

March 20, 2020

Administrator Andrew Wheeler  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Administrator Wheeler:

The undersigned agricultural groups thank you and the Administration for your swift action to address concerns surrounding the COVID-19 pandemic. As Americans begin to realize the potential long-term threat this pandemic presents to their personal safety, EPA plays an important role in ensuring that America's farms remain safe. Farms across the nation have closed their gates to visitors and other off-site guests to limit the spread of the virus to essential operational staff at farms and ranches. Respecting this effort, we request that the EPA issue a "no action" assurance, suspending site inspections of Clean Water Act 402 permitted agricultural operations to protect the safety of critical infrastructure workforce employees, including farm workers.

EPA's long-standing policy related to enforcement during emergencies allows the agency to make "no action" assurances in an extremely unusual circumstance where an assurance is clearly necessary to serve the public interest and which no other mechanism can adequately address the concern. The COVID-19 pandemic and its effects are clearly unprecedented. Agricultural workers, as outlined by the Department of Homeland Security, are critical infrastructure workers who need protection by all levels of government. Such protection serves the public interest by ensuring that agricultural workers continue to maintain the American food supply without unnecessary regulatory burden. A "no action" assurance is the only way to make clear EPA's intent to provide industry-wide relief.

On March 19, 2020, the Department of Homeland Security Cybersecurity and Infrastructure Security Agency (DHS-CISA) released its guidance identifying essential critical infrastructure workers. These workers identified by DHS-CISA conduct a range of operations and services that are essential to continued critical infrastructure viability. Food and agriculture workers are included in this list. The guidance document advises states and localities to encourage, rather than hinder, the ability of these industries to effectively continue their work. Other federal and state administrative agencies have provided temporary regulatory leniency to reduce constraints on these critical industries. For example, the Department of Transportation has suspended hours of service limitations for livestock haulers, and states across the nation have suspended unannounced inspections for food processors and manufacturers. EPA can further the administration's effort to reduce regulatory burdens by suspending inspection requirements during the pendency of the COVID-19 pandemic.

The undersigned groups urge EPA to make a "no action" assurance. Thank you for your consideration of America's agricultural producers.

Sincerely,

National Cattlemen's Beef Association

National Pork Producers Council

U.S. Poultry & Egg Association

National Milk Producers Federation

United Egg Producers

National Council of Farmer Cooperatives

American Farm Bureau Federation

Cc: Susan Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance

Enclosure: EPA 'No Action' Assurance Memo



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy Against "No Action" Assurances  
FROM: Courtney M. Price *Courtney M. Price*  
Assistant Administrator for Enforcement  
and Compliance Monitoring  
TO: Assistant Administrators  
Regional Administrators  
General Counsel  
Inspector General

This memorandum reaffirms EPA policy against giving definitive assurances (written or oral) outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement.

"No action" promises may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. This credibility is vital as a continuing incentive for regulated parties to comply with environmental protection requirements.

In addition, any commitment not to enforce a legal requirement against a particular regulated party may severely hamper later enforcement efforts against that party, who may claim good-faith reliance on that assurance, or against other parties who claim to be similarly situated.

This policy against definitive no action promises to parties outside the Agency applies in all contexts, including assurances requested:

- both prior to and after a violation has been committed;
- on the basis that a State or local government is responding to the violation;

- ° on the basis that revisions to the underlying legal requirement are being considered;
- ° on the basis that the Agency has determined that the party is not liable or has a valid defense;
- ° on the basis that the violation already has been corrected (or that a party has promised that it will correct the violation); or
- ° on the basis that the violation is not of sufficient priority to merit Agency action.

The Agency particularly must avoid no action promises relating either to violations of judicial orders, for which a court has independent enforcement authority, or to potential criminal violations, for which prosecutorial discretion rests with the United States Attorney General.

As a general rule, exceptions to this policy are warranted only

- ° where expressly provided by applicable statute or regulation (e.g., certain upset or bypass situations)
- ° in extremely unusual cases in which a no action assurance is clearly necessary to serve the public interest (e.g., to allow action to avoid extreme risks to public health or safety, or to obtain important information for research purposes) and which no other mechanism can address adequately.

Of course, any exceptions which EPA grants must be in an area in which EPA has discretion not to act under applicable law.

This policy in no way is intended to constrain the way in which EPA discusses and coordinates enforcement plans with state or local enforcement authorities consistent with normal working relationships. To the extent that a statement of EPA's enforcement intent is necessary to help support or conclude an effective state enforcement effort, EPA can employ language such as the following:

"EPA encourages State action to resolve violations of the \_\_\_\_\_ Act and supports the actions which \_\_\_\_\_ (State) is taking to address the violations at issue. To the extent that the State action does not satisfactorily resolve the violations, EPA may pursue its own enforcement action."

I am requesting that any definitive written or oral no action commitment receive the advance concurrence of my office. This was a difficult decision to reach in light of the valid concerns raised in comments on this policy statement; nevertheless, we concluded that Headquarters concurrence is important because the precedential implications of providing no action commitments can extend beyond a single Region. We will attempt to consult with the relevant program office and respond to any formal request for concurrence within 10 working days from the date we receive the request. Naturally, emergency situations can be handled orally on an expedited basis.

All instances in which an EPA official gives a no action promise must be documented in the appropriate case file. The documentation must include an explanation of the reasons justifying the no action assurance.

Finally, this policy against no action assurances does not preclude EPA from fully discussing internally the prosecutorial merit of individual cases or from exercising the discretion it has under applicable law to decide when and how to respond or not respond to a given violation, based on the Agency's normal enforcement priorities.

cc: Associate Enforcement Counsels  
OECM Office Directors  
Program Compliance Office Directors  
Regional Enforcement Contacts