

March 27, 2020



The EPA speaks up on clean water during COVID-19

By Alison Torbitt

On March 27, 2020, the governors of the U.S. received a letter from Andrew Wheeler of the U.S. Environmental Protection Agency (“EPA”), indicating that ensuring drinking water and wastewater services are fully operational is critical to containing COVID-19 and protecting Americans from other public health risks. Therefore, those critical infrastructure workers, as well as manufacturers and suppliers that provide treatment chemicals, laboratory supplies, and related goods and materials, must continue to work despite Shelter-in-Place Orders.

This directive came only one day after all governmental and private sector partners received a letter from Susan Parker Bodine of the U.S. EPA, titled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program.” The March 26, 2020, letter included a commitment from the EPA to exercise enforcement discretion for noncompliance resulting from the COVID-19 pandemic, if regulated entities take the steps outlined. In short, regulated entities are being asked to assure that action is taken for the benefit of human health and the environment, but there is also a promise of discretion if compliance becomes infeasible and certain mitigating measures are taken in real time.

Wheeler’s letter encourages state and local authorities to consult the President’s Coronavirus Guidelines for America, released on March 16, 2020, which state that “[i]f you work in a critical infrastructure industry, as defined by the Department of Homeland Security ... you have a special responsibility to maintain your normal work schedule.” They also may consult the Department of Homeland Security (“DHS”) Cybersecurity and Infrastructure Security Agency Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, released on March 19, 2020, which specifically recognizes water and wastewater workers and suppliers to the water sector (e.g., chemical manufacturers and delivery services) as essential critical infrastructure workers.

Wheeler also recognizes that manufacturers and suppliers who provide vital services and materials to the water sector are also considered essential workers and businesses, since homes and hospitals “depend on treatment chemicals, laboratory supplies[,] and related goods and materials.” Many in the regulated community are struggling with decreases in supplies, or subcontractors or laboratories that are struggling to determine independently whether they are essential. This letter provides some comfort and recognition for the hard work every person delivers toward assuring

clean water during a pandemic. (On a side note: Do your part and do *not* flush wipes or paper towels down the toilet! Our wastewater infrastructure is keeping us safe and you must do your part.)

Bodine's letter is also a message of partnership in these difficult times, and is being applied retroactively back to March 13, 2020. While the "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," the EPA recognizes that there may be labor or supply shortages due to COVID-19, which may affect 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. As a result, the EPA promises discretion, but only if:

- Entities make every effort to comply with their environmental compliance obligations.
- If compliance is not reasonably practicable, facilities with environmental compliance obligations:
 - Act responsibly under the circumstances 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 in these points.

Additional direction is provided if the pandemic constrains the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification, including that discretion will only be exercised "where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request." The letter also describes certain conditions for settlement agreement and consent decree noncompliance; Safe Drinking Water Act noncompliance; or if facility operation creates "an acute risk or an imminent threat to human health or the environment" due to a failure of an air emission control, or wastewater or waste treatment system, or other equipment failure. EPA states that this discretion is does not apply to imports, accidental releases, criminal violations, and conditions of probation in criminal sentences. Also, the EPA recognizes that authorized states or tribes may take a different approach under their own authorities.

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