industry.¹³

The present national emergency calls for heightened efforts across government to protect public health. EPA's latest representations regarding implementation of its COVID-19 enforcement policy further suggest not only that EPA is failing to collect information to help identify illegal pollution, but that it does not intend to conduct a comprehensive, effective review of whether any non-compliance was in fact caused by the COVID-19 pandemic. In light of these concerns, we request a response to the following:

1. What criteria does EPA plan to use in making determinations to terminate the policy in certain geographic areas or specific states and localities?
2. EPA stated that it expected to decide by the end of May whether to lift this enforcement policy in states where stay at home orders are being lifted. Please explain whether this occurred. If not, when does EPA plan to make this determination? We also request a list detailing any states or localities where this policy has been lifted or modified. For each, include the date, explanation of which aspects of the policy were modified or lifted, and rationale for the changes.
3. Which industries have requested program-specific modifications to EPA's COVID-19 enforcement policy? For each, please include the date of the request, name, title, and company of the requestor, and a description of the requested modification.
4. What actions has EPA taken with regards to supervision of state enforcement programs to assess whether any COVID-19 related enforcement discretion policies adopted by states is reasonable and appropriate given the public health circumstances within that state?

¹¹ See note 4.

¹² *Id.*

¹³ Memorandum from Susan Bodine, Assistant Administrator, U.S Environmental Protection Agency Office of Enforcement and Compliance Assurance, on COVID-19 Implications for Signing Paper Hazardous Waste Manifests (May 18, 2020).

The Honorable Andrew Wheeler

June 10, 2020

Page 4

These requests are in addition the requests in our April 21 letter, all of which remain outstanding. We request EPA provide our committees a written response no later than Wednesday, June 24, 2020. 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

June 10, 2020

Page 5

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