

Compliance Enforcement Discretion Amid COVID-19 Pandemic



As our national concerns are forced to be redirected by the COVID-19 pandemic, almost all lives are affected as states, counties, and cities are forced to meet requirements specific to the state's emergency declaration and/or public health order. The effect on regulated entities for compliance with the new restrictions can range from worker shortages due to illness, changes in business operations for compliance with social distancing, or facility shutdown (operation of essential business only). These new requirements may affect a facility's ability to be compliant with the PSM, RMP, and CalARP regulations particularly meeting the deadlines for submittal of related programs, Five-Year Revalidations, Compliance Audits, and program updates. To meet compliance deadlines, a site may need to consider conducting meetings remotely. With that in mind, PSM RMP Solutions has reached out to regulatory entities for their guidance and/or requirements as it pertains to missed deadlines and/or conducting remote analysis'.

EPA Enforcement Amid COVID-19

Federal EPA has released a temporary policy. On March 26, 2020, the EPA issued a memorandum regarding enforcement during the COVID-19 pandemic (<https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>). The agency has developed a temporary enforcement policy in which discretion will be applied to missed compliance deadlines. This policy is for non-compliance (actions or omissions) that occurs during this time period and will apply in lieu of the EPA enforcement response policy. This policy applies retroactively as of March 13, 2020, and notification regarding modifications and/or termination of the temporary policy (will be provided at least seven days before the policy is terminated). Once the policy is terminated, EPA expects full compliance going forward.

EPA acknowledges the memorandum does not address all potential violations and may provide program specific guidelines at a later date. The enforcement discretion is conditioned on the following:

Site management should make every effort to comply.

If compliance is not possible, site management must:

- Act responsibly to minimize the duration of non-compliance;
- Identify the nature and dates of non-compliance;
- Identify how COVID-19 caused non-compliance;
- Return to compliance as soon as possible; and
- Document items listed above.

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CalARP Enforcement Amid COVID-19

PSM RMP Solutions has contacted many local CUPA's throughout California and has also corresponded with the Senior Emergency Services Coordinator of the Cal-OES, Hazardous Materials Section.

Cal OES is consulting with lawyers on a formal legal interpretation of issues we are facing; in the meantime, they advise sites to contact their respective CUPA for non-compliance issues and determination of the adequacy of remote meetings.

After communicating with several CUPAs, the general advice has been:

- 1) Contact the CUPA if there are any concerns, i.e. non-compliance, inability to conduct remote meetings, etc.
- 2) Remote meetings can be useful but can very easily lead to a less than thorough analysis. CUPAs nearly unanimously would like to be invited to ALL remote meetings. In addition, most have requested that an on-site meeting be conducted once social distancing and stay-at-home restrictions are lifted.

NOTE: If a site decides to move forward with remote meetings, it is necessary to ensure a complete "team" of active participants.

- 3) Inform the CUPA if there is a specific requirement that cannot be timely met because it would be inconsistent with current governmental directives or guidelines related to COVID-19 (i.e. walkthrough as part of Hazard Review / Process Hazard Analysis, Seismic Assessment and Three-Year Compliance Audit), the responsible facility must notify the CUPA immediately in writing (via email or letter) and request for an extension.

Similar to EPA's requirements, the site must:

Return to compliance as soon as possible.

Document the information, actions taken, or condition of all efforts made to be in compliance and maintain all documentation.

Please note that each CUPA / Administering Agency has specific directions for each facility. They will review the request and respond on a case-by-case basis.

PSM RMP Solutions is available to provide assistance regarding compliance issues during this evolving COVID-19 pandemic.

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