

# BURR ALERT

## EPA to the Rescue

By Bill Penny

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How should the regulated community address environmental regulatory requirements during the pandemic? The Environmental Protection Agency (EPA) recently announced that it expects full compliance with all environmental rules and regulations during the pandemic, but is doing so in a kinder and gentler way. Retroactive to March 13, 2020, the EPA will exercise “enforcement discretion” for noncompliance resulting from the COVID-19 pandemic, if regulated entities take the steps applicable to their situations, as set forth in the [EPA’s temporary policy](#). To qualify for the enforcement discretion, the entity must comply with the following five factors:

- Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- Identify the specific nature and dates of the noncompliance;
- 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;
- Return to compliance as soon as possible; and
- Document the information, action, or condition specified above.

The EPA is expecting heightened compliance with public drinking water sources, but will also take in consideration the enforcement discretion criteria.

The EPA memo specifically recognizes that lack of personnel because of the pandemic may constrain the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. The EPA will not assess civil penalties for failure to perform these required activities if the data is otherwise available upon request along with required documentation on the cause of noncompliance. The EPA will not require a “catch up” upon a return to compliance. This would also include stipulated penalties in administrative consent orders with appropriate notification of force majeure as stated in such orders. The EPA plans to work with the Department of Justice and any co-plaintiffs for judicial orders to accomplish the same policy, though it does not have quite the discretion it would have for extra-judicial matters.

If an entity contacts the EPA due to a noncompliance matter that could result in an acute risk or an imminent threat to human health or the environment, the EPA will work with the authorized states to discuss measures to address the threats. Where the EPA is the lead, it will assess regulatory requirements needed to alleviate the threat. Where an entity encounters a failure of air emission control or wastewater or waste treatment systems or other facility equipment that could result in exceedances of enforceable limitations on emissions to air or discharges to water, or land disposal, or other unauthorized releases, the entity must notify the regulatory authority and make a decision as to whether the exceedances represent an acute risk or imminent threat.

The guidance also specifically addresses situations where hazardous waste exceeds the allotted generator storage time frame. The facility can document that it was unable to ship the waste timely because of the pandemic, while continuing to properly label and store it. The facility will not lose generator status and become a TSDf for such exceedances. Finally, the EPA will not convert animal feeding operations into CAFOs where the number of animals exceeds the regulatory threshold with documentation that the pandemic was the reason for excess accumulation.

The EPA is promising a “no action assurance” letter for response to critical infrastructure. These letters will identify requirements that may be waived or institute different requirements to address exigent circumstances.

This relief is considered temporary and the EPA will be updating its website to notify when it ends or otherwise changes.

**To discuss this further, please contact:**

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