



## Federal and State Environmental Authorities Respond to COVID-19

By: Gerald J. Pels and Andrew D. Otis

Federal and State environmental agencies are modifying their usual compliance procedures, including deadlines, to accommodate the various challenges presented by the COVID-19 pandemic. While a number of States initially indicated that they would exercise enforcement discretion, as a result of the pandemic, on March 26, 2020, the United States EPA ("EPA") announced a groundbreaking temporary enforcement policy to address the pandemic's effects. EPA's policy and actions by certain States are discussed below. The discussion of State actions is not intended to be exclusive as such policies are being implemented on an ongoing basis.

### United States EPA

The EPA's groundbreaking COVID-19 enforcement policy ("EPA Policy") is contained in a March 26, 2020 memo from Assistant Administrator Susan Parker Bodine. The EPA Policy is retroactive beginning on March 13, 2020 and is temporary in nature, although no end date is set at this time. The EPA Policy does not apply to criminal violations, nor will it apply to Superfund or RCRA corrective action enforcement matters that will be addressed separately. Further the EPA Policy does not relieve an entity from responsibility associated with responding and reporting accidental releases of regulated substances. EPA has indicated certain sectors may be analyzed through a different prism. EPA specifically mentions that public water supplies should be subject to heightened expectations, and as to critical infrastructure, EPA may develop a "more tailored short-term No Action Assurance."

The EPA Policy contains several important touchstones that are discussed below.

#### (a) General Compliance

The regulated community is expected to make every effort to comply with applicable rules. Where such compliance is not reasonably practicable, EPA sets forth general obligations. These obligations include to (i) act reasonably to minimize the effects of non-compliance; (ii) identify the nature and dates of non-compliance; (iii) document the COVID-19 related causation, actions taken in response and how compliance was sought at the earliest possible time; (iv) return to compliance at the earliest time; and (v) document the foregoing. Where the regulated entity can document the COVID-19 basis for this non-compliance, EPA has indicated it will generally not expect to seek penalties.

#### (b) Routine Compliance

Regarding routine compliance monitoring, integrity testing, sampling, lab analysis, training, reporting and certification, regulated entities are asked to utilize existing procedures to report non-compliance. If that is not possible because of COVID-19 impacts, entities are directed to maintain documentation supporting that assertion and be prepared to present it to EPA. EPA indicated it does not expect to seek penalties where that documentation is available. After the EPA Policy is not in effect, EPA expects entities to return to compliance, but will not require catch-up reporting. Wet signature reporting will be stayed in favor of digital signatures during the EPA Policy's term.



(c) Settlement and Consent Decree Reporting Obligations/Milestones

With regard to EPA administrative Consent Decrees, if enforcement milestones are expected to be missed, entities should use the notice procedures set forth in the agreement including force majeure provisions. For routine compliance matters, EPA intends to use the approach described above. EPA indicates that the notice should include a description of mitigating steps undertaken as well as the information required to be developed documenting the COVID-19 basis for non-compliance describe in the General Compliance section above. Where the Consent Decree is with the DOJ, EPA indicates it will seek to coordinate with the DOJ and relevant plaintiffs to allow for enforcement discretion, but notes the Courts retain jurisdiction. In all events the General Compliance documentation should be maintained.

(d) Facility Operations

EPA sets forth several categories of potential non-compliance and approaches. First, EPA indicates that the regulated community should take all steps to operate facilities in a safe and protective manner. Where operations are impacted in a way that raises an *acute health or environmental risk*, EPA directs facilities to contact the applicable implementing authority. At such time EPA will coordinate with the regulated entity, relevant state or tribe to determine measures to address the acute threat and ultimately consider the overall circumstances in determining appropriateness of enforcement.

Regarding the *failure of facility equipment, including air pollution or waste/wastewater treatment equipment*, that could result in exceedances or unauthorized releases, EPA requires notification to the implementing authority as soon as possible and include relevant information concerning the release (substances, comparison to applicable limitations, expected duration, and timing of exceedance/release). EPA indicates it will coordinate with the implementing authorities concerning response.

Where *other non-compliance* arises not addressed by the acute risk or equipment malfunction protocols, regulated entities should develop and maintain the documentation described for General Compliance set forth above. EPA indicates it will consider the totality of circumstances in determining enforcement including COVID-19.

