Environmental Compliance in the Coronavirus Era

By Mary Simmons Mendoza, Jeff Civins | April 1, 2020

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Many regulated entities are struggling to comply with certain environmental reporting, monitoring and settlement agreement requirements because of the impact of shelter in place orders, supply chain disruptions, and social distancing requirements relating to the COVID-19 pandemic response. To help alleviate some of these concerns, on March 26, 2020, the Environmental Protection Agency issued a memorandum, "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program." The Memorandum was addressed to "All Governmental and Private Sector Partners" and essentially says – regulated entities should do their best to comply, and EPA will use reasonable discretion and not take enforcement on violations of routine requirements where regulated entities made best efforts to comply but could not because of COVID-19 related personnel or supply restrictions.

The routine violations that EPA contemplated fall into these broad categories:

1. Reporting
2. Monitoring
3. Integrity testing
4. Sampling
5. Lab analysis
6. Training
7. Recordkeeping
8. Meeting settlement agreement timelines

In the guidance, EPA was careful to say that this policy is not a "blanket waiver." Even so, certain press outlets read the policy to say that EPA is going to allow facilities to disregard permit limits and is not going to enforce for any non-compliance. EPA felt compelled to respond. In an unprecedented rebuttal, on March 30, 2020, EPA issued a press statement entitled, "EPA Corrects the Record after Reckless Reporting on Temporary Compliance Guidance," EPA made it clear that this policy is temporary and limited. In it, EPA clarified its intent, stating:

> The policy does **not** say that the COVID-19 pandemic will excuse **exceedances of pollutant limitations in permits, regulations, and statutes**. EPA expects regulated entities to comply with all obligations and if they do not, the policy says that EPA will consider the pandemic, on a case-by-case basis, when determining an appropriate response. Further, in cases that may involve acute risks or imminent threats, or failure of pollution control or other equipment that may result in exceedances, EPA's willingness to provide even that consideration is conditioned on the facility contacting the appropriate EPA region, or authorized state or tribe, to allow regulators to work with that facility to mitigate or eliminate such risks or threats.

What now?

There are very real issues related to the disruptions in our work practices because of the COVID-19 response. When a regulated entity has legitimate concerns about its ability to comply, it should

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evaluate what it can do in the interim to comply as best as practicable, especially as to monitoring, recordkeeping and reporting requirements. Many states, in addition to EPA, have offered flexibility on recordkeeping requirements, like not requiring "wet" signatures until the next reporting cycle and extending reporting deadlines by at least 30 days.

If it is not possible to comply because of personnel or supply chain concerns, for example with schedules in an agreement or consent decree, then regulated entities should evaluate realistic timeframes for compliance and follow the process in those agreements to seek flexibility. States like Texas for example have developed distinct process for asking for regulatory relief. (See the March 18, 2020 release from TCEQ Office of Compliance and Enforcement, "COVID-19 Regulatory Relief Requests.")

Doing their best to comply now probably will significantly reduce both liability and conserve resources for regulated entities. To minimize exposure for non-compliance, regulated entities may wish to consider following these interim procedures:

1. Encourage compliance and working out ways to protect workers and comply the best they can in the circumstances.
2. Document, document, document. Keep track of what the requirement is and what they did to comply where they were not able to meet the letter of the requirement, and what they did in the interim. Keep a to do list of follow-up items and identify the next routine opportunity to follow-up. For example, in the next reporting cycle, consider emails that can act as surrogates for wet signatures – "I am Ms. Smith, I am the environmental manager for Company X and this email is in lieu of my signature because of the shelter in place requirements for COVID-19 response…"
3. If they have an issue that can't be addressed adequately, take advantage of the state and federal processes for disclosing and seeking enforcement discretion. It is advisable to contact both your state and federal contacts so that both regulatory agencies are aware of the request for flexibility and discretion.

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