

EPA Releases Guidelines for Enforcement Discretion and Continues to Prioritize Disinfectants

MARCH 30, 2020

OVERVIEW

This memorandum summarizes the U.S. Environmental Protection Agency's (EPA or Agency) "temporary guidance" related to civil enforcement in response to the COVID-19 pandemic.

EPA PLANS TO EASE ENFORCEMENT OF NON-COMPLIANCE CAUSED BY COVID-19 PANDEMIC

On March 26, 2020, EPA released its highly anticipated guidance, effective retroactively as of March 13, 2020, describing the Agency's response to environmental civil noncompliance caused by the COVID-19 pandemic. In a [memorandum entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program,"](#) EPA outlines a temporary policy for exercising enforcement discretion for noncompliance resulting from the COVID-19 pandemic. The policy currently has no termination date. EPA will provide a notification [here](#), at least seven days prior to terminating the temporary policy.

The Scope of EPA's Guidance

EPA's guidance ONLY applies to noncompliance that occurs during the period of time the policy is in effect *and* that results from COVID-19. The guidance does NOT apply to (i) criminal violations; (ii) activities carried out under Superfund and RCRA Corrective Action enforcement instruments (these are to be addressed in a separate communication), and (iii) imports.

During the COVID-19 exigency, EPA expects to focus its resources on situations that cause an acute risk or imminent threat to public health or the environment. All ongoing enforcement matters will continue. Furthermore, the temporary policy does not relieve entities from the responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, or other pollutants as required by federal law, and EPA's enforcement discretion does not extend to such releases.

EPA Outlines Steps for Ongoing Compliance Efforts

Generally, EPA encourages entities to make every effort to comply with environmental compliance obligations, and lays out specific steps to take if compliance is not reasonably practicable. More specifically, the policy addresses three consequences of COVID-19: (1) inability to carry out routine activities required by federal environmental permits, regulations, and statutes; (2) inability to comply with settlement and consent decree obligations; and (3) inability to meet enforceable limitations on air emissions and water discharges, hazardous waste management requirements, or safe drinking water requirements. Each is summarized briefly below:

- Routine Compliance Monitoring and Reporting by Regulated Entities

EPA encourages entities to use existing procedures to report noncompliance with routine activities such as monitoring, integrity testing, sampling, lab analysis, training, reporting, and certification. EPA states that it does not plan to seek penalties for violations of routine compliance monitoring or reporting, nor does it plan to ask facilities to “catch up” with missed monitoring or reporting if the underlying requirement applies to intervals of less than three months. In addition, EPA will now be accepting digital or electronic signatures, and emailed submissions where wet signatures and paper originals were previously required.

- Settlement Agreement and Consent Decree Reporting Obligations

EPA advises parties to utilize the notice procedures set forth in their respective agreements, including force majeure notification, as applicable. Parties should proceed as proposed in their notice to EPA (or DOJ) unless and until contacted by EPA or DOJ. EPA notes that courts retain jurisdiction over consent decrees and may exercise their own authority.

- Facility Operations

All facilities are expected to continue to manage and operate in a manner that is safe and protects the public and the environment. Where COVID-19 impacts may create an acute risk to human health or the environment, facilities should contact the appropriate regulatory authority. In the event a facility suffers a failure, such as an air emission control or wastewater/waste treatment system failure, that results in exceedance of enforceable limitations, the facility should notify the implementing authority as quickly as possible, following the requirements set forth in the memorandum.

For hazardous waste generators unable to transfer waste off-site within the time periods required under RCRA, facilities should continue to properly label and store such waste, and comply with the general conditions of compliance obligations set forth in section I.A. of EPA’s memorandum. Doing so will allow the facilities to be treated as hazardous waste generators only, rather than treatment, storage, and disposal facilities. Finally, EPA also provides specific guidance for animal feeding operation facilities.

- Public Water Systems

In contrast with the rest of the memorandum, EPA emphasizes that public water systems have a heightened responsibility to protect public health during the COVID-19 pandemic. As such, public water systems are expected to continue normal operations, maintenance, and sampling to ensure safe drinking water supplies are available. Still, EPA acknowledges that labor shortage is likely to occur, and sets forth a hierarchy of priorities for compliance monitoring; monitoring required under the National Primary Drinking Water Regulations to protect against microbial pathogens is of highest priority.

- Critical Infrastructure

Finally, EPA states that for facilities considered to be essential critical infrastructure, it may consider a more tailored short-term “No Action Assurance,” but provides no detail as to the criteria to be used to issue such assurance. Such determinations will be made by the OECA Assistant Administrator on a case-by-case basis.

FURTHER FLEXIBILITY FOR DISINFECTANT MANUFACTURERS

On March 26, 2020, [EPA also announced additional efforts](#) to increase the availability of disinfectant products for use against the novel coronavirus. EPA is now allowing manufacturers to obtain certain inert ingredients—or inactive ingredients such as sodium chloride or glucose—from different suppliers without checking with the Agency for approval. This action, along with a previously announced decision to expedite the review of requests to add emerging viral pathogen claims to already registered disinfectant labels, is part of EPA’s continued effort to get more disinfectant products on the shelves during this time of peak demand.

Please do not hesitate to contact Eleni Kouimelis (312-558-5133, ekouimel@winston.com) if you have any questions. We will continue to provide updates as the situation evolves.

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

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