

Better to Beg for Forgiveness Than to Ask Permission?: A Survey of COVID-19 Environmental Enforcement Policies

by Philip L. Comella, Ryan G. Rudich, Hannah D. Vanderlaan & Craig A. Nelson

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The protection of human health and the environment has always been the touchstone of environmental law. The ultimate goal of environmental compliance is to ensure clean air, clean water, and uncontaminated land for the protection of human health.

But the unprecedented COVID-19 pandemic has created a threat to human health not anticipated by the nation's environmental laws. The challenge for environmental regulators has been to respond to this new dynamic, and provide industry with guidance that balances the traditional interests of environmental protection against this once-in-a-lifetime unconventional—and immediate—threat to human health.

This article summarizes how state environmental regulators across the

country have decided to act – or refrain from acting – in their enforcement capacity to account for the COVID-19 crisis. Through its March 26, 2020, COVID-19 *Implications for EPA's Enforcement and Compliance Assurance Program*,¹ the U.S. EPA led the way by stating how it intends to exercise its enforcement discretion when faced with violations attributable to the pandemic. Since EPA's issuance of that policy, state regulatory agencies across the country have followed suit and offered their own guidance on how, and whether, COVID-19 affects a company's duty to comply with environmental regulations. These policies run the gamut between “business as usual” all the way to a recognition that these extraordinary times require broader discretion. But whatever the approach taken by environmental regulators, enforcement discretion is, of course, not a

license to pollute. All regulatory agencies are requiring that measures must still be taken to avoid causing real environmental harm or a serious threat of pollution. But COVID-19 is causing the strict compliance with environmental laws to bend, a bit.

I. U.S. EPA ENFORCEMENT DISCRETION POLICY

In its COVID-19 enforcement guidance, U.S. EPA announced its intent not to bring enforcement actions for a range of violations of environmental laws caused by the pandemic. The guidance states that, “[i]n general, the EPA does not

1. Susan Parker Bodine, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program, U.S. EPA (Mar. 26, 2020), available at <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>.

expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.”

The guidance also covers more serious violations. Although not offering a blanket allowance for noncompliance, U.S. EPA said it will “consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate,” even where an entity causes harm or a threat of harm to human health or the environment.

Contrary to some early criticism of the guidance,² U.S. EPA has not given the regulated community carte blanche to pollute or violate applicable standards. U.S. EPA’s enforcement abstention is specifically conditioned on good-faith efforts by regulated entities to maintain compliance and to document those efforts. Facilities that are not able to meet their environmental obligations may be required to produce records proving the specific nature and dates of any noncompliance and explain precisely how COVID-19 was the cause of the deviation. Regulated entities are also required to continue to report any noncompliance, even with routine activities, using existing procedures identified in applicable permits, regulations, and statutes. And the guidance reaffirms the requirement to notify U.S. EPA in the case of a system failure that leads to a release or emissions exceedance.

Once the pandemic ends, U.S. EPA will not require facilities to “catch up” with all monitoring and reporting that is excused under the conditions of the guidance. The agency does, however, expect facilities to eventually submit all annual and biannual reports, and conduct associated monitoring, even if that must be done late.

For environmental obligations that exist pursuant to settlement agreements, the guidance establishes that the agency considers the pandemic to qualify as a *force majeure* event. Notice provisions for invoking *force majeure* clauses in such agreements remain applicable and must be followed.

The guidance also addresses a number of specific scenarios. For example, hazardous waste generators that are unable to transfer waste out of their facilities within a Resource Conservation and Recovery Act (“RCRA”) prescribed time period will *not* be treated as storage and disposal facilities, as long as they continue to properly label and store the waste.

Only a limited number of facilities, however, are regulated

directly by U.S. EPA. State agencies have primary enforcement responsibility for most environmental regulatory programs. How these agencies are exercising their enforcement authority, and communicating that authority to the regulated community, is largely shaping environmental compliance during this pandemic.



II. STATE ENFORCEMENT DISCRETION POLICIES

States across the country are beginning to follow U.S. EPA’s lead and have issued enforcement discretion policies of their own. While some states expect regulated entities to maintain compliance with environmental regulations and permit requirements despite the COVID-19 pandemic, other states have provided a direct avenue for regulated entities to obtain a commitment from the state agency that it will not bring an enforcement action against the regulated entity if it falls out of compliance. Some states have even gone so far as to extend certain deadlines and relax certain requirements without being asked first.

At this point in the pandemic, these state policies are necessary because they provide regulated entities with assurance that they will not be the target of an enforcement action once the pandemic ends. Other states, however, have chosen not to provide clear guidance to a company that may be faced with the dilemma of whether to strictly comply with the environmental laws, or risk health impacts to workers, layoffs, or even the cessation of business.

To help regulated entities stay abreast of their obligations and state environmental agencies, the sections below identify each state enforcement discretion policy and the ways that state environmental regulators across the country have decided to act, or refrain from acting, in their enforcement capacity.

