

U.S. Environmental Protection Agency Enforcement Guidance Regarding COVID-19 Impacts on Compliance

The United States Environmental Protection Agency (US EPA) Office of Enforcement and Compliance Assurance released a guidance memo on March 26, 2020 regarding how the US EPA will evaluate non-compliance resulting from the COVID-19 pandemic. Specifically, US EPA has determined that it will use its enforcement discretion and will not seek penalties for violation of routine compliance requirements caused by the pandemic. US EPA's memo also provides guidance on managing compliance requirements under administrative settlement agreements and judicial consent decrees that are affected by COVID-19. Additionally, the memo provides guidance on additional issues ranging from spills and releases to hazardous waste storage.

The guidance memo provides significant flexibility and a fair measure of reassurance to regulated facilities that are simply unable to meet certain compliance requirements due to COVID-19, but it is not *carte blanche* to disregard such requirements. The most important aspect of the guidance memo, and contrary to some news reports about the memo, is that it **does not** provide an exemption or blanket excuse from compliance with applicable permit, regulatory and other compliance requirements. It **does not** authorize any facility to emit or discharge pollutants that would otherwise be prohibited. Instead, although unprecedented in scope, it provides exceptions in certain circumstances and subject to stated limitations and requirements to qualify for the use of enforcement discretion. In fact, due to excited news reports that overstated the guidance memo as a free pass to wantonly pollute, US EPA issued a clarification on March 30 confirming the limitations of the policy described here. Additionally, it should be noted that the memo speaks just to US EPA's approach, and most facilities are also subject to potential state enforcement for any violations. While US EPA's memo will influence state agencies, and state agencies are likely to also demonstrate an understanding of the circumstances, any given state agency may be more or less flexible than US EPA.

The most significant component of the guidance memo provides enforcement discretion if a facility encounters actual problems with meeting routine obligations due to COVID-19. If a facility cannot conduct or complete routine obligations such as monitoring, integrity testing, sampling, laboratory analysis, training, reporting, or certifying due to the coronavirus situation, the US EPA states that it will likely not seek any penalties for that non-compliance. The US EPA memo provides examples of each of these categories of activities, and the memo leaves unstated whether similar routine compliance activities, but ones not specifically listed, are also subject to the same enforcement discretion.

The guidance memo states that for requirements with an interval of less than three months (i.e., such as a monthly sampling requirement), the US EPA won't require facilities to "make up" the missed obligations. However, for obligations with a longer period (i.e., a semi-annual or annual obligation), US EPA does expect that the obligations will be completed, even if belatedly. Based on Eckert Seamans' recent experience with a US EPA regional office regarding COVID-19 travel restrictions making a semi-annual obligation impossible to conduct as scheduled, that US EPA regional office has made clear that they expect the obligation to be met, and as soon as possible, once circumstance allow.

While the overall intent of US EPA's policy is to provide flexibility, on a case by case basis companies should expect that when demonstrating that a non-compliance event qualifies for US EPA's use of discretion not to assess penalties, the burden of proof rests with the company, and can be considered as similar to the showing needed to support a force majeure claim. In order to qualify for this exercise of enforcement discretion, a facility must document the situation sufficiently to demonstrate the impact of COVID-19 on the compliance activity that has been prevented, must take reasonable steps to comply to the extent possible, and must return to compliance as soon as possible. Facilities should take contemporaneous steps to document the particular impact of COVID-19 and the reason why a compliance obligation is not being met. This will create a stronger basis to argue that any non-compliance qualifies for enforcement discretion. Similarly, if there is uncertainty about whether a particular non-compliance is within the scope of the policy, a facility should act as if it is – namely, make all reasonable efforts to comply, and document the circumstances of non-compliance, that could not be avoided, caused by the COVID-19 situation.

Other components of the memo address requirements under administrative settlements and consent decrees. In the context of administrative settlements, the same rules about routine compliance requirements noted above will apply. US EPA should be notified of non-compliance with an administrative settlement agreement, and provided with documentation and the details of steps taken to minimize the extent and effect of such non-compliance. In the case of judicial consent decrees, the guidance states that US EPA will coordinate with the Department of Justice regarding enforcement discretion for stipulated penalties for the routine compliance obligations discussed above. As noted in the US EPA memo, consent decrees are subject to judicial oversight, and the court can exercise its own authority over the situation.

The memo also provides relief to hazardous waste generators that may be unable to timely dispose of hazardous waste within the requirements of the Resource Conservation and Recovery Act. An affected facility must properly store and label the waste, but will not be required to obtain a permit to be a treatment, storage, or disposal facility if it exceeds the otherwise applicable storage time restrictions. Similarly, small quantity and very small quantity generators may exceed the limits on the amount of hazardous waste that may be stored on-site without losing that level of generator status.

The memo stipulates that releases and spills still need to be responded to, and that knowing, intentional and avoidable violations still remain subject to criminal prosecution. Additionally, if there is any impact on facility operations that creates an acute risk or imminent threat to human health and the environment, the facility should contact the appropriate authority – either US EPA or the relevant state environmental agency. When US EPA is involved, the agency will work with the facility to minimize the risk presented by the situation.

A copy of the US EPA COVID-19 Guidance Memo can be found [here](#).