Below are the 3 related but separate responses sent from Ruth Ivory-Moore in regards to concerns re: EPA regulations being rolled back while the pandemic unfolds. Feel free to share Ruth’s commentary with anyone who wants to know more – but realize that the topic is fluid. The main point in sharing it via the Lutherans Restoring Creation network is to understand:

1) how much our ELCA Advocacy office is needed to research/discern the issues behind the headlines

2) how very little is black/white >> being engaged in government takes a lot of patience and cooperating (even when we may not agree on the fine points!)

- Phoebe Morad – May 8, 2020

Email 1 of 3 On Thursday, May 7, 2020 Ruth Ivory-Moore <Ruth.Ivory-Moore@elca.org> wrote:

We are following very closely what has been happening with this Administration for over 3.5 years. Admittedly, it is very discouraging, but it is not “black and white”. Without sounding too lawyerly, there is no bright line. Yes, this Administration has been attempting to role back not only environmental regulations, but other regulations that impact the lives of the most vulnerable, the impoverished. This for the most part began almost day one of this Administration. So this is nothing new. But note I said “attempting”. Not all the attempts have been successful. See this article at https://policyintegrity.org/trump-court-roundup. The link takes you to the site for The Institute for Policy Integrity at the NYU School of Law which “tracks the outcomes of litigation over the Trump administration's use of agencies to deregulate as well as to implement its other policy priorities. This Roundup includes litigation over agency actions such as regulations, guidance documents, and agency memoranda.” When you click the link you will see a pie chart. This chart includes only 84 of all the regulations that the Administration tried to roll back. The charts shows that of 84 court challenges in this sampling, the Trump Administration has been successful in only 6 of them.

Though sometimes it may seem that it does not exist, we still do have a system of “check and balance” within our government. The Administrative Law process provides a means for filing various legal procedures. For the most part each action taken by this Administration (like previous administrations) is challenged in court. The challengers can be states, industry, citizens, big greens (like NRDC, Sierra Club, or Earth Justice), and others as long as they can prove they have standing. Most large schools have regulatory trackers, see the one from Harvard: https://eelp.law.harvard.edu/regulatory-rollback-tracker/.

Litigation most of the time take years to resolve. For example, the Clean Power Plan was a signature regulation of the Obama Administration, see here the sorted path it continues to take in the court system: https://eelp.law.harvard.edu/2017/09/clean-power-plan-carbon-pollution-emission-guidelines/.

To answer Pastor Burow’s question, no we are not doing any research, we know what is happening. We are not responding to this article. But we are following the legal
process. Our democratic system allows through the Administrative process and judicial system for this to happen. But we do actively participate in the process. Some examples of our participation from the Advocacy's office perspective includes sending out action alerts from the DC advocacy office to ELCA membership; writing or signing on to letters; or making comments on proposed regulations in addition to agency and congressional meetings. (See the attached comments we submitted on the Council on Environmental Quality’s proposal to revise/amendment the National Environmental Policy Act (NEPA).

We in the Advocacy are very active in the process. If you receive Action Alerts from us, please do act. If you are not on our Action Alert distribution list please let me know and I will get you added.

I also want to clarify what the EPA has done regarding enforcement of environmental regulations. First understand, in most cases states if they have the delegated authority, enforce many federal environmental regulations, especially air and water regulations. This means typically the first line of enforcement would normally be the states anyway for those that they have authority enforce. That is why states issue certain permits like operating air permits with emissions limits and water discharge permits. While I am not a fan of this EPA, EPA on paper did not say there were not enforcing regulations. They said they were exercising enforcement discretion due to COVID-19. The industrial facility wanting to take advantage of this must alert the EPA and document why and how due to COCID-19 they need to take advantage of the enforcement discretion. But EPA made it very clear that this discretion does not impact the state’s ability to enforce. I will send you the analysis I did for our ELCA Advocacy network. I will also forward to you a law firm analysis that is consistent with my interpretation. (Also, note that enforcement discretion is not new. Earlier Administrations (even the Obama Administration) have used this.)

Please let me know if you have any questions.

