

April 17, 2020

Director Liesl Eichler Clark
Michigan Department of Environment, Great Lakes, and Energy
Constitution Hall
525 West Allegan Street
Lansing, MI 48909-7973

Attorney General Dana Nessel
Michigan Department of Attorney General
G. Mennen Williams Building
525 W. Ottawa Street
Lansing, MI 48909

BY ELECTRONIC MAIL

Dear Director Clark and Attorney General Nessel:

We write to you as organizations committed to protecting the health of Michigan residents, particularly its communities most burdened by pollution. On March 26, the U.S. Environmental Protection Agency (EPA) released the first of several Enforcement Policies that will guide federal enforcement decisions during the ongoing COVID-19 pandemic.¹ We want to thank you for your proactive efforts in the last week following EPA's announcement, confirming that regulated entities are expected to maintain compliance with environmental regulations and permit requirements during this time. It is also our understanding that you have established a process for any requests for regulatory flexibility.² We write to now strongly encourage the Michigan Department of Environment, Great Lakes, and Energy (EGLE) and the Michigan Office of the Attorney General (OAG) to take further action in defining a Michigan-specific policy that reinforces the state's existing enforcement authority, commits to protecting those residents who are most vulnerable to pollution and who face increased risk of adverse COVID-19 outcomes, and minimizes the potential harms to public health from the federal agency's invitation for noncompliance.

Our organizations advocate on behalf of hundreds of thousands of Michiganders who depend on fair and consistent enforcement of pollution control rules to protect our communities, families, properties, and businesses. We are particularly concerned about the impacts of enforcement decisions on fenceline, downstream, and downwind communities, a concern this administration shares.³ These primarily Black and Brown communities have long suffered from heavy pollution burdens along with heavy sociodemographic burdens that amplify their vulnerability to the impacts of pollution, resulting in especially high cumulative burdens.⁴ These high burdens both drive, and are driven by, health-related

¹ US EPA Memorandum, *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* (March 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>.

² EGLE Establishes Process for Handling Enforcement Discretion Due to COVID-19, <https://www.michigan.gov/egle/0,9429,7-135--523592--,00.html>.

³ See Governor's Executive Order 2019-06 (February 20, 2019), Sections 1(b) (Interagency Environmental Justice Response Team), 1(f) (Office of the Environmental Justice Public Advocate), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-490039--,00.html.

⁴ Community Action to Promote Healthy Environments, *Cumulative Risk: Air Pollution & Population Vulnerability*, <http://caphedetroit.sph.umich.edu/cumulative-risk-air-pollution-population-vulnerability/>.

disparities. For example, impacted communities suffer the state's highest rates of asthma⁵ and other respiratory diseases, along with conditions like diabetes;⁶ and they also often lack access to health insurance and health services. These factors also make them especially vulnerable to COVID-19,⁷ as we are seeing with the staggering numbers of cases and fatalities in Detroit,⁸ which are disproportionately impacting Black people. We appreciate your leadership in establishing the Michigan Coronavirus Task Force on Racial Disparities⁹ to be chaired by Lt. Governor Garlin Gilchrist II. By establishing this Task Force, you have underscored the need for EGLE and OAG to ensure that reporting and monitoring requirements are upheld to the greatest extent possible, that Michigan's process for considering requests for regulatory leniency are transparent, and that at-risk communities in Michigan are protected from further health threats during this ongoing crisis.

EPA's new policy announces that the agency "does not expect to seek penalties for noncompliance with routine monitoring and reporting obligations" if a company claims COVID-19 related problems and EPA agrees. Yet, these routine obligations provide assurance that discharge and emissions limits are being met and public health is protected. Notably, the federal policy does not tie flexibility to the impact of noncompliance on nearby or downstream communities. It abandons accountability across the board rather than providing flexibility on a case-by-case basis as extant policies do. The new federal policy fails to require even minimal after-the-fact showings that are open to public review and scrutiny that could prevent abuse.

We ask that you publicly clarify that EGLE will continue to protect Michigan's air, land, and water despite the EPA non-enforcement policy, and that a high level of scrutiny will be applied to requests for leniency from regulated entities located adjacent to impacted communities. Such a statement and strict adherence to it would give confidence to communities already burdened by pollution in addition to the impacts of COVID-19, such as those residents facing lead and manganese pollution from the AK Steel facility in Dearborn. It would also provide clarity to regulated entities in Michigan who might otherwise be misled or emboldened by EPA's announcement.

We request that your agencies emphasize these points:

- Michiganders depend on EGLE to protect our air, land, and water, particularly during times of crisis.
- Monitoring and reporting requirements ensure that public health and the environment are being protected. EGLE will ensure that reporting and monitoring requirements are upheld to the greatest extent possible.

⁵ Michigan Department of Health and Human Services, Bureau of Disease Control, Prevention and Epidemiology, *Detroit: The Current Status of the Asthma Burden* (March 2016), https://www.michigan.gov/documents/mdhhs/Detroit-AsthmaBurden_516668_7.pdf.

⁶ Michigan Department of Health & Human Services, *Diabetes Mellitus Deaths and Death Rates, City Of Detroit Health Department District Residents, 1989-2018*, <https://www.mdch.state.mi.us/pha/osr/chi/CRI/CriticalInd/Crilhd.asp?TableType=Diabetes%20Mellitus&CoName=City%20Of%20Detroit%20Health%20Department&CoCode=09>.