2. *see, e.g.,* Rebecca Leber, “An Open License to Pollute”: The EPA Has Halted Enforcement Due to COVID-19, Mother Jones (Mar. 26, 2020), available at <https://www.motherjones.com/environment/2020/03/environmental-protection-agency-enforcement-coronavirus/>.

1. States That Have Not Issued Any Enforcement Discretion Policy

The following states have not issued any enforcement discretion policies with respect to environmental regulations and permit requirements:

- Delaware
- Florida³
- New Mexico

2. States That Have Not Issued a Formal Enforcement Discretion Policy but Request Entities to Contact the State Prior To Noncompliance

The following states have not issued a formal enforcement discretion policy and have stated that regulated entities are expected to fully comply with the state environmental laws during the COVID-19 pandemic. However, these states also recognize that some regulated entities may need some compliance assistance due to extenuating circumstances associated with COVID-19. Therefore, these states request that regulated entities contact the state agency if the entity believes it will fall out of compliance or is unable to achieve full compliance.

- [California](#)
- [Colorado](#)
- [Connecticut](#)
- [Kansas](#)⁴

3. States That Will Consider Enforcement Discretion on a Case-by-Case Basis

The following states have not issued a formal enforcement discretion policy and have stated that regulated entities are expected to fully comply with the state environmental laws and regulations during the COVID-19 pandemic. However, these states will consider exercising enforcement discretion on a case-by-case basis.

- [Arkansas](#)⁵
- [Idaho](#)
- [Illinois](#)
- [Indiana](#)
- [Maryland](#)⁶
- [Michigan](#)
- [Minnesota](#)
- [Mississippi](#)
- [Missouri](#)
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- [South Carolina](#)
- [Texas](#)
- [Vermont](#)
- [Virginia](#)
- [Washington](#)
- [Wisconsin](#)

4. States That Follow and Adopt U.S. EPA's Enforcement Discretion Policy

The following state has essentially adopted U.S. EPA's enforcement discretion policy as discussed in U.S. EPA's March 26, 2020 memo titled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program."

- [Georgia](#)

5. States That Follow U.S. EPA's Enforcement Discretion Policy with Some Variations

The following states have adopted U.S. EPA's enforcement discretion policy, in part, and have made additional variations with respect to specific programs and or requirements.

- [Arizona](#)
- [Maine](#)⁷
- [Utah](#)
- [West Virginia](#)

3. Although Florida has not issued an enforcement discretion policy, it did issue an [emergency final order](#) which extends certain deadlines by 30 days.

4. Kansas has not issued an enforcement discretion policy. However, in an [interview](#) with the Kansas Grain and Feed Association, Leo Henning, the Kansas Department of Health and Environment's ("KDHE") Deputy Secretary of Environment, stated that "KDHE will provide as much flexibility in these troubling times as possible. If a facility has difficulties implementing any of the environmental requirements that apply to its operations, they should call or notify us by email. We will do everything in our power to work through the issue with them."

5. The Arkansas Department of Environmental Quality (DEQ) has also issued a [provisional guidance](#) discussing how the DEQ may respond to instances of noncompliance that are verifiably caused by the COVID-19 pandemic.

6. Maryland Governor Hogan also issued an [executive order](#) providing a grace period for any state licenses, permits and/or registrations that may be expiring or up for renewal during the state of emergency.

7. The Maine Department of Environmental Protection (DEP) has issued separate guidance for each program. Please refer to the guidance issued by the specific program to determine compliance obligations and whether enforcement discretion will be exercised.

6. States That Have Issued Their Own Enforcement Discretion Policy

The following states have issued their own enforcement discretion policy illustrating how the agency will be exercising its enforcement discretion.

- [Iowa](#)
- [Louisiana](#)
- [Tennessee](#)
- [Wyoming](#)

7. Program Specific Enforcement Discretion Policies or Responses to COVID-19

The following states (and the District of Columbia) have not issued an all-encompassing enforcement discretion policy. Rather, these states have issued policies, guidance, or responses to COVID-19 with respect to specific programs or requirements.

