

COVID-19 Chaos, Environmental Noncompliance, & Presidential Elections — What's a Regulated Entity to Do?

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CLARK HILL

Agenda

EPA's Temporary COVID-19 Policy and Implications

EPA Audit Policy and Comparable State Programs

Environmental Self-Audit Guidance

Today's Speakers



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EPA's Temporary COVID-19 Policy

And Other Uncertainties

EPA's Temporary COVID-19 Policy

- On March 26, 2020 (retroactively applied to March 13, 2020), the EPA issued a policy statement, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program ("Temporary Policy").
 - In general, the policy stated that EPA will not seek penalties for noncompliance with routine monitoring and reporting requirements, *if EPA agrees that such noncompliance was caused by the COVID-19 pandemic.*
- Several state agencies also provided guidance policies that relied heavily on the Temporary Policy.
- On June 29, 2020, the EPA issued an Addendum on Termination. August 31, 2020 was chosen as the official termination date.

Response to EPA's Temporary COVID-19 Policy

- EPA's Temporary Policy was largely criticized.
 - NRDC CEO Gina McCarthy (and former EPA Administrator) said in a press release: "This is an open license to pollute. Plain and simple."
 - Cynthia Giles, (former head of EPA's Office of Enforcement during the Obama administration), said the temporary policy was "essentially a nationwide waiver of environmental rules for the indefinite future. It tells companies across the country that they will not face enforcement even if they emit unlawful air and water pollution in violation of environmental laws, so long as they claim that those failures are in some way 'caused' by the virus pandemic."
- However, others say that EPA's COVID-19 policy is a temporary response to the COVID-19 crisis, very limited in nature, and based on EPA's longstanding enforcement discretion.

April 2, 2020 EPA Letters to Congress

- EPA sought to clarify “misconceptions and misreporting” regarding the Temporary Policy.
- EPA’s goal was to allow itself to prioritize its resources to respond to acute risks and imminent threats, rather than make upfront case-by-case determinations regarding routine maintenance and reporting.
- EPA clarified that the Temporary Policy states that the Agency will not seek penalties for noncompliance **only** in circumstances that involve routine monitoring and reporting requirements, **if**, on a case-by-case basis, EPA agrees that the noncompliance was caused by the COVID-19 pandemic.

Executive Order 13924 of May 19, 2020

- Policy that agencies will help with economic recovery from COVID-19 pandemic.
- Section 1. Policy.
 - "...Agencies should address this economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility."
 - "They should also give businesses, especially small businesses, the confidence they need to reopen by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication." 85 Fed. Reg. 31353 at 31353 and 31354 (May 22, 2020).
- August 31, 2020 Memo from OMB (M-20-31) guides implementation of the Executive Order.

Environmental Compliance and Enforcement Policy Under the Trump Administration

- Executive Order memorializes the Trump Administration's policies on compliance and enforcement.
 - Critics call it a refusal to conduct robust enforcement and hold corporate bad actors responsible.
 - Again, others support the EO, recognizing Agency longstanding enforcement discretion.
- Temporary policy has been terminated, but EO and OMB guidance are still in place...for now.
 - Agencies are required to address economic emergency by "rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery".

What Could Change Under a Biden Administration?

- It has been stated that Biden will restore the environmental protections undone by the Trump administration.
 - Still promising PA supporters fracking will continue.
 - But, no new fracking on public lands.
- Climate change is the centerpiece of Biden campaign.
 - Rejoin Paris Climate Agreement.
 - Invest \$2 trillion in a massive green jobs program to build renewable energy infrastructure, including electric vehicle charging stations and increasing wind, solar, and other power technologies.
 - Aggressive goal of ending the use of fossil fuels to generate electricity by 2035. Net zero emissions of greenhouse gases by no later than 2050.
- EPA will still have enforcement discretion, but that discretion will change based on the policies of those in charge.

Other Environmental Enforcement Protections

- Force Majeure - If currently subject to a consent decree, and there are issues with compliance due to the COVID-19 pandemic, asserting a force majeure defense may extend the compliance timeline and reduce enforcement burdens (if EPA agrees).
- Self-audits under EPA Audit Policy.

