

Making Sense of Environmental Agency Enforcement Policies in the Wake of a Pandemic

And Best Practices for Documenting EH&S Compliance Efforts

This article summarizes the patchwork of environmental regulatory policies and trends emerging from the COVID-19 pandemic. We also provide a best practices guide and document checklist to aggressively manage and document these issues now in order to reduce the risk of disputes over compliance later.

Solving the maze of legal issues in the wake of COVID-19 will be no easy task, even though the deluge of COVID-19 related orders and guidance seems to be subsiding. Even the most ordinary environmental compliance tasks, such as preparing a routine report or conducting monitoring, may require unavailable resources. Despite best efforts, support from laboratories and contractors, the ability to travel for field inspections, or access to needed supplies may be limited. Necessary public meetings have been postponed, upsetting long-term schedules. Disruption of a task today might threaten a deadline months down the road. What has emerged in the United States is a patchwork of federal and state declarations and policies, ranging from general descriptions of environmental, health, and safety enforcement discretion to other highly specific guidance (such as discussions of PPE for field work, methods for public participation, and even descriptions of check-boxes on e-filing forms).

In assessing the regulatory war zone left behind, not much yet is certain. We are still in the midst of the COVID-19 pandemic, and we cannot know the full degree of resulting disruption to global supply chains, staffing, travel, schedules, and other issues that may influence regulatory compliance. However, even as regulatory policies evolve, we know that aggressively managing and documenting these issues now can reduce the risk of disputes over compliance later.

Regulatory Patchwork and Trends

Environmental agencies across jurisdictions are simultaneously communicating toughness and flexibility. Many have announced that, despite regulators working from home and the requirements of social distancing, they will continue to conduct inspections and enforcement. At the same time, some suggest (or even overtly assure) that certain noncompliance caused by COVID-19 will not be subject to penalties. The balance between the two messages continually shifts as the regulators adjust to changing facts and perceptions.

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For example, the U.S. Environmental Protection Agency (EPA) struck a flexible tone in its [March 26, 2020 policy](#), under which it announced that, subject to certain specified conditions, it would exercise enforcement discretion for noncompliance that is due to the pandemic. EPA's sweeping language signaled flexibility that some viewed as unprecedented, even though promises were scant. EPA immediately came under attack for excessive leniency and [quickly clarified](#) that its "temporary policy is not a license to pollute" and "does **not** say that the [pandemic] will excuse **exceedances of pollutant limitations in permits, regulations, and statutes...**" (emphasis in original) (March 30, 2020).

No two jurisdictions are identical, but some state agencies followed suit. For instance, Georgia largely adopted EPA's policy. Arizona did the same, but also signaled potentially greater leniency for exceedances, [stating](#) that "[p]ermit exceedances that do not pose an acute risk to human health or the environment generally will be addressed through informal enforcement." Even so, Arizona [stated](#) that its facility inspections and permitting work will continue without interruption. Florida's approach was both narrower and more sweeping than the portion of EPA's flexibility for delays in routine reporting: under an April 1, 2020 emergency order Florida [extended](#) (by 30 days) a variety of environmental reporting or monitoring deadlines.

As a flip side to Florida's approach, Maryland [provides](#) no up-front relief for monitoring and reporting, explaining that these "are integral to public health and environmental protection" and every effort must be made to comply. However, Maryland provided leeway for licenses, permits and/or registrations that may be expiring or up for renewal during the state of emergency. California, and many other jurisdictions, also avoided making any general assurances of relief, but various of its Departments, [Boards](#), or [Districts](#) issued expectations as to how they would navigate inevitable requests for exercise of enforcement discretion and what they expected to see as supporting documentation.

Some jurisdictions confronted directly the perceived tension between regulatory relief and enforcement rigor. For instance, Tennessee's environmental agency [discussed](#) that its divisions "should balance the need for regulatory flexibility with our mission to protect the environment and ensuring that important and Essential Services continue to be provided. Not all requests for regulatory flexibility should be granted" and it [referred to its use of best professional judgment](#) in achieving the desired balance. Similarly, Virginia [offered a discussion](#) of the balance stating that:

DEQ balances its obligation to protect the environment with the dramatic effects we're seeing on public health facilities, the delivery of goods and services, the economy and quality of life for all Virginians.

