

Important Clean Air Act NDEE & EPA Updates to Know from the Last Year

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Preparation Credit: Benjamin Fink, ARC Environmental Consultant



**September 29, 2020 – Nebraska Ethanol Board EHS Summit
[Similar Presentation for 2020 IA RFA Enviro. Task Force & 2020 FEW EHS]**

Overview of Agency Updates & Guidance

Updates from NDEE:

1. **Source Trial Policy [3/17/2020]**
2. **Updated Non-Compliance Communication [8/25/2020]**
3. **Standard & General Permit Conditions I & II [9/21/2020]**
4. **Hour Average Permit Limits**
5. **On-line Emissions Inventory – SLEIS Reporting Year 1 in Review**
6. **Administrative Matters**

Guidance from EPA:

6. **Revised Policy on “Ambient Air” [12/2/2019]**
7. **“Begin Actual Construction” [7/1/2020]**
8. **EPA COVID-19 Discretion [3/26/2020]**
9. **Reinterpretation of “Adjacent” [11/26/2019]**



Air Regulations Consulting, LLC

- **Founded in Lincoln, and also with offices in Omaha/Council Bluffs.**
- **Proponent of renewable fuels and avidly assisting agribusiness.**
- **Mission Statement:**

**WE MAKE THE COMPLEX SIMPLE,
ADDRESSING OUR CLIENT'S REGULATORY
PROBLEMS AS OUR PROBLEMS THROUGH
ENVIRONMENTAL EXCELLENCE,
EXPERTISE, AND EFFICIENCY.**



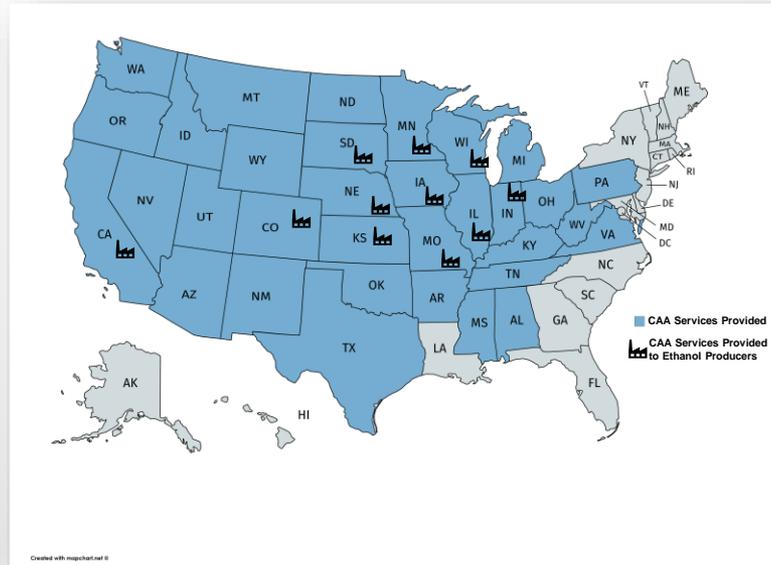
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Air Regulations Consulting, LLC

ARC has provided environmental solutions on air quality regulations for industry sectors nationwide (States below + Canada/Mexico) including various manufacturing, power, agribusiness, mining, milling, chemical plants, and energy:



Air Regulations Consulting, LLC

- **Eric Sturm is the founder and lead consultant.**
 - **2007 to 2011 at EPA Region 7 Air Permitting and Compliance.**
 - **At EPA, Eric oversaw of and guided EPA Region 7 states and local agencies on complex air quality permitting matters; also, compliance duties assigned to performing a full range of NSR enforcement issues and cases within EPA and DOJ.**
 - **Eric is a strong advocate of US industry competing on a global scale and finding efficiency within regulation.**
 - **2011 to present, have been providing consulting services for private industry on Clean Air Act matters; ARC founded and hired first professional engineers in 2014.**



1. Source Trial Policy [3/17/2020]

What & why?

- **Option to evaluate new process materials or methods of operations for a limited period of time while temporarily avoiding permitting; producers must notify the NDEE 30 days in advance and provide testing/compliance plans for the trial period.**
- **The NDEE's attempt to support "...operator interests in production and efficiency improvements..."**



1. Source Trial Policy [3/17/2020]

How it may affect NE Producers?

