

## **Memorandum – COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program**

### Introduction

Below is an overview of the U.S. Environmental Protection Agency’s (EPA) March 26, 2020 Memorandum entitled – [COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program](#) - announcing the agency’s temporary policy regarding the exercise of its enforcement discretion for certain noncompliance resulting from the COVID-19 pandemic. **In general, 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 situations where EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to EPA upon request.**<sup>1</sup> However, in the event of an exceedance of emission or discharge limitation, EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.

### Scope of the Temporary Policy

EPA’s Memorandum sets forth General Conditions which must be met in all instances for its announced enforcement discretion to be applicable and further details specific requirements for specified categories of regulated activity. Notably, these include routine compliance monitoring and reporting by regulated entities; settlement agreement and consent decree reporting obligations and milestones; and facility operations.

The policy applies retroactively beginning on March 13, 2020 and will remain in place until it’s terminated. EPA will assess the continued need for and scope of its temporary policy and will provide notification at least seven days prior to termination. The policy applies to actions or omissions that occur while it is in effect even after its termination and the policy will apply to any such noncompliance in lieu of an otherwise applicable EPA enforcement response. In recognition that the policy may not address every potential civil violation, EPA may provide additional enforcement guidance applicable to specific programs. EPA’s self-disclosure program remains available, as well.

Importantly, EPA acknowledges that authorized states or tribes may take a different approach under their own authorities. Accordingly, this policy will not be applicable under programs by authorized states or tribes. However, EPA plans to consult with states and tribes to encourage them to use their discretion in conducting routine inspections during the pendency of the COVID-19 pandemic.

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<sup>1</sup> **Disclaimer:** This guidance was prepared by the American Coatings Association, Inc. (“ACA”) and is intended to provide general guidance relating to its subject matter. ***It is not legal advice, nor intended to represent a definitive interpretation of any rules or regulations or legal compliance.***

## General Conditions to Qualify for Enforcement Discretion

All enforcement discretion set forth in EPA's temporary policy is conditioned on the following:

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:
  - a. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
  - b. Identify the specific nature and dates of the noncompliance, which must have occurred on or after March 13, 2020;
  - c. 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;
  - d. Return to compliance as soon as possible; and
  - e. Document the information, action, or condition specified in a. through d.

Although EPA does not define what is meant by "every effort," the policy was adopted based upon the agency's mindfulness of the health and safety of the public. Importantly, EPA expects all regulated entities to **continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment**. Indeed, if facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment, EPA sets forth specific guidance to be followed including contacting the appropriate implementing authority (EPA region, authorized state, or tribe).

As discussed below, in some instances, EPA will not require notice or reporting of non-compliances. In these situations, EPA asks that regulated entities maintain the information and make it available to EPA or an authorized state or tribe upon request. Accordingly, contemporaneous identification and documentation of EPA's conditions specified in 2a. through d. above are important.

### Covered Regulated Activity

EPA's temporary policy recognizes that impacts to facility operations, availability of key staff and contractors, and the capability of laboratories may constrain the ability to carry out certain activities required by federal environmental permits, regulations, and statutes. These may include reporting obligations and milestones set forth in settlements and consent decrees, as well as the ability of an operation to meet enforceable limitations on air emissions and water discharges, requirements for the management of hazardous waste, or requirements to ensure and provide safe drinking water. In the policy, EPA describes how it plans to manage these distinct situations. Businesses should read the entire [policy](#) to be assured of all potentially applicable criteria to its circumstances.

#### **a. Routine compliance monitoring and reporting by regulated entities**

EPA's policy affords enforcement discretion for violations of routine compliance monitoring, sampling, integrity testing, laboratory analysis, training, and reporting or certification requirements. EPA provides a detailed list of examples covered by each of these categories in the policy.

In the event of a failure to perform, entities should **first use existing procedures to report noncompliance with such routine activities** (i.e. an applicable permit, regulation, or statute). **If no such procedure is applicable**, or if reporting is not reasonably practicable due to COVID-19, regulated entities should **maintain this information internally and make it available to EPA or an authorized state or tribe upon request**. EPA does not expect to seek penalties for violations in situations where EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to EPA upon request.

After the policy is terminated, EPA expects full compliance moving forward. Absent exigent circumstances, EPA does intend to ask facilities to “catch-up” with missed monitoring or reporting for intervals of less than three months. For other monitoring or reports, such as those required on a bi-annual or annual basis, when this policy is no longer in effect, EPA expects facilities to take reasonable measures to resume compliance activities as soon as possible, including conducting late monitoring or submitting late reports. Additionally, in some programs, if the reporting form allows a facility to indicate why it has not conducted the required sampling and monitoring, EPA encourages facilities to include the information specified in the General Conditions 2a. through d. above when submitting any late reports.

#### **b. Training and Signatures**

As for training requirements, EPA directs regulated entities to make use of online training (if available) to maintain compliance. **If practicable**, sectors mandated to function with certified operators should maintain normal certification and training practices. **If not practicable due to COVID-19, EPA believes it’s more important to keep experienced, trained operators on the job, even if a training or certification is missed.**

Furthermore, if a submission to EPA requires a “wet” signature of a responsible official, the agency will accept a digital or other electronic signature. Additionally, EPA strongly encourages the use of its approved electronic reporting mechanisms. The agency will also accept emailed submissions even if a paper original is required.

#### **c. Facility Operations**

**EPA expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment.**

**EPA advises that facilities should contact the appropriate implementing authority** (EPA region, authorized state, or tribe) **if facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment.** The policy details EPA’s intended response to such circumstances, noting only that “EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.”

Similarly, if a facility suffers from a failure that may result in exceedances of enforceable limitations on emissions to air or discharges to water, or land disposal, or other unauthorized releases, the facility should notify the implementing authority (EPA regional office, authorized state, or tribe) as quickly as possible. The notification should identify the pollutants at issue and the expected duration and timing of any exceedances or releases. EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether enforcement response is appropriate.

#### **d. Generators of Hazardous Waste**

If a facility is a generator of hazardous waste and, due to disruptions caused by the COVID-19 pandemic, is unable to transfer the waste off-site within the time periods required under RCRA to maintain its generator

status, EPA's policy advises that the facility should continue to properly label and store such waste and take the steps identified under the General Conditions noted above. If the steps are met, EPA will treat such entities to be hazardous waste generators and not treatment, storage, and disposal facilities. Furthermore, EPA will treat Very Small Quantity Generators and Small Quantity Generators as retaining that status, even if the amount of hazardous waste stored on site exceeds a regulatory volume threshold due to the generator's inability to arrange for shipping of hazardous waste off of the generator's site due to the COVID-19 pandemic.

#### Exclusions to the Policy

EPA's enforcement discretion policy does **not** apply to the following situations:

- Ongoing enforcement matters;
- Activities carried out under Superfund and RCRA Corrective Action enforcement instruments;
- **Failure to respond to or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous wastes, and other pollutants;**
- Environmental crimes;
- Violations of conditions of probation in criminal sentences; and
- Imports, such as pesticide imports under FIFRA.

#### Recommendations

A business is well advised to have a reasoned, demonstrable, and supportable basis to show that it has:

1. Made every effort to maintain compliance, properly accounting for health and safety;
2. Acted responsibly; and
3. Documented the information and conditions specified under General Conditions 2a. through d. above if compliance was not reasonably practicable.