Thanks,

Ruth

Forwarded May 7th
FW: EPA's Enforcement Discretion email 2 of 3
From: Ruth Ivory-Moore
Sent: Friday, March 27, 2020 6:01 PM
Subject: FW: We see who gets the waivers

EIP Paragraph 1: We write to oppose EPA’s apparent plan to waive certain environmental compliance requirements for petrochemical plants and other polluting industries in response to the coronavirus. While it may be reasonable in limited circumstances for EPA to exercise discretion on a case-by-case basis to temporarily refrain from enforcement where the pandemic has clearly
undermined a facility’s ability to comply, we oppose any blanket or advance waiver of environmental requirements for several reasons:

- **EPA – Enforcement Discretion Letter**
  - Para. 1 - 2: ...The agency must take these important considerations into account as we all continue our work to protect human health and the environment. Accordingly, we are announcing the **following temporary policy** regarding EPA enforcement of environmental legal obligations during this time. The EPA will exercise the **enforcement discretion** specified below for noncompliance covered by [this temporary policy and resulting from the COVID-19 pandemic], if regulated entities take the steps applicable to their situations, as set forth in this policy. For noncompliance that occurs during the period of time that this temporary policy is in effect, and that results from the COVID-19 pandemic, this policy will apply to such noncompliance in lieu of an otherwise applicable EPA enforcement response policy.

- **Ruth’s Comments:**
  - This letter does not preclude states with delegated authority to act, that is, states can still enforce. A lot of permits are issued and controlled by the States, because they have been delegated authority to run the federal programs. For example, most air permits and water discharge permits are issued by the state such agencies such as the PADEP. (EPA letter para. 3 - Authorized states or tribes may take a different approach under their own authorities.)
    - For these types of permits, state agencies are typically the first line of enforcement.
  - The enforcement discretion does not apply to criminal activity. (EPA Letter: ...do not apply to any criminal violations or conditions of probation in criminal sentences.)
  - Enforcement discretion is conditional. To receive consideration for enforcement discretion the entity must
    - (a) Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
    - (b) Identify the specific nature and dates of the noncompliance;
    - (c) 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;
    - (d) Return to compliance as soon as possible; and
    - Document the information, action, or condition specified in a. through d.

- **EIP Paragraph 2:** It is not clear why refineries, chemical plants, and other facilities that continue to operate and keep their employees on the production line will no longer have the staff or time they need to comply with environmental laws. Again, EPA can grant waivers where sources can show how the coronavirus makes compliance with certain requirements impossible. But what is the basis for presuming that the pandemic means companies can no longer comply with environmental rules while they continue to operate and process all other forms of corporate “paperwork,” e.g., applications for permits to expand, detailed comments to support
The consequences of the pandemic may constrain the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. (The numbers refer to footnotes in the EPA letter such as “2 If affected by COVID-19, this category may include, for example, CEMS and stack tests, relative accuracy test audits, LDAR monitoring, fence line monitoring, RICE readings and monitoring, tank and piping inspections, assessments, or stormwater inspections.” Each is prefaced by “If affected by COVID-19.”)

Entities should use existing procedures to report noncompliance with such routine activities, such as pursuant to an applicable permit, regulation or statute. If no such procedure is applicable, or if reporting is not reasonably practicable due to COVID-19, regulated entities should maintain this information internally and make it available to the EPA or an authorized state or tribe upon request. In general, the EPA does not 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.

Ruth’s comments: Industry is hit hard also. See Forbes: [https://www.forbes.com/sites/uhenergy/2020/03/22/lower-for-longer-covid-19s-impact-on-crude-oil-and-refined-products/#2fe70f9f2fe8](https://www.forbes.com/sites/uhenergy/2020/03/22/lower-for-longer-covid-19s-impact-on-crude-oil-and-refined-products/#2fe70f9f2fe8). “… COVID-19 is adding another, and by most accounts a more serious complication, and one that will last longer. The impact of COVID-19 has been vastly underestimated by agencies such as the International Energy Agency. They had recently suggested that demand might drop by 90,000 barrels per day; that compares to a prediction in December 2019 that demand would go up by 900,000 barrels per day. A recent estimate by IHS Markit suggests that we might be in for a bigger shock. They predict that gasoline consumption in the US will drop by 55% for March and April due to COVID-19. They also indicated that jet fuel demand would be halved over the same period. Lastly, they suggest that diesel demand would be down by 20%....”

I will send an “E&E” article that shows how oil and gas is hurting going to cuts.

EIP Paragraph 3: Contrary to assertions by the American Petroleum Industry (API) and other interest groups, the suspension of monitoring and reporting requirements would have a very specific impact on public health and safety in many cases. Allowing a company to postpone the repair of equipment that leaks toxic gases into the atmosphere, as API has suggested, leaves the public exposed to those pollutants for longer periods of time, increases the risk of fire and explosion, and is not just a paperwork concern. For another example, Clean Air Act rules limiting hazardous air pollution require refineries to monitor benzene levels at their fencelines, and to take corrective action whenever annual concentrations of this deadly pollutant exceed 9 micrograms per cubic meter.

