



EPA Issues COVID-19 Guidance on Enforcement Discretion

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Among the challenges faced by manufacturers and other regulated parties in dealing with the COVID-19 pandemic is ongoing compliance with environmental laws. For weeks, manufacturers and other regulated entities have asked what will happen if they miss a monitoring or reporting deadline due to employee absences or workplace restrictions attributable to COVID-19. On March 26, 2020, the United States Environmental Protection Agency issued guidance that seeks to answer this and related questions. EPA is quick to note, however, that the guidance is temporary and limited and may be updated or superseded as the pandemic evolves.

In its *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* EPA acknowledges the constraints the pandemic will place on facility operations, and the availability of key staff, contractors and laboratories. In anticipation of these constraints affecting the ability of facilities to meet such things as enforceable limits on air emissions and water discharges, requirements for the management of hazardous waste and requirements to ensure and provide safe drinking water, EPA intends to use considerable discretion in pursuing enforcement for civil violations.

The guidance suggests, if the pandemic constrains a facility's ability to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification, facilities should document and maintain this information internally. However, EPA does not expect to seek penalties for violations where it agrees COVID-19 was the cause of the noncompliance. EPA will not expect catch-up monitoring or reporting where the required monitoring or reporting interval is less than three months. For other monitoring or reports, such as those due on a bi-annual or annual basis, the facility should take reasonable measures to resume compliance activities as soon as possible once the pandemic subsides, including submitting late reports.

EPA notes that many training classes are offered on-line, which should allow training certification requirements to continue to be met. However, where COVID-19 makes it impracticable for facilities required to have certified operators to maintain normal certification and training practices, the facility should keep experienced, trained operators on the job, even if a training or certification is missed. EPA

will accept a digital or electronic signature in lieu of an ink signature and will generally accept emailed submissions even if a paper original is required.

Compliance with reporting obligations and milestones in EPA administrative settlement agreements may be impacted as well. Where a facility anticipates missing such an obligation because of COVID-19, parties should utilize notice procedures set forth in the agreement, including *force majeure* notification requirements. If the party asserting *force majeure* complies with the requirements of the agreement for notification and documentation of the event, EPA intends to refrain from seeking stipulated or other penalties for noncompliance with routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and associated reporting or certification obligations.

If a facility's operations are impacted by COVID-19 to the degree that an acute risk or an imminent threat to human health or the environment exists, the facility should contact EPA. EPA will consult with facility personnel and, where appropriate, the State on measures to minimize or prevent the acute or imminent threat to health or the environment. Where exceedances of air emissions or wastewater limitations occurs, the guidance provides notification and documentation requirements that facilities should follow. If a generator of hazardous waste is unable to transfer waste off-site within the time periods required by the Resource Conservation and Recovery Act (RCRA) due to disruptions caused by the COVID-19 pandemic, the guidance suggests the facility should continue to properly label and store such waste and notify EPA of the disruption. If these steps are taken, EPA will continue to view such entities to be hazardous waste generators, and not treatment, storage and disposal facilities.

Although far reaching, the EPA guidance does not provide protection from criminal activity. EPA reminds the regulated community that EPA's Criminal Investigation Division remains active and prepared to pursue criminal violators. The guidance also specifically states it does not apply to activities being carried out pursuant to Superfund or RCRA Corrective Action enforcement mechanisms. The agency intends to issue a separate guidance document covering such matters.

Perhaps most importantly, this guidance does not bind state environmental agencies. Most regulated entities operate under permits issued by state agencies, not EPA. You should check the website of your state environmental agency to see if it has adopted a policy similar to what is set forth in EPA's guidance. Many of them have done so.

As EPA continues to evaluate the impact of COVID-19 on the ability of regulated entities to maintain environmental compliance, additional guidance is likely to be issued. In the meantime, facilities facing the prospect of relying on the COVID-19 guidance should carefully review the document, while ensuring detailed and comprehensive documentation of the noncompliance and its causal connection to COVID-19.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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