

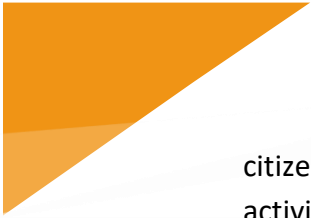
EPA'S GUIDANCE ON ENFORCEMENT ACTIVITY DURING THE COVID-19 PANDEMIC: 5 NOTES OF CAUTION

On March 26, 2020, EPA issued guidance on how it intends to carry out its enforcement activities during the on-going COVID-19 pandemic.¹ The Guidance is wide-ranging in scope. It addresses everything from routine recordkeeping and reporting to facility operations. Environmental professionals would be well-advised to study the Guidance carefully and discuss it with their colleagues and stakeholders.

The COVID-19 Implications Guidance, while considerably detailed, is only seven pages long, and so it is not my intent to summarize its contents here. However, I would like to offer five notes of caution that regulated entities may want to consider when assessing the impact of the Guidance on their operations. These are as follows:

1. ***There may be a change of presidential administration before the benefits of the Guidance begin to accrue.*** Typically, there is a lag between noncompliance with environmental requirements and subsequent enforcement action. With a presidential election less than eight months away, one must keep in mind that many EPA decisions on enforcement with respect to alleged violations of environmental requirements during the COVID-19 crisis may not be considered until after a change of presidential administration has taken place. If a new administration comes in, it will have considerably different enforcement priorities than the current one. Subsequent changes in the interpretation or implementation of the Guidance by EPA under such a new administration may limit the Guidance's utility to regulated entities.
2. ***Most environmental enforcement activity takes place at the state level.*** Environmental enforcement activity often arises from compliance inspections or file reviews of regulated facilities by state environmental regulators. The Guidance only applies to EPA's enforcement activity. Although states may issue similar guidance at some point, few states have done so up until now.
3. ***The Guidance does not address citizen suits.*** The Guidance will probably receive less than an enthusiastic reception from environmental groups; particularly those that pursue


¹ *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* (EPA Mar. 26, 2020). (referred to herein as the "COVID-19 Implications Guidance" or simply the "Guidance").



citizen suits as a part of their respective advocacy strategies. As a result, citizen suit activity may increase while the Guidance is in effect.

4. ***Regulated entities should monitor the statements and activities of environmental laboratories and other environmental service providers.*** One of the grounds for the issuance of the COVID-19 Implications Guidance is that the pandemic may place such a strain on the staffing resources and supplies of environmental service providers that they will not be able to deliver services in a manner that allows for their clients to comply with monitoring, recordkeeping, and reporting requirements. However, as of the date of this article (end of March 2020), several national environmental laboratories have issued statements indicating that they remain ready and able to respond to the needs of their clients.² This may change, of course. The point here though is that even if one particular service provider is unable to respond to the needs of its clients in a timely fashion, there may be other service providers who can. A regulated entity relying on the Guidance as a defense against noncompliance with monitoring, recordkeeping, or recording requirements because of staffing or other resource difficulties experienced by its service provider will likely face questions about what it did to either prevent or mitigate any such noncompliance. If the regulated entity is unable to demonstrate that it investigated alternatives, or at the very least, that it investigated the state of the environmental services marketplace, it may have a difficult time obtaining the relief afforded by the Guidance.
5. ***A facility whose compliance activities are impacted by the COVID-19 pandemic should consider competing risks of noncompliance when deciding where and how to allocate limited compliance resources.*** Facilities should keep in mind that even in the absence of any threat to human health or the environment, noncompliance with certain types of requirements carry greater risks than noncompliance with other types of requirements. As an example, one can look to the specific relief afforded by the Guidance to generators of hazardous waste. According to the Guidance, EPA indicates that so long as certain criteria are met, it will exercise its enforcement discretion to excuse noncompliance with the time periods required under RCRA for transferring waste off-site. EPA also indicates that the status of very small quantity generators (VSQGs) and small quantity generators (SQGs) of hazardous waste will not change if the amount of hazardous waste stored on-site exceeds the applicable regulatory volume threshold due to an inability to arrange for shipping as a result of the COVID-19 pandemic. Regulated facilities will certainly welcome the prospect of the application of such discretion by EPA. However, regulated entities should remember that the risks of noncompliance associated with these time and volume requirements go well beyond fines. Noncompliance can result in a facility being subject

² See e.g., Pace Analytical Services, LLC, COVID-19 Update - Essential Services (Mar. 20, 2020) - <https://www.pacelabs.com/assets/covid-19-update-essential-services.pdf>



to a whole new range of considerably more onerous compliance requirements, including the compliance requirements associated with large quantity generator (LQG) status, or even in the extreme, the permitting requirements for hazardous waste treatment, storage, and disposal (TSD) units that previously had “less than 90-day” status. The prospect of such “cascading consequences” resulting from noncompliance with certain types of requirements should be weighed when deciding where and how to allocate compliance resources that have been impacted by the COVID-19 pandemic.

In summary, while the Guidance should provide relief to regulated entities struggling to manage their respective compliance obligations due to personnel and other resource limitations during a time of crisis, it is not a panacea. Regulated entities should review the Guidance thoroughly, assess the competing risks associated with the allocation of compliance resources impacted by the COVID-19 pandemic and be prepared to document any instances of noncompliance resulting from the on-going pandemic in the manner prescribed by the Guidance.

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