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EPA Announces Policy of Enforcement Discretion for Compliance with Pollution Control Requirements Affected by COVID-19 Outbreak

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Citing potential coronavirus-related disruptions, the U.S. Environmental Protection Agency (“EPA”) announced on March 26, 2020 that it would use “enforcement discretion” when regulated facilities fail to meet certain requirements relating to pollution controls and other requirements.

EPA explained that travel restrictions and social distancing guidelines prompted by COVID-19 may compromise a company’s ability to comply with EPA rules and consent decrees, including those relating to “enforceable limitations on air emissions.”

The policy outlines steps regulated facilities must take to qualify for favorable treatment. Most importantly, they must describe and document how factors related to COVID-19 make compliance “not reasonably practicable,” as follows:

- Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- Identify the specific nature and dates of the noncompliance;
- 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;
- Return to compliance as soon as possible; and
- Document the foregoing information, actions, or conditions.

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While acknowledging that disruptions may affect routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, reporting or certification, the policy directs regulated entities to use existing procedures to report noncompliance, or maintain such information internally to be provided to state or local regulators upon request. EPA also expects that resumption of compliance will include catch-up monitoring and reporting in many cases.

The policy is subject to important exceptions. It applies to civil enforcement, but not to criminal violations. It requires reporting if effects on facility operation may create an acute risk or imminent threat to human health or the environment, and notice “as quickly as possible” if pollution controls fail in such a way as to result in exceedances or unauthorized releases.

Generators of hazardous waste can maintain “generator” status even if unable to transfer waste offsite within RCRA time limitations, if they continue to label and store waste properly and comply with the description and documentation steps above. Under the policy, EPA would continue to treat the entity as a generator rather than as a treatment, storage and disposal facility.

The policy stresses that efforts should continue to maintain compliance despite the current public health environment. For example, mandatory training classes may not be held, but training is available online. At the same time, EPA notes that it may be more important to keep experienced operators on the job even if they miss certification renewal deadlines.

Environmental and public health advocacy organizations expressed concern that the policy could allow facilities to be less diligent about maintaining compliance with air and water pollution standards. "This is an open license to pollute. Plain and simple," Gina McCarthy, former EPA Administrator and current president and CEO of the Natural Resources Defense Council, explained. "We can all appreciate the need for additional caution and flexibility in a time of crisis, but this brazen directive is an abdication of the EPA's responsibility to protect our health."

Similarly, public health advocates fear that less stringent pollution enforcement during a global respiratory health crisis could jeopardize public safety. Although, to date, there is no scientific evidence that shows air pollution exacerbates the effects of COVID-19, it has been shown to increase the risk of other respiratory illnesses, such as asthma and pneumonia.

Keep in mind that in many jurisdictions, regulatory and enforcement authorities under federal waste, air and water laws are delegated to state environmental regulatory agencies, which make independent enforcement decisions and are not bound by EPA policy. EPA's guidance provides a useful template for regulated entities to prioritize and document COVID-19-related compliance problems, but state-specific guidance should be consulted. In Connecticut, the Department of Energy and Environmental Protection has collected information on its COVID-19 response page.

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The EPA's new enforcement policy applies retroactively, beginning on March 13, 2020. The policy is available online [here](#).

Pullman & Comley attorneys have been closely monitoring the many developing implications of the COVID-19 pandemic for businesses and for professionals, including law firms. We have been responding, and will continue to respond, to a wide range of risk management questions. The firm's FOCUS page for the latest COVID-19 advisories may be found [here](#).

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