EPA Issues Unprecedented Civil Enforcement Relaxation Policy Due to COVID-19


Policy “General Conditions”

If compliance is not “reasonably practicable” due to COVID-19, facilities with environmental compliance should satisfy the following Policy “general conditions” in order for EPA to exercise its enforcement relaxation discretion (“General Conditions”):

1. Minimize the effects and duration of any non-compliance caused by COVID-19;
2. Identify the specific nature and dates of the noncompliance;
3. 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;
4. Return to compliance as soon as possible; and
5. Document the information, action, or condition specified in (1) – (4) above.

EPA expects to focus largely on situations that “may create an acute risk or imminent threat to public health or the environment”. All ongoing enforcement matters will continue.

Primary compliance categories to which the Policy is applicable

The COVID Enforcement Policy addresses the following major compliance categories that are generally relevant to Mississippi manufacturing facilities: (1) routine compliance monitoring and reporting, (2) facility operations and (3) critical infrastructure.

The Policy also addresses (1) public water systems regulated under the Safe Drinking Water System, (2) EPA settlement agreement and consent decree reporting obligation and milestones and (3) programs that EPA implements directly rather than by MDEQ. Those portions of the Policy are not addressed in this article since they are not generally applicable to Mississippi facilities.

I. Routine compliance monitoring and reporting

EPA has determined that the COVID-19 pandemic may constrain the ability of facilities to perform the following environmental obligations:
1. **Routine compliance monitoring** - including CEMS and stack tests, relative accuracy test audits, LDAR monitoring, fence line monitoring, RICE readings and monitoring, tank and piping inspections, assessments, or stormwater inspections;

2. **Integrity testing** - including tank integrity testing (e.g., API 653) for compliance with certain “good air pollution control practices”;

3. **Sampling** – including effluent sampling and testing, as well as cooling tower sampling;

4. **Laboratory analysis** – including laboratory holding times and turn-around times;

5. **Training** - including SPCC training, hazardous waste trainings, CAA section 129 renewals, and other annual re-certifications; and

6. **Reporting and certification** – including reports and certifications associated with delayed activities described above, and late reports under permits or other regulatory obligations, including TRI and greenhouse gas inventory reporting.

If reporting is not “reasonably practicable” due to COVID-19, Mississippi facilities should maintain this information internally and make it available to MDEQ upon request. In general, EPA does not expect to seek penalties for violations of these obligations in situations where (1) EPA agrees that COVID-19 was the cause of the noncompliance and (2) the facility provides supporting documentation to EPA upon request. After the Policy is no longer in effect, EPA does not plan to ask facilities to “catch-up” with missed monitoring or reporting if the underlying requirement applies to intervals of less than three months.

**II. Facility operations**

With regard to COVID-19 impacts on facility operations, the Policy includes the following key provisions:

1. Facilities should contact MDEQ if **facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment**. In Mississippi, EPA’s first step after this contact will be to consult with MDEQ to discuss measures to minimize or prevent the acute or imminent threat to health or the environment from the COVID-19-caused noncompliance.

2. If a facility suffers from **failure of air emission control or wastewater or waste treatment systems or other facility equipment** that may result in exceedances of enforceable limitations on air emissions, water discharges, land disposal, or other unauthorized releases, the facility should notify MDEQ as quickly as possible. The notification also should include (1) information on the pollutants emitted, discharged, discarded, or released; (2) the comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s); and (3) the expected duration and
timing of the exceedance(s) or releases. EPA will consult with MDEQ to determine the appropriate response.

3. If a facility is a **generator of hazardous waste** and, due to disruptions caused by the COVID-19 pandemic, is unable to transfer the waste off-site within the time periods required under RCRA to maintain its generator status, the facility should continue to properly label and store such waste and comply with the Policy’s General Conditions (see above). If these steps are met, EPA will treat these facilities as “hazardous waste generators”, and not “treatment, storage and disposal” (TSD) facilities. In addition, EPA will treat “Very Small Quantity Generators” and “Small Quantity Generators” as retaining that status, even if the amount of hazardous waste stored on site exceeds a regulatory volume threshold due to the facility’s inability to arrange for shipping of hazardous waste off of the facility site due to the COVID-19 pandemic.

4. If a facility is an **animal feeding operation**, and, due to disruptions caused by the COVID-19 pandemic, is unable to transfer animals off-site and, solely as a result of the pandemic, meets the regulatory definition of concentrated animal feeding operation (CAFO), EPA will not treat these animal feeding operations as CAFOs (and will also not treat small CAFOs as medium CAFOs or medium CAFOs as large CAFOs).

**III. Critical infrastructure**

In situations where a facility is an “essential critical infrastructure”, EPA may consider a more “tailored” short-term “No Action Assurance” if EPA determines that is in the public interest. Such determinations are made on a case-by-case basis by EPA’s Office of Enforcement and Compliance (OECA) Assistant Administrator – Susan Bodine (who issued the Policy memorandum). EPA will consider “essential” the facilities that employ “essential critical infrastructure workers” as determined by guidance issued by the Cybersecurity and Infrastructure Security Agency.

**Exclusions from the Policy**

The Policy does not provide EPA compliance enforcement discretion regarding:

(1) Accidental releases;
(2) Criminal violations;
(3) Superfund and RCRA corrective action; and
(4) Imports

**Policy modifications/updates and termination**

EPA will assess and update the Policy as needed and post a notification at [https://www.epa.gov/enforcement/enforcement-policy-guidance-publications](https://www.epa.gov/enforcement/enforcement-policy-guidance-publications) at least seven days prior to terminating the Policy.
If you have any questions concerning the COVID Enforcement Policy or related issues, please feel free to contact John Milner of Brunini Law Firm, who is MMA Environmental Counsel, at jmilner@brunini.com or at (601) 960-6842.