⁷ <https://www.nbcnews.com/health/health-news/coronavirus-comes-detroit-why-certain-michigan-residents-are-higher-risk-n1172096>.

⁸ <https://www.detroitnews.com/story/news/local/michigan/2020/04/02/michigans-covid-19-deaths-hit-417-cases-exceed-10-700/5113221002/>.

⁹ <https://www.michigan.gov/coronavirus/0,9753,7-406-98163-525224--,00.html>

- EPA’s non-enforcement policy poses significant risk to fenceline, downstream, downwind communities, as well as communities that still bear the burden of lacking safe drinking water in their homes. Given this, EGLE will apply a high level of scrutiny to requests for regulatory leniency from entities located in or adjacent to communities that have been and/or continue to be disproportionately burdened by pollution, especially those that bear a high cumulative burden taking into account sociodemographic and other factors.
- Pollution control systems are designated as “critical infrastructure” involving “workers who perform necessary government activities” under the Governor’s March 24 “Stay At Home” order,¹⁰ because of the vital role they play in keeping communities safe.
- Enforcement during the pandemic will include all applicable state laws and all federal environmental laws, regulations and permit requirements for which EGLE has been delegated enforcement authority, including but not limited to: the Clean Air Act; Clean Water Act; Resource Conservation and Recovery Act; Emergency Planning and Community Right-to-Know Act; and Safe Drinking Water Act.
- Although EPA’s March 26 policy expressly states that “public water systems have a heightened responsibility to protect public health,” during this crisis, we encourage EGLE to affirmatively ensure that these “heightened expectations” result in full and complete enforcement of the Safe Drinking Water Act—including the 2018 revisions to the Michigan Lead and Copper Rule.
- In addition, EGLE recognizes the importance of safe and sufficient stormwater and sanitary sewer services during the pandemic to ensure the safety of homes while people shelter-in-place, especially during the spring wet season, and states that stormwater and sanitary sewer operators will be held to heightened expectations as well.
- EGLE recognizes that during this pandemic, with staff falling unpredictably ill or needing to quarantine for extended periods of time, regulated entities may face challenges meeting some ongoing monitoring and reporting deadlines. Likewise, EGLE may face similar staffing challenges during the evolving COVID-19 crisis. Given this, the agency will work with regulated entities based on individual circumstances, as per the agency’s process for handling enforcement discretion.
- This flexibility does not remove the obligations, as per the agency’s process for handling enforcement discretion, of regulated entities to communicate with state and local emergency managers when the entities have knowledge or constructive knowledge that their pollution control systems are failing or at heightened risk of failure or for regulated entities to notify state and local officials immediately if the entities expect to have trouble meeting monitoring, reporting, testing, or certification requirements.
- For any regulated entity that seeks and/or is granted regulatory leniency during the COVID-19 crisis, EGLE will publish a link to the complete submission online in an electronically searchable and sortable format, as well as EGLE’s response to the request. This approach will avoid placing the burden on impacted communities to submit repeated Freedom of Information Act (FOIA) requests (and pay associated fees) to monitor how EGLE’s enforcement policy is being applied to facilities of concern, and will inform the public in real time, particularly during a time when state agency deadlines for responding to FOIA requests have been extended.¹¹

¹⁰ See Governor’s Executive Order 2020-21 (March 24, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-522626--00.html.

¹¹ See Governor’s Executive Order 2020-38 (April 5, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-524359--00.html.

- Since holding public hearings and other forms of community engagement will be severely diminished (and in many instances, impossible) during the COVID-19 crisis, all pending permits and projects that include a public participation process and are not subject to legally-mandated deadlines are suspended until after the COVID-19 crisis has ended and full public access can be restored, unless they are critical to protecting public health. The most vulnerable community members already face fewer opportunities to participate due to the digital divide and, with electronic means of communication being the go-to option for public comment at this time, a business-as-usual approach to community input undermines the participation of tens of thousands of impacted community members. We must not let a moment of crisis create another layer of injustice in people's lives.

Emerging evidence suggests that Americans with heavy lifetime exposures to pollution may face disproportionately greater risks from this pandemic, underlining the need to maintain strong protections for our air and water. This evidence includes a compelling new study of 3,080 U.S. counties, which demonstrates a clear link between long-term exposure to fine particulate matter and COVID-19 death rates.¹²

Yet, we also recognize that the ongoing COVID-19 pandemic presents a major challenge for all of our public and private institutions, including environmental managers. We appreciate the strong state leadership the Administration has shown over the last month in health policy, reconnections to water utilities, and overall emergency response as the state works to protect Michiganders during this crisis. Similar state leadership is now needed in the context of environmental enforcement as well. Your handling of regulatory enforcement in this moment can have repercussions for community health for many years to come. Allowing sound and reasonable flexibility during the COVID-19 crisis must not be used as an excuse to threaten - or cause additional public health crises.

We look forward to your response and stand ready to help in any way we can.

Sincerely,

Mary Brady-Enerson, Michigan Director
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Ecology Center

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¹² Harvard University, *A national study on long-term exposure to air pollution and COVID-19 mortality in the United States* (updated April 5, 2020), <https://projects.iq.harvard.edu/covid-pm>.

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