It's important that regulated entities do all they can to ensure compliance with environmental requirements and DEQ expects good faith effort to comply.

DEQ will exercise reasonable enforcement discretion within its authority when deciding whether to pursue potential violations caused by pandemic-related disruptions.

Virginia buffers any perceived promise for discretion with a requirement "that regulated entities communicate early and often regarding compliance issues that arise due to COVID-19 disruptions." *Id.*

The biggest danger for the regulated community, as it construes these policies, is to focus selectively only on the comforting messages that regulatory relief is available. That relief "may" be available, but in most jurisdictions the relief is conditioned on making the requisite demonstrations, such as proof of causation, efforts to comply, and "early and often" communication. The degree of demonstration will likely vary by jurisdiction, timing, and multiple other factors, making application of COVID-19 enforcement discretion uneven across the country. The risk is that if enforcement discretion is never granted, denied, or retracted, companies will need to affirmatively defend their noncompliance likely

on the basis of Force Majeure, either as it arises under an applicable statute or the common law. The legal standards for Force Majeure typically involve demonstrations that the noncompliance was due to an event that was unforeseen and beyond the control of the facility and as a consequence, are intensely fact specific. These defenses are also more exacting – especially if the Agency has denied use of its discretion in the first instances -- and likely will require a higher showing than for enforcement discretion to prevail in court. These may vary by state, and we outline how some of those issues arise in [Texas](#) as an example and offer additional considerations below.

What is One to Do? Action in the Midst of Confusion

All of this balancing and mixed messaging—within and across jurisdictions—can be paralyzing. However, a key and unsurprising common thread is that the regulated entity has the burden of proof. If an entity hopes to be entitled to enforcement relief, it should prepare early and thoroughly to demonstrate how noncompliance truly is due to COVID-19 and to offer evidence that it acted responsibly to prevent and mitigate noncompliance. To prepare for meeting that burden, it helps to understand the type of relief that may be available, and the pre-conditions for qualifying for relief. Review our ideas for [best practices](#) and an [enforcement preparedness checklist](#) to support planning.



Type or Scope of Relief

Much of the regulatory relief has been by informal policy statements or guidance, with a mix of formal executive orders. The more informal, the less reliance one can place on an enforcement policy, especially one that is temporary. The changing terrain will likely continue. Regardless of an informal website statement or “FAQs” today in the midst of the pandemic, such policies may be accorded little weight or construed differently in several years when an agency (possibly lead by different personnel) decides whether or not to seek enforcement. Formal executive orders or regulatory action has more enduring weight. The least enduring relief is a verbal “approval” or time extension from a regulator who may forget or not be around at the time of enforcement decisions. Central questions about the relief may include:

- ◆ What type of regulatory action was taken and who is bound? (order, guidance)
- ◆ What is the applicable period?
- ◆ What type of noncompliance is eligible? (i.e., permit expiration, reporting, monitoring, schedule due date, exceedance of a limit)
- ◆ How can you secure relief?
 - Is prompt notice to the agency required?
 - What immediate submittals may be needed?

Demonstration Needed to Qualify for Relief

Most regulatory relief is through an agency’s exercise of enforcement discretion. Even the agency’s willingness to apply Force Majeure clauses under agreements may initially be a matter of discretion, absent a judicial relief. Agencies will vary as to their required showings as a pre-requisite for enforcement discretion, but generally regulators want to know:

- ◆ The circumstances leading to the inability to comply with a requirement;
- ◆ Actions taken to prevent the noncompliance and why those were unsuccessful;

- ◆ Actions taken to mitigate the impact and duration of the noncompliance, and efforts to return to compliance as soon as feasible;
- ◆ If an entity asserts a Force Majeure clause or other exemption, why it should apply;
- ◆ Documentation supporting each of the above points.

Some regulators may have specified added information demands. Certain programs (such as some in California, or Virginia's communicate "early and often" mandate) have requested prompt reporting of the issue. Or as a different requirement, [Alaska offers](#) that COVID-19 related travel restrictions and other interruptions may justify deferring certain above ground tank and piping inspections, but provides that deferment requests must "include an equivalent level of protection and a description of how these equivalent protections will be recorded." Such an equivalency showing requires up-front planning and documentation.