Definition of Force Majeure

- EPA defines “Force majeure” in its model Remedial Design/Remedial Action (RD/RA) Decree as:
 - [A]ny event arising from causes beyond the control of SDs [settling defendants], of any entity controlled by SDs, or of SDs’ contractors that delays or prevents the performance of any obligation under this CD [consent decree] despite SDs’ best efforts to fulfill the obligation.
 - The requirement that SDs exercise ‘best efforts to fulfill the obligation’ includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure...
 - (a) as it is occurring and
 - (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible.”
 - “Force majeure” does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

EPA Guidance on Force Majeure

- EPA's 1987 "Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees" provides some guidance on force majeure.
 - One of the most common reasons for the non-collection of stipulated penalties is the occurrence of a force majeure event. A force majeure event is one which is beyond the control of the defendant and provides the defendant with an affirmative defense to a charge of noncompliance. Since penalties do not accrue during this period, the definition of a force majeure event should be narrowly drawn and the burden placed on the defendant to show that a force majeure event has occurred. In any event, neither increased costs nor financial difficulty should constitute a force majeure event.

Issues with Asserting a Force Majeure Defense

- Under either the model consent decree or the guidance, it seems difficult to establish a force majeure defense, as not only does EPA narrowly construe what constitutes a force majeure event, a settling defendant must prove that an event is beyond its control, and that best efforts to anticipate the event and minimize any effects of the delay were employed.
 - The SD shoulders the burden of proving that the event fits within the definition.
- Note: EPA's Temporary Policy essentially created a very narrow force majeure defense for all facilities (not just those under consent decrees) to a pandemic-caused failure to perform routine monitoring or reporting requirements, which was also subject to agreement by EPA and based on records kept and the demonstration made.

Best Practices in Asserting a Force Majeure Defense

- Depending on the consent decree force majeure provision, SDs may be required to provide EPA with notice very quickly after becoming aware of a *potential problem* that may prevent full compliance.
- Legal counsel can strategically identify and describe the force majeure event and the associated compliance obligation.
- Best practices would be to:
 - (1) Ensure compliance with all notice requirements in consent decrees;
 - (2) Maintain regular contact with contractors (or others that are relied upon for compliance);
 - (3) Maintain regular communication with EPA;
 - (4) Keep diligent records (showing COVID-19 pandemic is the cause) and provide any required supporting information to EPA; and
 - (5) Diligently document and work towards compliance until EPA makes a force majeure determination and grants an extension for compliance.
- **Key Takeaway:** Document, document, document! Follow all notice requirements and keep detailed records of how the pandemic caused the compliance issue.

EPA Self-Audit Policy

And Similar State Programs

Overview

- EPA's Self-Disclosure Policies
- EPA's *eDisclosure* System
- Representative State Self-Disclosure Statutes and Policies

EPA's Self-Disclosure Policies

- Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations ("Audit Policy") - 65 Fed. Reg. 19,618 (April 11, 2000)
- Small Business Compliance Policy ("SBCP") - 65 Fed. Reg. 19,630 (April 11, 2000)
 - Applies to "small businesses" as determined by the Small Business Administration (generally <100 employees), as well as "small governments" (<50,000 population) and "small organizations" (i.e., not-for-profit organizations)
- Interim Approach to Applying the Audit Policy to New Owners ("New Owner Policy") - 73 Fed. Reg. 44,991 (August 1, 2008)

Audit Policy Conditions

1. **Systematic Discovery:** audit or compliance management system
2. **Voluntary Discovery:** by means not otherwise legally required by permit, statute, regulation or consent agreement
3. **Prompt Disclosure:** within 21 days of discovery
4. **Independent Discovery:** independent of action by a government or third-party plaintiff.
5. **Correction:** within 60 days of discovery unless written agreement/order
6. **Prevent Recurrence:** take steps to prevent recurrence of the violation
7. **Repeat violations are ineligible:** same facility within past 3 years or as part of a pattern of violations within past 5 years at another facility owned/operated by same company
8. **No Actual Harm:** no actual and imminent danger to human health or the environment
9. **Cooperation:** cooperate with EPA's determination of Audit Policy's applicability

Audit Policy Incentives

- **No gravity-based penalties** if meet all of the policy conditions.
 - Gravity-based penalties reflect the egregiousness of the violator's conduct.
 - EPA retains discretion to collect any economic benefit realized from noncompliance.
- **Reduction of gravity-based penalties by 75%** if meet all conditions except for "systematic discovery."

