

EPA INTENDS TO EXERCISE ENFORCEMENT DISCRETION FOR SOME NON-COMPLIANCE DUE TO COVID-19

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On March 26, 2020, the Environmental Protection Agency (“EPA”) issued a 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 the COVID-19 virus. The Memo is not remotely a general amnesty for all environmental violations but is tailored to address specific and generally routine activities. The Memo is retroactive to March 13, 2020 and will remain in place until withdrawn by EPA.

Specifically, the memo addresses compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification. The 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 Memo is in effect. Companies seeking protection under the 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 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 Memo is pending.

The 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 Memo states that it does not apply to criminal actions, particularly intentional violations of environmental law.

In general, the Memo is a recognition of the resource limitations imposed by the response to the COVID-19 virus 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 the virus. 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 this 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 virus responsibilities.

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