

# COVID-19 Legal Update: EPA's Enforcement Discretion Policy

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The U.S. Environmental Protection Agency recently released new guidance to assist the regulated community in responding to COVID-19. The guidance confirms that EPA will exercise fact-specific enforcement discretion regarding compliance issues that arise due to the outbreak and addresses a number of specific scenarios that may arise. A full copy of the policy, which is effective until withdrawn by EPA, can be found [here](#).

*Note that the North Carolina Department of Environmental Quality and approved local programs (like local sewer authorities) are not bound by this policy and that NCDEQ has not yet released its own policy.*

## Accidental Releases During the Outbreak

The policy does not relieve facilities from any requirements regarding reporting or responding to accidental releases. It explicitly disclaims any plan by EPA to exercise enforcement discretion regarding accidental releases, regardless of the outbreak. We take this to mean that facilities should attempt to mitigate the potential for releases in advance of a shut-down scenario.

## EPA's General Approach for Exercising Enforcement Discretion

- **General Rule.** Facilities should continue to comply, unless it becomes "not reasonably practicable."
- **If Compliance Becomes Impracticable:**
  - Act responsibly under the circumstances to minimize the effects and duration of noncompliance; and
  - Memorialize the following: (a) nature and dates of noncompliance; (b) how COVID-19 was the cause thereof; (c) response actions (including efforts to comply and to return to compliance as quickly as possible); and (d) the date compliance was achieved.

## Facility Operations

EPA and states will use the information described below to determine if an immediate response is warranted and to determine if follow-up enforcement actions are justified.

- **Acute Risks or Imminent Threats.** If facility operations are affected by the outbreak in a way that creates an acute risk or an imminent endangerment to human health or the environment, contact the agency with primary enforcement authority. In North Carolina, this is almost certainly NCDEQ (except in areas with approved local programs). EPA also recommends contacting EPA Region IV.
- **Failures of Air Pollution Controls and Wastewater Treatment Systems.** Facilities should notify the appropriate permitting authority (most likely NCDEQ except for approved local programs like local sewer authorities) and provide the following information: (i) pollutants emitted/discharged/released; (ii) the expected duration of the event; and (iii) a comparison of the expected total amount of the release to applicable limits.
- **Hazardous Waste Generators.** Generators who exceed generator status thresholds or storage time limitations will not be treated as treatment, storage and disposal facilities, and EPA will not require those facilities to comply with the requirements of the new generator status (small-quantity generator requirements would continue to apply rather than large-quantity generator requirements).
- **Animal Feeding Operations.** If a facility is unable to transfer animals, solely due to the outbreak, and it either becomes a concentrated animal feeding operation (CAFO) or becomes a higher class of CAFO (large CAFO versus medium CAFO, for example), EPA will not begin regulating the facility as a CAFO or subject an existing CAFO to the requirements of the higher class thereof.
- **Other Types of Incidents.** EPA will consider the information outlined in number 2, above, to determine if further enforcement is warranted.

## Routine Compliance, Monitoring and Reporting Tasks

In general, EPA does not intend to seek penalties for missed routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, or reporting and certification compliance events due to COVID-19.

- **All Missed Events.** Follow any existing procedures for reporting routine noncompliance, such as the generic requirement for reporting other noncompliance in NPDES permits, to inform the permitting authority of a missed event. If none applies, maintain documentation about the missed event and provide it to regulators upon request.
- **Sampling Events Occurring at Least Once Every Three Months.** EPA does not expect facilities to "make up" missed events after the fact.
- **Sampling Events Occurring Less Frequently (Semiannual or Annual Events).** Facilities should take reasonable steps to complete these events as soon as possible.
- **Missed Training Events.** Facilities should use online training if possible, but EPA believes "it is more important to keep experienced, trained operators on the job, even if a training or certification is missed."
- **Signatures.** EPA will accept digital signatures where "wet" signatures are normally required.

## Pesticidal Claims

EPA is particularly concerned about imports of products claiming to have antimicrobial effects on COVID-19. We suggest anyone who sells or distributes such products should confirm the product is appropriately registered under FIFRA.

## EPA Administrative and Judicial Settlements

Many of these settlements contain milestones or interim deadlines with stipulated penalties for failure to comply.

- **Administrative Settlements.** Follow the notification and force majeure provisions of any settlement agreements or administrative orders if the outbreak may force a facility to miss a deadline.
- **Judicial Settlements.** Courts retain their own authority to enforce the terms of a consent decree or a judgment. Parties to such instruments should consult the applicable notice and force majeure provisions. Note that a filing with the applicable court may be necessary.

## Critical Infrastructure

EPA may be willing to consider one-off agreements with critical infrastructure facilities and provide short-term assurances of no enforcement action, but EPA will likely include conditions to protect public health.

## Public Water Systems

While this is primarily directed towards government entities, there are a number of private companies providing water services – either as a utility or to employees.

- **Operations and Maintenance as Normal.** Because of the importance of maintaining water service, EPA expects operators of these systems to continue normal operations and maintenance.
- **Worker Shortages.** In the event of worker shortages, EPA considers continued operation of these systems as *the highest priority*.
- **Priority of Certain Tasks:**
  - Highest priority is monitoring for microbial pathogens;
  - Additional priorities – nitrate/nitrite rules, Lead and Copper Rule monitoring, MCLs for which the system has had recent exceedances.
- **EPA Website.** EPA plans to launch a website with additional resources for public water systems.

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