Thus, keep in mind that jurisdictions' requirements vary. Where there is a serious risk of not meeting a requirement, prompt direct communication with the regulator may enable a swift and amicable resolution up-front, and if not may at least clarify the types of information that will be needed for future resolution. In either case, do not assume that the regulator will retain records of every phone call or will be able to retrieve an email several years from now. Documentation is key.

Conclusion

This much is certain: over the next several years, disputes will emerge regarding environmental compliance during COVID-19 disruptions. Requests for enforcement discretion will abound, as the impacts of COVID-19 reverberate across our communities and throughout the global supply chain. Regulators may voice sympathy for the massive level of disruption now, but as with other emergencies we have seen empathy fade as a crisis recedes in time. With this in mind, now is the time to prepare for an inevitable look-back in the months and perhaps years to come.

As the leading law firm for environmental, health, and safety law and litigation, Beveridge & Diamond helps clients with unprecedented challenges posed by COVID-19. Our team includes lawyers with high-level federal government experience, including determining when to exercise enforcement discretion, grant or deny Force Majeure petitions, and sufficiency of documentation. Visit B&D's [COVID-19 EH&S Resource Center](#) for more information on navigating the global pandemic, or contact the authors.

Preparing for, Identifying, and Mitigating Risks from COVID-19 Disruptions



Prepare for, identify, and mitigate risks from COVID-19 disruptions by taking the following actions. Some are likely already well-established in your company’s emergency response plans and other environmental, health, and safety (EH&S) practices, but this is a good time to check for gaps and test those practices.

Communicate Early and Often

Strong communication demonstrates the type of proactive engagement regulators will be looking for to determine whether appropriate steps were taken during the pandemic.

- Make a list of key contacts, including in-house EH&S legal staff and backup, contractors, consultants, and labs, and federal, state, and local agencies, in case you need to act quickly.
- Check in with staff, contractors, consultants, and suppliers to identify early any anticipated impacts.
- Reinforce messages within your organization regarding a commitment to compliance and EH&S. Remember that a culture of compliance and accountability starts at the top.
- Explain to staff that any COVID-19 regulatory relief tends to be “conditional” and to confirm thoroughly before relying on any relaxed requirements.

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Review Your Records

Advance planning for upcoming deadlines and familiarity with legal requirements can avoid last minute emergencies and demonstrate to regulators that you have taken the appropriate steps toward compliance.

- Identify compliance deadlines within the next 6 months.
- Get familiar with modification, notice, and Force Majeure requirements and deadlines.
- Identify start and end dates for shelter-in-place and other executive orders or declarations.
- Review internal standard operating procedures (SOPs) or other guidance.
- Understand the scope of relevant state and federal enforcement discretion policies, the specific documentation requirements, and any requirement for immediate communication.

Retain and Know the Location of Your Records

It can be difficult to find critical records later when they are needed. Good recordkeeping practices now will conserve future resources and can limit embarrassing or confidential information that you will not want shared with a regulator.

- Develop or re-circulate recordkeeping SOPs, best practices, or guidelines for email and hard copy documents.
- Ensure employees are aware of the appropriate document management system.
- Identify retention requirements for documents and communicate that widely to staff and management.
 - Retain documents consistent with settlement agreement/consent decree requirements and company policy for at least 5 years, which is the federal statute of limitation under most statutes.
- Mark and retain relevant documents as privileged or otherwise confidential.
- Retain:
 - Contracts with vendors, including bills of lading.
 - Notifications of Force Majeure from vendors or other statements requesting a delay in deliverables.
 - All communications with agencies, including notes of telephone conversations.



Comply and Return to Compliance

Regardless of the type of enforcement discretion guidance, all agencies expect a return to compliance as quickly as possible. Failure to do so can eliminate eligibility for enforcement discretion. Requirements vary depending on jurisdiction, but the U.S. Environmental Protection Agency and state agencies emphasize the importance of compliance first.

- Document all efforts taken to remain in compliance and to return to compliance.
- Document all efforts to mitigate the impact of a noncompliance.

Document, Document, Document!

In the event of anticipated or unanticipated noncompliance, documentation is critical. It can feel burdensome, but your company will be in a better position if it prepares strong documentation in response to potential future enforcement requests now, before memories fade, facts become stale, and personnel change.

- Review the document checklist to make sure records are complete.
- Record:
 - Who is documenting?
 - How?
 - What level of management is involved?
 - Where is the underlying paperwork?

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