

COVID-19: ENVIRONMENTAL AGENCY RESPONSES TO VIRUS MITIGATION MEASURES

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U.S. Energy Alert

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As COVID-19 mitigation efforts have taken effect across the country, environmental protection agencies are also adjusting operations and policies to accommodate their teleworking staff and to account for impacts to the regulated community. This update covers the responses from the United States Environmental Protection Agency, the Illinois Environmental Protection Agency, and the Pennsylvania Department of Environmental Protection.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WILL USE ENFORCEMENT DISCRETION

On March 26, 2020, the United States Environmental Protection Agency (“EPA”) issued a memorandum (“EPA Memo”) announcing that it would use its enforcement discretion to eliminate penalties for violations of compliance monitoring and documentation requirements caused by staffing and resource limitations as a result of responses to COVID-19. The EPA Memo is not remotely a general amnesty for all environmental violations but is tailored to address specific and generally routine activities. The EPA Memo is retroactive to March 13, 2020, and will remain in place until withdrawn by the agency.

Specifically, the EPA Memo addresses compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification. The EPA Memo states that if constraints imposed by COVID-19 response measures, such as “stay home” orders for non-essential businesses, prevent companies from meeting these types of compliance obligations, EPA will not seek penalties for violations occurring while the EPA Memo is in effect. Companies seeking protection under the EPA Memo must continue to act responsibly to limit the violations, identify and document the source and basis for the violations and return to compliance as soon as possible. Such companies are still required to make non-compliance notifications under their permits. To the extent the COVID-19 limitations present larger issues, such as breakdown of treatment equipment and subsequent violation of discharge or emissions limitations, the company will need to work with its regulating authority to resolve these issues.

The EPA Memo also addresses hazardous waste management by stating that EPA will not seek penalties for exceeding 90-day storage requirements if caused by COVID-19 response issues. In addition, EPA will not seek recategorization of small quantity or very small quantity generators if they exceed their storage limits while the EPA Memo is in place.

The EPA Memo does not apply to a wide range of other environmental activities. Activities controlled by administrative or court orders will need to be addressed consistent with those orders, with appropriate notices and invocation of force majeure clauses as applicable. EPA states that it will strictly enforce compliance with the Safe

Drinking Water Act by water suppliers. Finally, the EPA Memo states that it does not apply to criminal actions, particularly intentional violations of environmental law.

In general, the EPA Memo is a recognition of the resource limitations imposed by the response to COVID-19 on the regulated community as well as on EPA. Companies seeking to take advantage of this should recognize its limitations as well as its requirements, and should carefully document their choices as well as the basis for those choices in response to COVID-19. They should also recognize that this only applies to the enforcement decisions of the federal government and not to those of state government which are frequently the primary enforcement authority for most of the regulations. In addition, most regulations authorized by federal statute are also enforceable by way of citizen suits, which are not affected by the EPA Memo.

In short, companies need to continue to be compliant with environmental regulations and to document those areas where compliance is affected by COVID-19 responses.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

On April 16, 2020, Illinois Environmental Protection Agency (“Illinois EPA”) issued a “Compliance Expectation Statement” (“Statement”) on their use of enforcement discretion in light of guidelines and movement restrictions imposed by Illinois Governor J.B. Pritzker’s executive orders in response to the COVID-19 pandemic. The Statement says that if these restrictions result in an inability to comply with environmental regulations, Illinois EPA will use their enforcement discretion to evaluate the non-compliance “if appropriate.” This discretion will not apply to actions that will create harm to human health or the environment and also does not apply to “critical infrastructure” such as drinking water or waste water treatment facilities. Illinois EPA says these are case-by-case decisions best made by discussions with Illinois EPA in advance of the non-compliance.