- Alabama
The Alabama Department of Environmental Management (ADEM) has issued a [temporary advisory](#) for discharge monitoring reports.
- Alaska
As a result of COVID-19, the Alaska Department of Environmental Conservation (Alaska DEC) issued [No Action Assurance Memorandums](#) that recognize the need for flexibility with respect to specific programs during COVID-19. These programs include (1) air quality; (2) landfill groundwater and surface water monitoring; (3) pesticide control program; (4) spill preparedness and response; and (5) water quality.
- District of Columbia
The D.C. Department of Energy and Environment (DEE) issued an [enforcement discretion policy](#) with respect to underground storage tank requirements.
- Hawaii
The State of Hawaii Department of Health Clean Air Branch (“CAB”) issued its own [temporary enforcement discretion policy](#) to noncovered source permittees, covered source permittees, and other entities regulated by the Department of Health, Clean Air Branch. Additionally, the Hawaii Department of Health Hazardous Waste Program has [stated](#) that it will follow EPA guidance regarding enforcement discretion when hazardous waste generator operations are impacted by the COVID-19 pandemic.
- Kentucky
The Kentucky Energy and Environment Cabinet (EEC) issued an [emergency bulletin](#) granting relief or flexibility to certain regulations concerning the handling, storage, and disposal of solid waste and recycling materials. It also issued a [memorandum](#) granting a limited grace period for EPA Reference Method 9 Certifications, required proof of training, and accreditation renewals. It similarly issued a [memorandum](#) waiving the approval and renewal processes for wastewater treatment plants and drinking water plants.
- Massachusetts
The Massachusetts Department of Environmental Protection (MDEP) issued guidance enforcement discretion policies and responses to COVID-19 with respect to specific programs and operations. These programs and operations include (1) [wastewater](#); (2) [bottle redemption](#); (3) [hazardous waste management](#); (4) [waste site cleanup operations](#); and (5) [public water suppliers](#).
- New Hampshire
The New Hampshire Department of Environmental Services (NHDES) set up a website entitled [NHDES Response to COVID-19](#), where it has published guidance and enforcement discretion policies for specific programs and operations, including (1) accredited laboratories; (2) the air resources division; (3) fuel storage tanks; (4) public water systems; (5) community water systems; (6) septage; (7) solid waste; waste management; (8) wastewater; (9) wetlands.
- New York
The New York Department of Environmental Conservation issued an [enforcement discretion policy](#) with respect to signature procedures for hazardous waste and low-level radioactive waste manifests and nonhazardous waste shipping papers during the COVID-19 pandemic.
- South Dakota
The South Dakota Department of Environment and Natural Resources (DENR) issued guidance with respect to [wastewater treatment](#) facilities that are unable to meet certain permit requirements

III. CONCLUSION

As the saying goes, “it is better to beg for forgiveness than to ask permission.” This saying has rarely been applied in the field of environmental law because the risks are too high and the penalties too great. COVID-19, however, has created such wide-ranging impacts upon society and U.S. commerce that strict compliance with at least some environmental laws must yield to the immediate health – and yes, business – impacts of this virus. It is noteworthy that U.S. EPA and many state environmental agencies recognize that in these extraordinary circumstances, human health can best be protected by showing flexibility in the area of environmental compliance.

ABOUT THE AUTHORS



Philip L. Comella

Partner

Chicago Office
(312) 360-6935
pcomella@freeborn.com

Philip Comella is a Partner in the Litigation Practice Group and Co-Leader of the Environment and Energy Law Practice Group. Phil’s practice spans both regulatory counseling and environmental-based litigation. With over three decades of experience in environmental law, and a focus on the solid and hazardous waste industry, he regularly counsels owners and operators of landfills, treatment facilities, recycling operations, and waste generators on compliance and permitting matters arising under the environmental laws.



Ryan G. Rudich

Associate

Chicago Office
(312) 360-6379
rrudich@freeborn.com

The environmental and energy challenges that companies face today are expanding and evolving at a rapid pace. Ryan helps his clients navigate them, both as a thoughtful and efficient litigator, and as an insightful counselor. Ryan understands that the best solutions are tailored to his clients’ unique business needs, and he works tirelessly to provide them with sound and creative advice and advocate for their interests in the courtroom.



Hannah D. Vanderlaan

Associate

Chicago Office
(312) 360-6487
hvanderlaan@freeborn.com

Hannah’s practice focuses primarily on environmental-based litigation and regulatory counseling. Prior to joining Freeborn as an attorney, Hannah was a Law Clerk at the firm in the Environment and Energy Law Practice Group. In addition to working at Freeborn & Peters, while in law school, Hannah served a Legal Extern at the U.S. Environmental Protection Agency and The Office of Illinois Attorney General, Environmental Bureau, where she gained experience working on a variety of federal and state environmental enforcement actions.



Craig A. Nelson

Paralegal

Chicago Office
(312) 360-6562
cnelson@freeborn.com

Craig Nelson is a Paralegal in the Environment and Energy Law Practice Group. Craig works in a diverse practice that focuses on defending clients in complex environmental litigation and state and federal government enforcement actions. He routinely assists with regulatory compliance issues.

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CHICAGO

311 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 fax

NEW YORK

230 Park Avenue
Suite 630
New York, NY 10169
(212) 218-8760
(212) 218-8761 fax

SPRINGFIELD

217 East Monroe Street
Suite 202
Springfield, IL 62701
(217) 535-1060
(217) 535-1069 fax

RICHMOND

901 East Byrd Street
Suite 950
Richmond, VA 23219
(804) 644-1300
(804) 644-1354 fax

TAMPA

1 Tampa City Center
201 North Franklin Street
Suite 3550
Tampa, FL 33602
(813) 488-2920

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