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Environmental Compliance During the COVID-19 Pandemic

In the wake of coronavirus (COVID-19), businesses are finding themselves in situations where facilities need to shut down, staff are sent home, laboratories that test monthly samples are temporarily closed, or outside contractors scheduled to complete required performance testing have canceled. These types of situations will create real challenges for environmental regulatory/permit compliance but may allow businesses to seek a waiver or variance from the regulatory or permitting condition, or, if a variance is not available, require businesses to chart the best path forward regarding compliance.

This update highlights various ways that the COVID-19 pandemic can adversely affect a facility's environmental compliance, summarizes some of the current steps that agencies are taking to address these issues, and provides tips to minimize the risk of agency enforcement.

The COVID-19 pandemic may have a wide range of impacts on environmental compliance.

Compliance with environmental permits (e.g., monitoring, sampling, testing, reporting) and a wide range of regulatory programs may be affected by the COVID-19 pandemic. Such impacts include the following:

- **Remote Work Policies**—Working remotely may prevent or slow environmental staff and contractors' ability to conduct on-site inspections, monitoring, environmental equipment maintenance, or transportation of samples to labs for analysis.
- **Social Distancing Restrictions**—General social distancing policies and/or governmental "shelter-in-place" restrictions may limit staff and third-party consultants/contractors from entering facilities, preclude close-quarters testing (e.g., stack testing, water sampling), preclude travel to facilities for compliance support, and limit on-site agency inspections.
- **Employee Illnesses/Staff Shortages**—Illness or self-quarantine due to COVID-19 exposure may affect key environmental staff or teams on very short notice.
- **Supply Chain Interruptions**—Availability of materials, environmental consultants, testing and maintenance contractors, and outside laboratories necessary to meet regulatory or permitting requirements, as well as ongoing cleanup projects, may be interrupted, slowed, or unreliable.
- **Facility Shutdowns**—Facility shutdowns can result in bypasses or excess emissions, but permit requirements may remain in effect even if facilities are shut down in whole or part.

Federal and state environmental agencies are evaluating how to respond to COVID-19–related compliance issues, but there is not yet a uniform approach or set of guidelines.

The U.S. Environmental Protection Agency (EPA) has just issued [guidance](#) on how regulated entities should respond to various noncompliance scenarios due to COVID-19 and how EPA will exercise its enforcement discretion in response to such noncompliance. A few states have issued similar guidance, but the situation is very fluid, and guidance is expected to roll out over time on an ad hoc, state-by-state basis.

What can permittees and regulated facilities do if they expect a COVID-19–related compliance issue?

Remain on the lookout for guidance issued by applicable federal, state, and local regulatory authorities. Until these agencies issue clear guidance, a reasonable set of operating principles and practices for COVID-19–related compliance includes the following:

- **Maintain a Compliance Mindset**—Regulatory agencies will expect to see a good faith effort to comply with permits and regulatory requirements, so maintain an approach that seeks to maximize compliance to the greatest extent possible.
- **Prepare Contingency Plans**—Facilities commonly rely on a limited number of designated environmental staff for a wide range of compliance tasks. Because anyone can be adversely affected by COVID-19, planning for redundant compliance support is critical (e.g., retain a qualified environmental consulting firm familiar with the facility or industry to be on call as needed). Regulators may be less sympathetic for noncompliance that occurs at facilities that choose to remain open (despite limited staffing) versus noncompliance that occurs at facilities that are closed or are forced to close abruptly.
- **Document Specific Causes and Responses to Delays**—Keep a *contemporaneous* written record of (1) specific environmental compliance challenges, (2) how COVID-19 caused or contributed to the delay and potential noncompliance, and (3) the efforts to mitigate or correct the delay and potential noncompliance. Things are moving rapidly, so failing to keep track of compliance issues and responses in real time may reduce the company's ability prove the root cause and document its efforts to minimize or correct the violation.
- **Review Permit/Order/Rules for Force Majeure Provisions**—Check operating permits (and related agency rules/orders/statutes) for force majeure and waiver/variance-type provisions that may excuse performance and provide a defense to noncompliance.
- **Regularly Check Local, State, and Federal Regulatory Agency COVID-19 Websites**—The facility environmental manager or environmental attorney should frequently track the publicly stated positions on how the agency will enforce COVID-19–related noncompliance. Outside legal counsel can also informally contact regulators to determine the agency's posture and positions if uncertain.
- **Don't Wait Until the Potential Noncompliance Has Occurred**—Be proactive and submit waiver/variance requests or force majeure notices to regulatory agencies and discuss with the agency potential alternatives for meeting the regulatory or permitting requirement. In assessing penalties, regulators will likely take into consideration those facilities that were proactive and reached out to the agency versus those facilities that did not comply with the regulatory or permitting requirements and did not seek waivers or variances.

Compliance normally presents challenges but during this pandemic may be impossible to achieve. Strategic planning is essential and, if compliance will not be achieved, it is critical that the regulatory agencies be notified to minimize potential enforcement.

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