In the end, the Statement provides little guidance and says far less than the U.S. EPA’s enforcement memo from two weeks earlier. Illinois EPA expects regulated entities to continue to comply with their permits and regulations and if compliance is hampered by compliance with COVID-19 restrictions, then the entities should discuss that with Illinois EPA. Illinois EPA retains its authority to make the decisions it thinks are appropriate and the regulated community has the same ability to affect that decision that it had before. Persons looking to take advantage of this should recognize that many of the compliance requirements arise under federal as well as state law and most of the federal laws allow enforcement by citizens’ actions, which are not limited by these statements. In addition, in Illinois, while Illinois EPA is the preliminary enforcement agency, ultimate enforcement determinations are made by the Illinois Attorney General and they are not bound by Illinois EPA exercises of enforcement discretion.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

On March 19, 2020, Pennsylvania Governor Tom Wolf issued an executive order that no person or entity shall operate a place of business that is not a life-sustaining business, regardless of whether the business is open to members of the public. The Pennsylvania Department of Environmental Protection (“PADEP” or the “Department”) announced operational changes, and provided some clarification of the impact of this order on environmental compliance requirements.

PADEP closed its offices, but announced that staff who are able to work from home are continuing to fulfill the agency’s mission. The agency is also still accepting complaints, responding to environmental emergencies, and

processing permits, though the agency has suspended its permit decision guarantee policy and advises that delays are possible.

CONTINUED COMPLIANCE REQUIRED IN PENNSYLVANIA

PADEP's announcement reminds all businesses, including those ordered by the Governor to cease operations, that they are expected to continue to meet environmental regulatory obligations and permit conditions during the COVID-19 crisis, though some may qualify for a waiver under certain circumstances. This waiver is discussed further below.

Businesses that have had to cease operations are advised to review the provisions of their permit, which should "contain regulatory obligations and details regarding cessation or temporary stoppage of work."

PADEP directs operators or permittees with questions about a specific permit or operating condition to contact the entities identified on their permit or cover letter. Where a point of contact is not identified, DEP refers regulated entities to its current list of contacts.

PENNSYLVANIA CHAPTER 102 EARTH DISTURBANCE ACTIVITIES EXCEPTION

The Department specifically addresses earth disturbance activities permitted under Chapter 102. For entities that qualify as life-sustaining businesses, they may continue permitted earth-disturbance activities to the extent they support the operation of a life-sustaining business.

Non-life-sustaining businesses must cease their activities immediately, and then implement temporary or permanent stabilization practices as required by the permit and in accordance with the erosion & sediment control program manual. Once these stabilization measures are complete, operators may cease weekly routine erosion and sediment inspections, though other required inspections must continue. PADEP advises that these inspections are not a violation of the Governor's executive order.

REQUEST FOR SUSPENSION OF REGULATION OR PERMIT CONDITIONS IN PENNSYLVANIA

On March 6, 2020, Governor Wolf declared a disaster emergency. This declaration gives the Governor authority to suspend provisions of any regulatory statute, rule, or regulation "if strict compliance with the provisions . . . would in any way prevent, hinder, or delay necessary action in coping with the emergency."¹

PADEP has provided a waiver form for businesses seeking a temporary suspension of regulatory requirements and/or permit conditions. Businesses submitting waivers must explain how the strict compliance will interfere with action in response to COVID-19 and evaluate the risk to public health and the environment.

If granted, the waiver will likely be valid as long as the Governor's disaster declaration continues. PADEP has posted applications and approvals for several approved requests. These approvals have come in the form of letters signed by the Governor and state Secretary of Health.

Governor Wolf must take affirmative action to renew the declaration every 90 days, or terminate it via executive order when the Governor "finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation."²

Regulated entities should continue to make every effort to comply with permit requirements and carefully document any adjustments made due to COVID-19 restrictions, and the basis for those restrictions.

This article is for informational purposes and does not contain or convey legal advice. The information here should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

FOOTNOTES

¹ 35 Pa.C.S. § 7301(f)(1).

² 35 Pa.C.S. § 7301(c).

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