

Environmental Enforcement Discretion Guidance from U.S. EPA for COVID-19 Disruptions

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On Thursday, March 26, 2020, the U.S. Environmental Protection Agency ('EPA') published guidance for how it will enforce environmental legal obligations during the COVID-19 pandemic.

The temporary policy, which is retroactive to March 13, 2020, will apply to actions or omissions that occur while the policy is in effect, even after the policy terminates.

The EPA adopted the temporary policy in recognition of potential worker shortages, availability of staffing and key personnel, and the impacts of travel and social distancing restrictions to limit the spread of COVID-19 that may cause constraints on a facility or laboratory to carry out certain activities required by federal permits, regulations, and statutes. The enforcement discretion policy applies to those making good faith efforts to comply with obligations. Regulated entities can focus on four main components:

1. General Conditions of the Policy. Make every effort to comply with environmental compliance obligations in permits and programs. If complying will be an issue due to COVID-19 disruptions, act responsibly to minimize effects of disruptions. Document dates and the nature of noncompliance, identify how COVID-19 caused the disruption, and document all decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance. Then, return to compliance as soon as possible.
2. Routine Compliance Monitoring, Sampling, and Reporting. Use existing procedures to report noncompliance. Maintain records internally and provide them to the EPA upon request. Also, use approved electronic reporting mechanisms. The EPA does not expect to pursue penalties for violations of routine compliance monitoring if the EPA agrees that COVID-19 was the cause of noncompliance.
3. Settlement Agreements and Consent Decrees. These documents may require meeting deadlines and milestones. For administrative settlement agreements reporting obligations, utilize notification procedures in the agreement, including any force majeure provisions (which are not available in permits). Provide information required by the agreement, and include information on how COVID-19 caused the failure. Describe all decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance. For consent decrees, proceed as proposed, and

utilize notification procedures. The EPA plans to coordinate with the U.S. Department of Justice to exercise enforcement discretion.

4. Facility Operations. Always endeavor to operate in a manner that is safe and protects the public and the environment. Most regulated entities in North Carolina are subject to federal programs implemented by the Department of Environmental Quality ("NCDEQ"). Communicate with NCDEQ and the EPA regional office if noncompliance could cause acute risk or an imminent threat to human health or the environment so there can be coordination between agencies.

Notify the implementing Division of NCDEQ and the EPA for failure of air emission controls and wastewater, stormwater, or waste treatment system controls that may cause noncompliance. Provide information on pollutants released compared to expected releases and the expected duration or timing of the release.

If hazardous waste generators cannot transfer the waste off-site within the time periods required under the Resource Conservation and Recovery Act ("RCRA") to maintain generator status, the facility should continue to properly label and store such waste and take the documentation steps identified above. The EPA will continue to treat such entities as hazardous waste generators, and not treatment, storage, and disposal facilities, if generation is properly documented under its temporary policy. The EPA plans to treat RCRA Very Small Quantity Generators and Small Quantity Generators as retaining that status even if hazardous waste stored on-site exceeds a regulatory volume threshold due to the generator's inability to arrange for shipping of hazardous waste off-site.

If an animal feeding operation, common in North Carolina, cannot transfer animals off-site and meets the regulatory definition of a concentrated animal feeding operation (also known as "CAFO"), the EPA does not intend to treat the animal feeding operations as a CAFO if it takes the documentation steps identified above.

The EPA has heightened expectations for operators of public water systems because the availability of safe drinking water is critical for handwashing during the COVID-19 pandemic. Public systems are strongly encouraged to communicate with the State and EPA regional offices immediately if delivery of safe drinking water becomes compromised due to the pandemic.

Neither criminal violations and terms of criminal sentences nor imports regulated by the Federal Insecticide, Fungicide, and Rodenticide Act are covered by the temporary policy. The EPA indicates in the published document that Superfund and RCRA Corrective Action enforcement will be covered under separate guidance.

While we wait to see what North Carolina does, following the EPA guidance will be beneficial. Exercise communication and outreach to NCDEQ Divisions with jurisdiction if adjustments are needed. When in doubt, document as identified above: identify and record dates and nature of noncompliance; identify how COVID-19 is the cause and all decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance; and, return to compliance as soon as possible.

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