- **Positive for the industry as the Policy provides options to make changes without committing to making the change permanent or requiring preconstruction permitting.**
- **Negative aspects could arise if the trial results in any noncompliance with existing permits, and this will be handled with NDEE enforcement discretion.**



2. Updated Non-Compliance NDEE Communication [8/25/2020]

What & why?

- **Starting Sept. 1, NDEE will only use a Letter of Non-Compliance (LNC) to communicate when a facility is in violation of environmental regulations. In the past, the agency used different forms of correspondence (such as Letters of Warning, Notices of Violation, Repairs or Corrective Action Letters, and Compliance Requests) depending on the severity of the violation.**
- **By using the LNC as its single tool, NDEE hopes to bring consistency and fairness to the process.**



2. Updated Non-Compliance NDEE Communication [8/25/2020]

How it can affect NE Producers?

- **Most in industry have viewed this as a negative.**
- **The compliance and enforcement process is very sensitive interaction with the NDEE. Using a “one-tool fits all” could lead to confusion as to the severity of the communicated deviation or violation, i.e. LNCs could be issued for a small paperwork issue for some and also issued for major emissions violations.**
- **The new policy could also leave industries uncertain of the NDEE’s intent to pursue enforcement.**



2. Updated Non-Compliance NDEE Communication [8/25/2020]

NDEE Simultaneously Published Two Guidance Documents on Inspections Compliance

- **[“Inspection Tips For Regulated Facilities”](#) and **[“A Guide to NDEE’s Return to Compliance Process.”](#)****
- **These two documents are mostly helpful to Producers.**
- **Some statements within [“Inspection Tips For Regulated Facilities”](#) can be a bit misleading regarding the records an inspector may request/obtain. Important to keep confidentiality and release practices in mind.**



3. Standard & General Permit Conditions I & II [9/21/2020]

What & why?

- **NDEE has completed the periodic review of the standardized Conditions I and II that began in January 2020. The updated standardized Conditions I and II are used in air quality construction permits (CP) and air quality operating permits (OP).**
- **NDEE began standardizing these conditions approximately four years ago in attempt to unify permit requirements, and NDEE committed to update these somewhat routinely to keep up-to-date.**



3. Standard & General Permit Conditions I & II [9/21/2020]

How these can affect NE Producers?

- **NDEE had proposed multiple updates, and of the most controversy was the Federal Rule Applicability Review (FRAR).**
- **The FRAR was an attempt to require Producers to update the NDEE upon applicable requirement changes within federal NSPS and NESHAP.**
- **ARC and other commented heavily to in opposition to the FRAR; ultimately, NDEE withdrew the FRAR proposal.**



4. Hour Average Permit Limits

What & why?

- **Starting in 2020, NDEE has been changing the language in OPs and CPs of “Permitted Limit Averaging Period” from 3-hour to 1-hour.**
- **As to why... this may be case by case, but in asking NDEE recently they indicated there was confusion among industry on whether limits based on emissions per hour, i.e. lbs/hr, could be exceeded in an hour but averaged under for three hours to avoid deviations.**



4. Hour Average Permit Limits

How it can affect NE Producers?

- **If NDEE adds the “1-hour” averaging period in a Producers permit, this could have very negative and confusing effects when doing stack testing and compliance demonstration.**
- **All EPA and NDEE stack test methodologies allow for an hourly average over at least three hours due to inherent variability in stack sampling and procedures; it is very important this is clarified in permit language to avoid compliance concerns.**



5. Nebraska SLEIS Review

What & why?

- **Starting in 2019, NDEE allowed sources to submit emissions inventory through the State & Local Emissions Inventory System (SLEIS) for reporting year 2018. In 2020, reporting emissions online through SLEIS was required for reporting year 2019, by March 31, 2020.**
- **Meant to be more user friendly than paper forms. In addition, it is supposed to streamline data processing and public access to emissions.**



5. Nebraska SLEIS Review

How has this affected industry?