With regard to *hazardous waste generation*, where waste cannot be shipped off-site timely due to COVID-19 implications, generators are directed to maintain typical generator requirements (e.g., labeling, storage etc.). In such cases generators will maintain their status and EPA will not consider the generator a TSD as a result of the COVID-19 delays. In all events records should be maintained documenting the COVID-19 based non-compliance.

Finally, EPA has eased restrictions on *animal feeding operations*, where animals cannot be timely transferred off-site.

### Texas

The Texas Commission on Environmental Quality ("TCEQ") established an email account pursuant to which regulated entities may request enforcement discretion, where non-compliance is unavoidable directly due to COVID-19. Regulated entities should email both of the following accounts [OCE@tceq.texas.gov](mailto:OCE@tceq.texas.gov) and [Ramiro.Garcia@tceq.texas.gov](mailto:Ramiro.Garcia@tceq.texas.gov). Naturally the regulated entity should develop and maintain records documenting the direct nexus to COVID-19. Further, the TCEQ is extending certain deadlines to accommodate COVID-19 disruptions. It will consider 2019 point source Emissions Inventories ("EIs"), Mass Emissions Cap & Trade ("MECT") Annual Compliance Reporting, and Highly Reactive Volatile Organic Compound Emissions Cap & Trade ("HECT") Annual Compliance Reporting submitted on or before April 30, 2020 as timely received. The expiration dates of all occupational licenses expiring in March and April of 2020 are extended by 30 days. TCEQ will consider additional enforcement discretion regarding these deadlines as conditions warrant.

The Railroad Commission ("RRC") offices are currently open and operational. Because of infection concerns, RRC is not accepting in-person filings at this time. Filings may be submitted online or via mail.



In response to Governor Abbott's State of Disaster Declaration, the RRC is allowing certain fuel companies to apply for regulatory requirement waivers on a case-by-case basis:

- Alternative fuels companies
- Gas utilities
- Oil & gas operators
- Pipeline safety operators
- Surface mining and reclamation operators

RRC issued a Notice extending certain deadlines under Statewide Rule 32, which regulates flaring.<sup>1</sup> First, operators may notify the RRC of releases or request exemptions via email rather than telephone or fax. Release notification deadlines are extended from the next business day following the release to seven days from the commencement of the release. Applications for exceptions under 3.32(h) are due by the end of the fourteenth day following the initial release. The RRC will issue a Notice to Oil and Gas Operators upon termination of the notification requirement extension under Statewide Rule 32.

### Oklahoma

Oklahoma offices are closed to outside visitors.

The Oklahoma Department of Environmental Quality ("DEQ") expects that permit conditions and compliance schedules will continue to be met. The DEQ has stated that it understands closures and illness may limit this ability, and it has committed to flexibility as needed and appropriate.

To accommodate reduced staff, DEQ is requesting that non-compliance issues be communicated through email or program specific reporting telephone numbers. The Air Quality Department of the DEQ has also instructed regulated companies to submit permit applications, annual reporting, semiannual reporting, and any questions through email.

DEQ is extending the expiration date of all Lead Based Paint licenses and certifications that are expiring on March 31, 2020 and all Renovation, Repair & Painting ("RRP") certifications that expired on or after March 17, 2020. These expirations are extended until further notice by DEQ.

DEQ has suspended the July 1, 2020 deadline for the four hour training requirement for water and wastewater operator certification license renewals. No late fees will be assessed for license renewal applications after July 1, 2020, and the grace period is extended through September 30, 2020.

### Louisiana

All scheduled public hearings are postponed until further notice. Public comment periods will be adjusted accordingly. The Louisiana Department of Environmental Quality ("LDEQ") will accept electronic submittals for the duration of its Declaration of Emergency and Administrative Order.

LDEQ has extended certain compliance deadlines for 30 days. Deadlines to conduct periodic reporting, to report periodic monitoring or other reports required by permits, regulations, other authorizations, enforcement actions, or settlement agreements, only insofar as a facility does not have appropriate personnel available due to COVID-19. Deadlines to file an application for renewal of an existing permit are also extended 30 days; all renewal applications must be submitted no later than the expiration date of the existing permit.

The above extensions do not apply to reporting, monitoring, or renewal for permits issued under Title IV or Title V of the Clean Air Act, or under the PSD program. Emergency reporting requirements are not suspended.