Audit Policy Incentives (continued)

- **No recommendation for criminal prosecution** for disclosing violation of criminal law if meet all of the policy conditions.
- **No routine requests for audit reports** from entities who disclose under the Audit Policy.

Small Business Compliance Policy Conditions

Differences from Audit Policy Conditions:

- 1. **Systematic Discovery**: 100% penalty mitigation even if discovery is not systematic
- 5. **Correction**: within 90 days of discovery unless written schedule/order
- 7. **No Repeat Violations**: similar 3-year bar plus can't have more than one violation of any requirement for past five years

Interim Approach to Applying the Audit Policy to New Owners

- **Goal:** encourage new owners to look closely at compliance issues at their recently-acquired facilities, self-disclose and correct the environmental problems they find.
- **Definition of New Owner:** an eligible new owner must certify that:
 1. Prior to transaction, was not responsible for environmental compliance at subject facility, did not cause violations and could not have prevented their occurrence;
 2. Violation originated with prior owner; and
 3. Prior to transaction, neither buyer nor seller had largest ownership share of other entity, and did not have common corporate parent.

Interim Approach to Applying the Audit Policy to New Owners (continued)

- **Penalty Mitigation:** Applies to new owners that, within 9 months of transaction closing, meet all Conditions of the Audit Policy, as modified for new owners:
 1. No penalties will be assessed against new owner for period before acquisition;
 2. Economic benefit associated with avoided O&M costs will be assessed against new owner, but only from the date of acquisition; and
 3. No recovery of economic benefit associated with delayed capital expenditures or with unfair competitive advantage assessed against new owner if violations are corrected within 60 days of discovery or agreed-upon timeframe.

Modified Compliance Policy Conditions for New Owners

1. **Systematic Discovery:** EPA waives the “periodic” element of this condition for violations discovered through pre-acquisition due diligence.
2. **Voluntary Discovery:** New owners that enter into an audit agreement or disclose violations before the first instance when monitoring, sampling or auditing is required under a Title V air permit are not disqualified.
3. **Prompt Disclosure:** For violations discovered pre-closing, new owner has up to 45 days after closing to disclose violations. For violations discovered post-closing, new owner has to disclose violations within 21 days after discovery or within 45 days after the transaction closing, whichever time period is longer. These deadlines can be extended further if the new owner enters into an Audit Agreement with the EPA within 9 months of closing.
8. **No Actual Harm:** Where violations that gave rise to serious actual harm or an imminent and substantial endangerment began before new owner acquired the facility, EPA will allow such violations to be eligible absent a fatality, community evacuation or other seriously injurious or catastrophic event.

Audit Policy Successes and Concerns

- For more than 20 years, companies have taken advantage of the Audit Policy to obtain waiver of significant gravity-based civil penalties.
- Particularly helpful where there was little or no economic benefit realized from the noncompliance.
- Self-disclosures under Audit Policy directed to EPA Regional contacts (violations in multiple regions are directed to EPA Headquarters contact).
- Concern that EPA staff was not responding promptly to self-disclosures.
- Concern that EPA might even abandon the Audit Policy.

eDisclosure Portal

- In 2015, EPA created a centralized web-based "*eDisclosure*" portal to modernize implementation of self-disclosure policies.
- Promotes quick resolution of some routine types of violations (Tier 1) and electronic docketing of more complicated violations (Tier 2) for subsequent determination of eligibility.
- New Owner disclosures are **NOT** eligible for *eDisclosure* system and will continue to be resolved manually.