- **As other states have seen some issues with SLEIS, so did Nebraska in its first year.**
- **Most facility's inventories and units were not set up correctly, and this led to much time to fix.**
- **Some SLEIS users had difficulty separating VOCs and HAPs along with *normal* emissions vs *excessemissions*.**
- **Since April 2020, NDEE has sent multiple Notices of Violations (NOVs) and implicated enforcement if 2019 emissions were not reported correctly through SLEIS.**



6. Administrative Changes at NDEE

- **Starting in 2020, NDEE began accepting scanned copies of signatures; previously wet original copies were required for many reporting items.**
- **Todd Ellis, former Air Compliance Unit Supervisor retired, and Brad Pracheil has filled his spot in the interim of formally naming a replacement.**
- **Gary Buttermore, former Air Permitting Section Supervisor retired and NDEE does not plan to fill his role, and Dave Christensen is informally taking over some of Gary's previous duties.**



What is EPA or NDEE Guidance?

Federal & State guidance documents come in a variety of formats, including interpretive memoranda, policy statements, manuals, advisories, and more.

- **Rules of internal agency procedures, or practices.**
- **While guidance is not law, statute, or regulation, it is very often used by permitting agencies to navigate gray areas of federal and state rules.**
- **Be aware that if guidance is referenced or included in an issued permit, it is then an applicable requirement, like laws/statutes/regulations.**

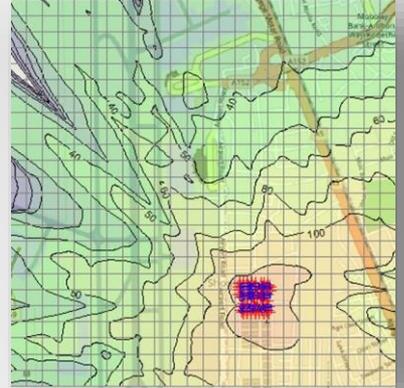
***Source: Guidance Implementation Executive Order 13891,
"Promoting the Rule of Law Through Improved Agency
Guidance Documents" (Oct. 2019)***



6. Revised Policy on “Ambient Air”

What & why?

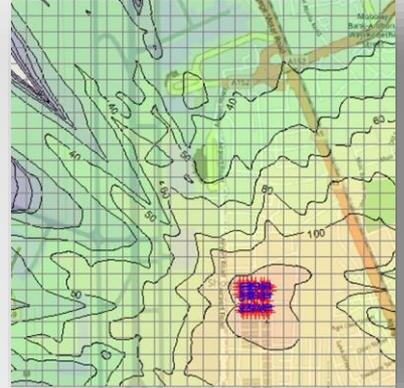
- **Wheeler, “I am revising the ‘fence or other physical barriers’ element of this ambient air policy while maintaining public health protection.”**
- **Wheeler, “...longstanding ambient air policy is overly restrictive...consider additional types of measures that are effective in precluding public access...revised policy is fully consistent with the regulatory definition”**



6. Revised Policy on “Ambient Air”

How could all of this affect you?

- **Many permit limits are based on fence line and stack height**
- **Modeling based limits could be revised**
- **Certain permit conditions could be removed**
- **Save money on fencing**
- **Reduced ambient air monitoring**
- **Projects that had been held up indefinitely due to modeling, could now be issued**



7. “Begin Actual Construction”



What is being proposed? This administration sees the regulatory definition as a 5-part test: the source owner or operator is precluded from activity specifically on emissions units:

- 1. That is “physical” in nature;**
- 2. That is undertaken “on-site”;**
- 3. That involves “construction”;**
- 4. That is “on an emissions unit”; *and***
- 5. That is of a “permanent nature.”**

**Source: 2020 Interpretation of “Begin Actual Construction”
Under the New Source Review Preconstruction Permitting Regulations.**



7. “Begin Actual Construction”



The current Administration finds that the previous EPA interpretation “erases the distinction between the regulatory definition of an emissions unit and a stationary source.”

Through this interpretive ruling, this Administration has removed the restriction on installations necessary to accommodate the unit (i.e. parts of the rest of the stationary source that might not be directly emitting), in contrast to the 1986 Reich Memorandum.

