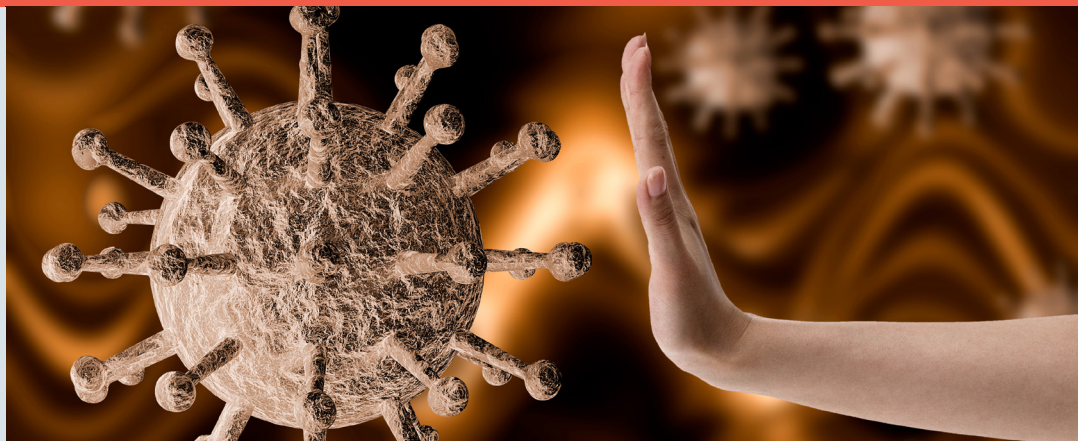


U.S. Environmental Protection Agency Set to Scale Back Enforcement Actions During COVID-19

by Ryan G. Rudich

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On March 26th, the U.S. Environmental Protection Agency (“EPA” or “Agency”) issued a sweeping guidance [memorandum](#), announcing its intent not to bring enforcement actions for a range of violations of environmental laws caused by the ongoing COVID-19 pandemic.



For an indefinite period of time, “[i]n general, the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.”

The guidance also announces the Agency’s intent to be lenient even with more serious violations, including those that cause harm or a threat of harm to human health or the environment. If such circumstances arise, “[t]he EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.”

Nevertheless, the policy does not give carte blanche to pollute or violate applicable standards. EPA’s enforcement abstention is specifically conditioned on good-faith efforts by regulated entities to maintain compliance and the ability to adequately document those efforts. So facilities that are not able to meet all of their environmental obligations should keep records of the specific nature and dates of any noncompliance, and be prepared to explain precisely how COVID-19 was the cause of the deviation. Regulated entities should also continue to report any noncompliance, even with routine activities, using existing procedures identified in applicable permits, regulations and statutes. And the guidance reaffirms the requirement to notify EPA or the applicable state implementing authority in the case of a system failure that leads to a release or emissions exceedance.

Once the pandemic ends, EPA will not require facilities to “catch-up” with all monitoring and reporting that is excused under the conditions of the guidance. The Agency does, however, expect facilities to eventually submit all annual and bi-annual reports, and conduct associated monitoring, even if that must be done late.

For environmental obligations that exist pursuant to settlement agreements, the guidance establishes that the Agency considers the pandemic to qualify as a force majeure event. Notice provisions for invoking force majeure clauses in such agreements remain applicable and should be followed. Consent orders, however, are subject to the jurisdiction of a court, and while EPA intends to work with the Department of Justice to help avoid the imposition of certain penalties, its authority in that area is more limited.

Hazardous waste generators that are unable to transfer waste out of their facilities within a Resource Conservation and Recovery Act (“RCRA”) prescribed time period will *not* be treated as storage and disposal facilities, as long as they continue to properly label and store the waste.

The guidance identifies protection of public water supplies as the Agency’s highest priority and makes no specific exceptions for testing and maintenance of public water systems. Nevertheless, the Agency will consider the pandemic when determining if any enforcement action is appropriate for violations involving public water systems.

Significantly, this is federal guidance only. States and other government entities with environmental enforcement authority may exercise the same or similar enforcement discretion, but are under no obligation to do so. That further underscores the significance of taking all possible action to maintain compliance. EPA’s stated leniency is significant, but the regulated community should not assume that any violations that occur during the COVID-19 pandemic cannot lead to enforcement problems down the road.

If you have questions, please contact Ryan Rudich and stay tuned for more developments on [Freeborn’s COVID-19 webpage](#).

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The environmental and energy challenges that companies face today are expanding and evolving at a rapid pace. Ryan helps his clients navigate them, both as a thoughtful and efficient litigator, and as an insightful counselor. Ryan understands that the best solutions are tailored to his clients’ unique business needs, and he works tirelessly to provide them with sound and creative advice and advocate for their interests in the courtroom.

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