Ruth’s comments: The language used by EIP letter is found similarly in the API letter, but not in the EPA policy. EPA was careful not use the API exact language. Is it likely
that the EPA reacted with the issuance of this policy based on the API letter? The answer is likely yes. Is the policy wrong, because they reacted to API???

- EPA instituted enforcement discretion, not suspension of compliance. Non-compliance must be documented and proven as to why they cannot comply.

**EIP Paragraph 4:** Monitoring reports reveal that at least 10 refineries in Illinois, Louisiana, Mississippi, Pennsylvania, New Mexico and Texas exceeded this annual threshold in the fourth quarter of 2019. Pasadena Refining Systems in Texas reported that benzene levels along part of their boundary averaged 565 micrograms per cubic meter between October 16 and October 30 of 2019, or nearly six times the ten-hour exposure limit recommended by the National Institute of Occupational Safety and Health. Take away this monitoring, and you will leave both plant workers and communities blind to these hazards, and forestall the corrective action required when benzene levels get too high. Actions that obscure the release toxins or other air pollutants that exacerbate asthma, breathing difficulty, and cardiovascular problems in the midst of a pandemic that can cause respiratory failure is irresponsible from a public health perspective.

- EPA – Enforcement Discretion Letter—Does not address past noncompliance. The enforcement discretion is retroactive to March 13, 2020 when the pandemic was declared.
- Ruth’s comments—If EPA has not enforced, then citizens’ suits maybe the only legal recourse for these alleged violations.

**EIP Paragraph 5:** The Environmental Protection Agency has not shown the same concern for the impact the coronavirus has had on the ability of community and public interest groups to respond to various proposals to weaken environmental standards. In fact, EPA recently denied a request to extend the comment period for the so-called “science transparency” rule, at a time when public health officials who may oppose that decision have had to turn their attention to coronavirus. Our organizations face the same challenges keeping up with the rulemaking process as do large corporations, but with fewer resources. As pointed out by Mustafa Santiago Ali, EPA’s former Associate Administrator for Environmental Justice, communities already hardest hit by air pollution and particularly vulnerable to the virus may have no meaningful opportunity to comment during the current pandemic.

- EPA – Enforcement Discretion Letter: Does not address
- Ruth’s comments: EIP likely makes a relevant point here.

**EIP Paragraph 6** We understand the coronavirus is a public health emergency that may require a flexible response from EPA. That response must be tailored to specific and appropriate circumstances and not offer a blanket waiver of requirements that many companies that are up and running may have no trouble meeting.

- Ruth’s Comments: This statement takes liberties with the scope of enforcement discretion and does not comprehend the criteria that must be met.

**EIP Paragraph 7** We ask that EPA post online any agreements with regulated sources to delay or reduce environmental requirements, with a clear explanation of how the coronavirus pandemic made such decisions necessary and what steps facilities will take to reduce their health impacts. This would include the public posting of any “no action assurances” EPA issues for industries, along with an explanation of how the action is consistent with EPA’s written policy against no action assurances.
Ruth’s Comment: This is a fair request by EIP. Note the 1984 Policy Against Assurance of No Action is attached.

- **EIP Paragraph 8:** In all cases, EPA should provide a clear explanation of how the coronavirus pandemic made such agreements or no action assurances necessary. EPA should also provide notice and a meaningful opportunity to comment on any proposed changes to consent decrees, and ensure that states authorized to implement federal environmental rules do not inappropriately waive those requirements and are equally transparent about their decisions.

- **EPA – Enforcement Discretion Letter** Page 2
  - If compliance is not reasonably practicable, facilities with environmental compliance obligations should:
    a. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
    b. Identify the specific nature and dates of the noncompliance;
    c. 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;
    d. Return to compliance as soon as possible; and
    e. Document the information, action, or condition specified in a. through d.

- **Ruth’s Comment:**
  - The facility has to justify by documentation.

