

COVID-19: Changes in Environmental Permitting and Enforcement for Indiana Manufacturers - What You Need To Know

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COVID-19: Remediation Sites and Enforcement: A Private Perspective

Presented by: Dan Cory

Indiana Manufacturers Association

Covid-19 Resources Webinar

April 21, 2020

Overview

- Widespread Impact of COVID-19
- Remediation projects slowed
 - “Essential” Business
 - Practical Considerations
- Agency Guidance
- Deadlines / Compliance for Remediation Projects
 - Force Majeure
 - Notice, Communication
- Best Practices



COVID-19 Response

- State Orders
 - 37 states, DC, Guam and Puerto Rico have introduced COVID-19 legislation.
 - 34 states, DC and Puerto Rico have enacted or adopted legislation.
 - Adjourn legislative sessions or adopt temporary rules to allow governing bodies to meet or vote electronically.
 - Appropriate funds or focus on health topics such as insurance coverage, medical costs or telehealth services, involve paid leave, unemployment benefits, guidance for schools, or workforce protections for those in quarantine or isolation.
 - Address price gouging or eligibility for public services, temporarily prohibit evictions and ensure utility services, or extend certain legal deadlines.



COVID-19 Response (cont.)

- Indiana has addressed through executive orders.
- Stay at Home Order (EO 20-08) (Mar. 23, 2020)
 - All individuals ordered to stay home except for
 - “Essential Activities”
 - “Essential, Governmental Functions”, or
 - “Essential Businesses and Operations”
 - Stay home order extended through April 20, 2020 by EO 20-18.
- Continuity of Operations of Government (EO 20-09) (Mar. 23, 2020)
 - Requires remote work unless physical presence required for essential function.



COVID-19 Restrictions

- Stay home, except for
 - “Essential Infrastructure”
 - “Essential Governmental Functions”
 - “Essential Businesses and Operations”
 - “Essential Critical Infrastructure”



COVID-19 Restrictions

- Practical considerations
 - Even essential workers directed to work from home where practicable.
 - Maintain social distancing, even outdoors.
 - Facilities / affected properties may be inaccessible.
 - Balancing risks of timely completion against exposure of workers.



Agency Guidance

IDEM

- Not relaxing or reducing any requirements.
- But IDEM will work with any source taking reasonable measures to protect human health and the environment.
- EOs authorize extension of non-essential deadlines by 60 days.
- Need to demonstrate actual connection to COVID, not just use as an excuse for delay.



Agency Guidance

EPA – Pandemic Plan

- Identifies essential functions and services during a pandemic, including:
 - Management and communication with Agency employees, contractors, assistance recipients, and other stakeholders;
 - Implementation of EPA’s continuity of operations plans;
 - Support for the federal response to a pandemic outbreak;
 - Response to hazardous material releases that endanger human health and the environment; and
 - Performance of the Agency’s national security functions.



Agency Guidance

EPA – Emergency Response Guidance

- Office of Land and Emergency Management Considerations and Posture for COVID-19 Pandemic, March 19, 2020
- Primary Mission Essential Function (PMEF) is to prevent, limit, mitigate or contain chemical, oil, radiological, biological, and hazardous materials during and in the aftermath of an accident, natural or man-made disaster in the United States, and provide environmental monitoring.
- Directs Regions to continue response actions but prioritize sites where the risk posed by the discharge or release outweighs health risks from COVID-19 and ensure protective measures are taken.



Agency Guidance (cont.)

EPA – Guidance for Field Work

- “Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19,” April 10, 2020.
- Applies to Superfund, RCRA, TSCA, OPA, UST and other programs.
- On-site work has been reduced or stopped because of COVID-19 concerns at about 34 Superfund NPL sites (12% of EPA sites with ongoing remedial actions).



Agency Guidance (cont.)

- Work can be reduced or suspended at sites if:
 - State, tribal or local health officials have requested a stoppage.
 - Any workers have tested positive for or exhibited symptoms of COVID-19.
 - Workers may closely interact with high-risk groups or those under quarantine.
 - Contractors are not able to work due to state, tribal or local travel restrictions or medical quarantine.
 - Workers can't maintain proper social distancing.



Agency Guidance (cont.)

