

COVID-19: EPA Enforcement Discretion Policy

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Today, the U.S. Environmental Protection Agency (EPA) issued a policy memorandum on the exercise of enforcement discretion due to the evolving impact of the COVID-19 pandemic in the United States. Susan Parker Bodine, Assistant Administrator for Enforcement and Compliance Assurance (OECA) posted the memorandum on EPA's website for all governmental and private-sector partners.

Key message

"The EPA will exercise the enforcement discretion specified below for noncompliance covered by this temporary policy and resulting from the COVID-19 pandemic, if regulated entities take the steps applicable to their situations, as set forth in this policy."

In general, the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situation where the EPA agrees that COVID-19 was the cause of the noncompliance, and the facility provides supporting documentation to the EPA upon request.

Steps to Take

1. Entities should make every effort to comply with their environmental compliance obligations.
2. If compliance is not reasonably practicable, facilities with environmental compliance obligations should:
 1. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
 2. Identify the specific nature and dates of the non-compliance;
 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 [items] (a) through (d) [above].

In reviewing Ms. Bodine's memorandum, it is clear to me that EPA provides you with some examples of the "types" of causes you could use to document a COVID-19 impact. For example,

- Worker shortage
- Travel restrictions and Social distancing restrictions at facilities that are consistent with announcements by the U.S. Centers for Disease Control and Prevention (CDC)
- Missing key staff and contractors
- Laboratories that are not available for a variety of reasons
- Worker and third-party resource shortages that affect your facility's ability to meet reporting obligations or milestones under consent decrees

Important Advice

The key will be (1) to keep track of the COVID-19-related changes you are implementing, (2) link those changes to specific guidance from the CDC and the local emergency-management orders from your county judges and city mayors, and (3) task someone in your compliance or legal department with writing these things down in real time. Six, nine, or twelve months from now—you will be glad that you did.

You can view the EPA policy memorandum [here](#). If you have questions or need more information, please contact Kevin Collins at kevin.collins@bracewell.com or by mobile phone at (512) 924-0904.