eDisclosure Two-Tiered System

Tier 1

- **Includes** violations of Emergency Planning and Community Right-to-Know Act (“EPCRA”) that meet **all** Audit Policy or SBCP conditions
 - **Excludes** CERCLA 103/EPCRA 304 chemical release reporting violations
 - **Excludes** EPCRA violations with significant economic benefit
- *eDisclosure* system automatically issues an electronic Notice of Determination (“eNOD”) confirming that the violations are resolved with no assessment of civil penalties, conditioned on the accuracy and completeness of the submitter’s *eDisclosure*.
- Must certify compliance by submitting Compliance Report through *eDisclosure* within 60 days (90 days for SBCP disclosures)

eDisclosure Two-Tiered System (continued)

Tier 2

- **Includes:**
 - All Non-EPCRA violations
 - EPCRA violations where discloser can only certify compliance with Audit Policy Conditions 2-9 (i.e., discovery was not systematic)
 - EPCRA 304/CERCLA 103 violations excluded above
- *eDisclosure* system automatically issues an Acknowledgement Letter (“AL”) noting EPA’s receipt of the disclosure and stating that EPA will make a determination as to eligibility for penalty mitigation if and when it considers taking enforcement action for environmental violations.
- Must certify compliance by submitting Compliance Report through *eDisclosure* within 60 days (90 days for SBCP disclosures)

Compliance

Compliance Home

How We Monitor Compliance

Compliance Monitoring Programs

CAA

CERCLA

CWA

FIFRA

RCRA

SDWA

TSCA

Good Laboratory Practices (GLP)

State Review Framework

NPDES Electronic

State Audit Privilege and Immunity Laws & Self-Disclosure Laws and Policies

On this page:

- [State Audit Privilege and Immunity Laws](#)
- [Voluntary Self-Disclosure Penalties](#)
- [State Self-Disclosure Policies](#)
- [State Attorney General Opinions and Memoranda of Understanding Concerning State Audit Privilege and/or Immunity Laws](#)

State Audit Privilege and Immunity Laws

The following states have enacted environmental audit privilege and/or penalty immunity laws.

The first date in parentheses indicates when the law was enacted; the subsequent dates reference the

State Self-Disclosure Statutes and Policies

- **Michigan** Environmental Audit Privilege and Immunity Law (Part 148 of Natural Resources and Environmental Protection Act) (1994 with 1997 amendments)
- **Pennsylvania** - Policy to Encourage Voluntary Compliance by Means of Environmental Compliance Audits and Implementation of Compliance Management Systems (1996)
- **Texas** Environmental, Health, and Safety Audit Privilege Act (1995 with 1997 and 2017 amendments)
- **Ohio** Audit Immunity Law (1996 with multiple amendments)

State Self-Disclosure Statutes and Policies

State	Statute or Policy	Prior Notice of Audit Required	Audit Report Privileged	Timing for Compliance
Michigan	Statute	Yes	Yes, upon execution of a "Nonwaiver of Privilege Confidentiality Agreement"	"promptly correct the violation"
Pennsylvania	Policy	No	DEP will not request or use the audit report.	"reasonable action is promptly initiated and diligently pursued to correct or eliminate the violation"
Texas	Statute	Yes, except for pre-acquisition audit	Yes	"initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance within a reasonable time"
Ohio	Statute	No	Yes	"as quickly as practical"

Audit Policy Considerations

- Plan ahead, particularly if state statute requires prior notice of audit.
- Is disclosure required to EPA, state agency, or both?
- Retain documentation of the company's eligibility for coverage under the EPA's Audit Policy and/or a state audit privilege and immunity law or policy.

Environmental Self-Audits

Pro Tips and Pitfalls

Who Should Consider Self-Auditing?

Anyone subject to environmental* requirements

- Manufacturing facilities
- E & P operations
- Pharmaceutical companies + 3PLs
- Auto repair shops
- Petrochemical facilities
- And more...

* These dynamics apply to health and safety as well; however, there can be material differences between EPA and OSHA self-audit policies that are beyond the scope of this webinar.

Why Self-Audit?