**Source: 2020 Interpretation of “Begin Actual Construction”
Under the New Source Review Preconstruction Permitting Regulations.**



7. “Begin Actual Construction”



How could this affect you?

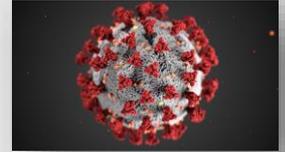
- **In many cases it could allow more construction activities at your site/stationary source prior to permit issuance.**

EPA notes that applicants that choose to undertake on-site construction activities prior to being issued a permit do so at their own risk, so it would be wise to coordinate with the NDEE with utilizing this new interpretation.

Source: 2020 Interpretation of “Begin Actual Construction”
Under the New Source Review Preconstruction Permitting Regulations.



8. COVID-19 Enforcement Discretion



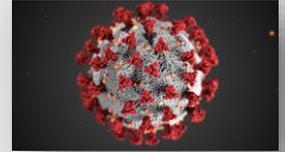
Initially published on March 26, 2020 with retroactive application to March 13, 2020 & terminated (August 31, 2020).

Authorized states or tribes may take a different approach under their own authorities.

Seven-page document explained that EPA had to be cognizant and accepting of travel and social distancing restrictions imposed by both governments and corporations.



8. COVID-19 Enforcement Discretion



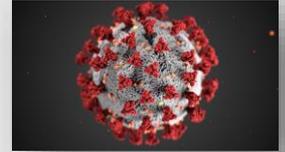
**Enforcement Discretion, Civil Violations, General Conditions,
Section I.A.1.:**

**“Entities should make every effort to comply with their
environmental compliance obligations.”**

Source: COVID-19 Implications for EPA's Enforcement
and Compliance Assurance Program



8. COVID-19 Enforcement Discretion



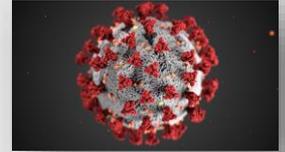
“If compliance is not reasonably practicable, facilities with environmental compliance obligations should:

- 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.”**

Source: COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program



8. COVID-19 Enforcement Discretion



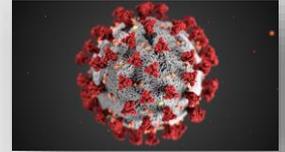
Enforcement Discretion, Civil Violations, Routine Compliance Monitoring and Reporting, Section I.B.:

“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.”

Source: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program



8. COVID-19 Enforcement Discretion



The discretion policy also covers the following:

- **I.C. - Settlement agreement and consent decree reporting**
- **I.D. - Facility operations**
- **I.E. - Public water systems, Safe Drinking Water Act**
- **I.F. - Critical infrastructure**
- **II. - State Oversight (Note: NDEE deferred to the EPA's Policy whereas other states and agencies made specific policies in addition to EPA's.)**
- **III. - EPA Actions**
- **IV. - Accidental Releases**
- **V. - Criminal Violations**

Source: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program



9. Reinterpretation of “Adjacent”



Why is there uncertainty over what is “adjacent” in the first place?

- **Over the years, court decisions and case-specific letters from the EPA have provided their own interpretations.**
- **This, according to the memorandum, has let state and local permitting authorities consider circumstances beyond physical proximity when determining whether two facilities were on “adjacent properties.”**



9. Reinterpretation of “Adjacent”



Another source for uncertainty, EPA and past interpretation of “functional-interrelatedness.”

At times, EPA has considered whether pollutant-emitting activities share some functional relation to each other and emphasize less the physical proximity. An example: Two General Motors facilities that shared a process line and were connected by a mile of dedicated railroad were considered a single source.



9. Reinterpretation of “Adjacent”



How could this new interpretation affect you?

- **Future permitting could be done to separate a facilities.**
- **If an operation or grain elevator was combined with your ethanol production facility, those could possibly be excluded.**
- **If so, permit/emissions inventory fees could be greatly reduced along with permit processing times and compliance requirements.**

Questions?

Please email questions to info@airregconsulting.com or eric@airregconsulting.com.

We will respond to your question within the same day and also provide an ARC gift (which we were hoping to give away in person if the EHS summit had not been virtual).





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