

E-NEWS Brief

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U.S EPA & MassDEP UPDATES: COMPLIANCE POLICIES & SOLICITING COMMENTS FOR 2020 MSGP

U.S. EPA'S TEMPORARY COMPLIANCE POLICY

On Thursday, Susan Bodine the head of EPA's Office of Enforcement and Compliance Assurance, issued a policy to the agency's governmental and private sector partners outlining the agency's approach to enforcing regulations when regulated entities find themselves unable to comply due to COVID-19-related circumstances like personnel shortages or travel restrictions.

The policy generally divides compliance obligations into tiers and treats potential violations differently. Significant leeway will be given to businesses that show they can't meet routine compliance monitoring and reporting requirements, while those at risk of allowing discharges or emissions that could damage human health and the environment will be scrutinized more closely. Once the coronavirus crisis has passed, Bodine said the policy will be rescinded.

The policy does **not** apply to *intentional* violations of EPA statutes or requirements, (and because the EPA has made clear it will continue to carry out criminal enforcement for these violations), businesses have to be extra careful to have clear communication with EPA regulators and keep scrupulous records in the event they anticipate severely running afoul of the law.

This means that MMTA members should do the following with respect to their NPDES stormwater monitoring obligations:

If monitoring/testing/reporting is not reasonably practicable, the facility should take the following steps:

1. *Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;*
2. *Identify the specific nature and dates of the noncompliance;*
3. *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;*
4. *Return to compliance as soon as possible;*
5. *Document the information, action, or condition specified in steps 1-4.*

In other words, **you should be making every effort to complete required storm water monitoring, but in the event that you are *not* able to, you must document the dates of your non-compliance and the reasons why you are not able to comply at that time.** Note, that the reasons should be related to COVID-19 burdens, such as limited or no on-site staff, or unavailability of laboratory testing/reporting.

Note that states are technically free to enforce as they see fit if they've been delegated that authority, and nothing has eliminated the rights of groups like CLF to enforce environmental laws under citizen suit provisions. See, e.g., *Conservation Law Foundation and Charles River Watershed Association v. U.S. EPA*, Docket No. 15-cv-11727 (D. Mass., 2015). MassDEP has not published any guidance regarding enforcement changes or waivers, but DEP staff are working remotely and enforcement visits during this time are highly unlikely. Lastly, the EPA policy does not apply to enforcement related to the Superfund Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

Read the full U.S. EPA policy update here: <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

MASS. DEP'S COMPLIANCE/ENFORCEMENT STANCE

At this time, MassDEP has chosen NOT to issue any blanket policy about non-compliance.

Per MassDEP Commissioner Martin Suuberg, the Department's current policy (as of 4/2) is flexible but still focused on compliance. The Commissioner specifically emphasized MassDEP is not seeking to catch people and penalize them, and is trying to work on other ways to handle compliance concerns.

Commissioner Suuberg encourages permittees to contact DEP in the event that they are out of compliance, providing reasons why full compliance wasn't possible or practicable or safe. **It is my recommendation, however, that you run any emails by legal counsel before volunteering non-compliance status to MassDEP.**

I also advise this might be a reasonable time to let MassDEP know if there are on-site needs which have to be put in place before formal permitting can be completed and that the permits are being sought as promptly as possible. If you have any questions about the scope of permitting that may be necessary, please contact my office.

COMMENT PERIOD FOR PROPOSED 2020 MSGP NOW OPEN! DEADLINE TO SUBMIT COMMENTS IS MAY 1st

As discussed in last month's E-News Brief, U.S. EPA has released its proposed 2020 Multi-Sector General Permit (MSGP) for all NPDES Permits, which govern stormwater related to industrial activities.

The proposed 2020 MSGP (which consists of 3 PDF's) can be found here on EPA's website: <https://www.epa.gov/npdes/proposed-2020-msgp-public-comment>

The official process for any proposed government agency action requires that all public comments be submitted through the federal government's website, Regulations.gov.

To comment on the Proposed 2020 MSGP click here: <https://www.regulations.gov/docket?D=EPA-HQ-OW-2019-0372>

If you have any questions regarding state or federal environmental compliance, please contact Jamy Madeja at 617-227-8410 or jmadeja@Buchananassociates.com. All MMTA members are also entitled to a free consultation on any topic.