---

**email 3 of 3 – forwarded May 7th**
**From:** Ruth Ivory-Moore
**Sent:** Saturday, March 28, 2020 1:46 AM
**Subject:** FW: News Alert: EPA Policy Provides Enforcement Relief Where Needed Due to Pandemic --FYI

All,

The news alert below came into my mailbox after I sent my email out to you. This email is from a large trusted law firm whose practice focuses on environmental issues. The firm’s managing principal (Ben Wilson) is Black. The firm does a lot of EJ work. (Ben is also the uncle of Russel Wilson—Seattle Seahawks quarterback. I only mention that because if you know Russell’s story- you know of his character and work ethic which is a Wilson family trait starting with the patriarch of the family being President of Norfolk State University years ago. All those who know Ben know of his high ethics and character. I see that in the way he runs the firm.) The summary below is a more accurate description of the EPA enforcement discretion policy than the EIP letter; and fortunately the version below aligns with my interpretation.

Please note that EPA is doing no more here than it does during the aftermath of hurricanes.

Thanks,
Ruth
On March 26, 2020, EPA issued new guidance addressing a range of issues relating to environmental compliance and enforcement during the COVID-19 pandemic. The Agency sets expectations for the regulated community to continue to comply with the law, while signaling its likely exercise of substantial enforcement discretion for pandemic-related non-compliance where regulated entities follow the conditions set forth in the policy and EPA agrees that the non-compliance is related to COVID-19. Read more.

Beveridge & Diamond has a number of lawyers with high-level federal government experience in determining when to exercise enforcement discretion, grant or deny force majeure petitions, sufficiency of documentation, and other pertinent experience. Our team includes Allyn Stern, former EPA Region 10 Counsel; Josh Van Eaton, former DOJ senior trial attorney in the Environmental Enforcement Section of the Environment and Natural Resources Division; and John Cruden, former DOJ senior leader on environment and natural resource matters. Enforcement discretion will often be exercised at the state level for delegated programs, and B&D can also provide its experience working with multiple state jurisdictions throughout the country.
### COVID-19 Resource Center

As the leading law firm for environmental law and litigation, B&D helps clients meet environmental, health, and safety challenges impacting the workplace, including many unprecedented issues posed by COVID-19. Please visit B&D’s **COVID-19 Resource Page** for more information, which we will update as developments occur.

**Sign up here** to receive our COVID-19 news alerts.

---

**Authors**

<table>
<thead>
<tr>
<th><strong>Allyn Stern</strong></th>
<th><strong>Aron Schnur</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Of Counsel (Seattle, WA)</td>
<td>Principal (Baltimore, MD)</td>
</tr>
<tr>
<td>206.620.3027</td>
<td>410.230.1334</td>
</tr>
<tr>
<td><a href="mailto:astern@bdlaw.com">astern@bdlaw.com</a></td>
<td><a href="mailto:aschnur@bdlaw.com">aschnur@bdlaw.com</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Pam Marks</strong></th>
<th><strong>Karen Hansen</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal (Baltimore, MD)</td>
<td>Principal (Austin, TX)</td>
</tr>
<tr>
<td>410.230.1315</td>
<td>512.391.8040</td>
</tr>
<tr>
<td><a href="mailto:pmarks@bdlaw.com">pmarks@bdlaw.com</a></td>
<td><a href="mailto:khansen@bdlaw.com">khansen@bdlaw.com</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Maddie Boyer</strong></th>
<th><strong>Alan Sachs</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal (Austin, TX)</td>
<td>Principal (Washington, DC)</td>
</tr>
<tr>
<td>512.391.8010</td>
<td>202.789.6049</td>
</tr>
<tr>
<td><a href="mailto:mboyer@bdlaw.com">mboyer@bdlaw.com</a></td>
<td><a href="mailto:asachs@bdlaw.com">asachs@bdlaw.com</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Josh Van Eaton</strong></th>
<th><strong>Susan Smith</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal (Washington, DC)</td>
<td>Principal (San Francisco, CA)</td>
</tr>
<tr>
<td>202.789.6033</td>
<td>415.262.4023</td>
</tr>
<tr>
<td><a href="mailto:jvaneaton@bdlaw.com">jvaneaton@bdlaw.com</a></td>
<td><a href="mailto:ssmith@bdlaw.com">ssmith@bdlaw.com</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Stephen Richmond</strong></th>
<th><strong>Kate Tipple</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal (Boston, MA)</td>
<td>Associate (San Francisco, CA)</td>
</tr>
<tr>
<td>617.419.2310</td>
<td>415.262.4015</td>
</tr>
<tr>
<td><a href="mailto:srichmond@bdlaw.com">srichmond@bdlaw.com</a></td>
<td><a href="mailto:ktipple@bdlaw.com">ktipple@bdlaw.com</a></td>
</tr>
</tbody>
</table>