- Protect your employees and the public
- Establish and reinforce compliance culture
- Assess compliance with environmental requirements
- Minimize (ideally, prevent) enforcement exposure
- Qualify for penalty leniency and immunity programs
- In some cases: Because it's required (e.g., ISO 14001 certification or EPA consent decree*)

* Not eligible for EPA Audit Policy

Planning and Executing Your Self-Audit Program

PLANNING

1. Ensure you have management buy-in and support
2. Establish parameters of audit program:
 - Objectives
 - Scope
 - Expectations
3. Develop Standard Operating Procedure (SOP):
 - Roles and responsibilities
 - Risk ranking system
 - Schedule/timeline

EXECUTION

1. Conduct pre-audit planning and coordination:
 - Planning coordination
 - Legal coordination
2. Conduct audit:
 - Opening/closing meetings
 - Documents and records review
 - Interviews
 - Walk-through
3. Conduct post-audit follow-up:
 - Technical assistance
 - Corrective action management

Audit Best Practices

What should we be auditing?

- Define your scope (and stick to it)
 - SOPs should include approaches for conducting full or partial audits (i.e., multi-media or targeted areas). Use risk ranking system to identify priority areas and facilities.
 - If filing a Notice of Intent to Audit or entering into an Audit Agreement, define the facility/facilities and media area(s) that you will be auditing.
- Develop, update, and use a ***tailored*** checklist
 - No “one size fits all”
 - Requirements change, as do operations

Audit Best Practices

When should we be auditing?

- Generally not defined in voluntary self-audit programs
- Build triggers within your organization around change management– e.g.,
 - Mergers and acquisitions
 - Material capital expenditures
 - Regulatory and policy changes
 - COVID-19 closures/understaffing

Audit Best Practices

Who should be on our audit team?

- Internal EHS and Compliance Team – e.g., Compliance Manager, General Counsel, Facility Lead
- External Consultants – e.g., subject matter experts, Professional Engineers, third-party auditors
- Outside Counsel – e.g., environmental attorneys
 - Training and technical assistance with regard to analysis and conclusions/findings
 - Different roles depending on intent to pursue attorney-client privilege for audit materials

Cross-functional teams are crucial to the success of a self-audit program.

Audit Best Practices

Pre-Audit

- Hold a conference call or meeting between all parties to make introductions, coordinate scheduling, and reach mutual understanding of audit scope and objectives
- Submit any required notifications (e.g., to EPA)
- Provide the facility with a list of documents and records that the audit team will need to review before and during the audit
- Provide the facility with a list of personnel the audit team will need to interview
- Review documents and records, if provided in advance

Audit Best Practices

During the Audit:

- Hold opening meeting to review audit scope and approach
- Conduct tour of facility and note preliminary findings
- Interview key personnel about their areas of responsibility and review required records
- Adhere to applicable auditor standards of conduct and Audit Policy or self-audit agreement terms
- Conduct interim verbal updates to counsel
- Holding closing meeting to review preliminary findings and chart course for next steps

Audit Best Practices

Post-Audit:

- Coordinate among lead auditor, technical specialists, management, and counsel on next steps, including:
 - Root cause analysis – group findings by common causes to identify widespread/systemic issues
 - Reporting - compliance findings vs. best practices
 - Self-disclosures – when and how to make
 - Corrective actions – strategies for implementation, resources needed, and mandatory timelines
 - Supplemental investigations – mechanism for separating privileged investigations (e.g., topics or facilities outside scope of current audit)

Special Considerations for Virtual Audits

- Establish reasoned policies – don't be driven by crisis
- Consider unique costs and logistics, including:
 - Acquiring new software
 - Lack of connectivity in certain areas of facility if live-streaming walkthrough
 - Training personnel on new SOP, technology, etc.
 - Cloud storage space (and associated security)
- Create SOP for virtual audits to clarify scope and objectives, including whether process will be temporary or permanent
- Communicate with and train personnel on changes
- Allocate more time for pre-planning and expect more back-and-forth with audited facility

Q & A

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To help provide perspective and education on COVID-19, Clark Hill attorneys have produced thought leadership to assist clients through this difficult and rapidly-changing time:

clarkhill.com/pages/covid-19

Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information.

Businesses facing specific issues should seek the assistance of an attorney.

Contact Us for Further Assistance



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