- Case by Case basis
- Site-specific factors for determining if suspension appropriate.
 - Whether failure to continue response actions would likely pose an imminent and substantial endangerment to human health or the environment, and whether it is practical to continue such actions.
 - Whether maintaining any response actions would lead to a reduction in human health risk/exposure within the ensuing six months.
 - Whether work that would not provide near-term reduction in human health risk could be more strongly considered for delay, suspension, or rescheduling of site work, in coordination with state, tribal, and local officials and with updated HASPs as appropriate.



Remediation Deadlines and Contractual Considerations

- Compliance Deadlines
 - Agency may not approve non-compliance in advance for short deadlines.
- “Force Majeure “ clauses
 - Typically still need to mitigate.
- Other discretionary mechanisms
- Notice requirements



Best Practices

- Notice and Communication
 - With Agency
 - Document agreements with agency personnel.
 - With Contractors
 - With Public?
- Review and be prepared to invoke contractual provisions if necessary.
- Catch up on non-field aspects of project.
- Update your HASPs
- Be flexible
- Consider potential liability for creation of new exposures.
 - Insurance





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EPA's COVID19 Enforcement Policy – How Far Does it Go?

Presented by: Amy E. Romig

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EPA COVID-19 Enforcement Policy

- Issued March 26, 2020
 - Applies Retroactively to March 13, 2020
 - Will Apply until EPA Announces End (7 Days Notice)
 - Applies to actions occurring during effective date
- National Application – but how it works may differ state to state depending on fact-specific circumstances



Why is Policy Necessary?

- Worker Shortages due to sickness or travel restrictions
- Social Distancing Restrictions may limit practical operations
- Contractor and laboratory availability may be affected beyond permittees' control



Policy is For Enforcement Discretion

- Policy *does not* change any actual rules or requirements
 - “The EPA will exercise the enforcement discretion...for noncompliance covered by this temporary policy and resulting from the COVID-19 pandemic, if regulated entities take the steps applicable to their situations...”
 - Unless you can link potential non-compliance directly to Covid-19 or related disruptions, policy will not apply



Conditions of Policy

- Entities should make every effort to comply with their environmental compliance obligations
- If compliance is not practicable, entities must still document the information, actions, and conditions surrounding the noncompliance



Permittees' Required Documentation:

- They acted responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19
- Identify the nature and dates of the noncompliance
- Identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
- Return to compliance as soon as possible



Routine Compliance and Reporting

- EPA recognizes that routine compliance and reporting will be affected
 - Routine compliance monitoring
 - Integrity Testing
 - Sampling
 - Laboratory analysis
 - Training
 - Reporting
 - Certifications



Hierarchy of Compliance

- Choose the “lesser evil” of noncompliance
 - Example: If inspection by certified employee required, but certification delayed due to COVID-19, better to maintain inspections with uncertified personnel than to miss inspections
 - Example: If certified operators required, but certifications lapse because of COVID-19, better to keep experienced and trained operators on the job



Facility Operations

- If disruptions create imminent threat to human health and the environment - consult with EPA or State Agency immediately
- If disruptions create exceedances of enforceable limitation on emissions or discharges – report immediately



Settlement Agreements and Consent Decrees

- If you anticipate missing a milestone in a administrative settlement agreement – use the notice procedures in the agreement
- Courts retain jurisdiction over Consent Decrees – but EPA has agreed to cooperate with DOJ and to exercise enforcement discretion with regard to stipulated penalties for routine compliance obligations



Special Circumstances

- RCRA Generator Status
 - Transport issues may prevent hazardous materials removal
 - Accumulation of waste will not change generator status
 - Must still comply with proper labeling and storage requirements



Special Circumstances

- Animal Feeding Operations
 - Transportation issues may prevent animal transport
 - Temporary increases in number of animals will not trigger CAFO Status
- Wet Signatures – EPA will accept digital or electronic signatures if original signatures are not available



Exclusions

- Accidental Releases
- Imports of Pesticide Products under FIFRA
- Criminal Violations
- Superfund and RCRA Corrective Actions Covered by their own policy



Practical Application

- Agency personnel are still working – even if remotely
- EPA has announced that it will focus its resources on situations creating acute risks or imminent threat, but all enforcement matters are continuing



Case by Case Determination

- Documentation of your circumstances is essential to request enforcement discretion
 - Ask for written confirmation from laboratories or contractors if they are source of delay
- Document how your company is responding to “Stay At Home Orders”



Case by Case Determination

- Some emergency actions may help your operations
 - Federal Motor Carrier Safety Administration issued emergency relief related to Hours of Service requirements for some immediate transportation needs
 - Department of Homeland Security declared waste collection as essential service





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