### New York

On March 23, 2020 New York Department of Environmental Conservation Commissioner Basil Seggos issued an Emergency Declaration waiving formal permit procedures and review under

<sup>1</sup> 16 Tex. Admin. Code § 3.32.



the State Environmental Quality Review Act<sup>2</sup> for “activities necessary to immediately facilitate the construction (and operation) of medical facilities, infrastructure and related facilities” “to control and combat the COVID epidemic.” The Declaration allows regional DEC staff to issue general permits or issue emergency declarations with regard to such activities, at their discretion. Note that the law applicable to such emergency declarations requires prior notice to the DEC before engaging in such activities, except for activities taken by state or local governments where prior notice is not feasible, in which case notice must be made within 24 hours.<sup>3</sup> The Declaration also authorizes the issuance of emergency authorizations “to allow for changes in operations of existing facilities” for the same purpose. The Declaration and all permits and authorizations issued thereunder expire no later than September 23, 2020, unless extended by order of the Commissioner.

The New York Department of Environmental Conservation is temporarily closing regional offices to the public but has provided contact information on its website. All customer service and records offices will be closed until further notice.

### Illinois

Vehicle emission testing has been temporarily suspended. The suspension is in effect through April 7, 2020 and may be extended depending on circumstances. Vehicle registration expiration dates have been extended by 30 days allowing motorists to wait to have their vehicles tested and renew vehicle registrations.

### New Mexico

Oil Conservation Division (“OCD”) Field Offices are only accessible by appointment. The OCD is encouraging operators and the public to conduct business online as much as possible.

### North Dakota

The North Dakota Department of Environmental Quality offices are closed, but they are available via telephone or email.

### Colorado

The Colorado Department of Public Health and Environment, recognizing the difficulty with wastewater sampling during personnel shortages, has provided guidance on compliance procedures that permittees should follow.

Any wastewater discharge permittee that temporarily cannot collect or analyze samples as required by their permit should still submit the required Discharge Monitoring Reports (“DMRs”). If samples cannot be collected or analyzed, paper DMR users are instructed to complete the DMR to the best of your ability and write “Pandemic Incident” on the DMR. Electronic reporters using NetDMR should enter a no data indicator (“NODI”) code into the required fields.

If permittees are able to conduct monitoring during part, but not all, of the monitoring period, any collected data should be reported on the DMR (or entered in NetDMR). Permittees should specifically note the actual frequency that the discharge was monitored.

If permittees are constricted to utilizing non-EPA approved methods for sampling and analysis, any relevant data should be reported on the DMR. Permittees should submit a cover letter or comment that identifies the specific methodology used.

In all cases, a cover letter should be submitted with the DMR that includes a brief explanation of how conditions beyond the reasonable control of the permittee resulted in the monitoring and reporting requirements not being met, providing any information to support that the facility was being properly maintained at the time and was expected to be meeting effluent limits. Permittees should outline their plan to complete the monitoring and reporting requirement as soon as

<sup>2</sup> Environmental Conservation Law, Article 8 “SEQRA”

<sup>3</sup> NY ECL 70-0116(3)



possible. Any monitoring requirements that cannot be met by the deadlines in a permit should still be completed at and reported to the division when conditions allow.

A facility may be able to claim upset per the permit if it violates its permit effluent limits, including practice based effluent limits, because it is following COVID-19 safe practices.

Some Colorado Discharge Permit System permits and division forms require submittals to include an original signature. Until the end of the state of emergency, a scanned hand-signed signature or a digital signature will be accepted.

### Indiana

The Indiana Department of Environmental Management ("IDEM") will continue to issue permits, assess environmental conditions, and perform inspections. Requirements of regulated entities to follow permit terms, submit reports, conduct and report on sampling, and other activities, have not been suspended.

### California

The California Air Resource Board's regulations continue to be in effect, and regular deadlines apply. The California Water Board is postponing non-essential file reviews, and essential file reviews are by appointment only.

The Department of Conservation is modifying some practices including limiting staffing in some offices.

### Conclusion

The EPA Policy offers the regulated community a reasonable approach to potentially mitigate enforcement for COVID-19 caused non-compliance. It will be key for facilities to document the basis for non-compliance, including efforts toward compliance and the reasons COVID-19 interfered. States vary in their willingness to be flexible with deadlines, and regulated entities should continue to make a good faith effort to meet compliance deadlines and standards where possible. In this unprecedented time, hopefully the EPA Policy will serve as a model for State discretion where programs have been delegated.

*Rachael Beavers-Horne, a law clerk in our Houston office, contributed to this article.*

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author.

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