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Client Alert: Ohio EPA Issues Two COVID-19 Policies

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A. Enforcement Discretion. Ohio EPA recently issued two new guidance memos relating to compliance and operator obligations. On March 25, 2020, the Ohio EPA announced a short memo dealing with notice and enforcement discretion for a broad range of environmental compliance issues. In the event that a regulated entity is having problems with compliance, recordkeeping, fees or other requirements due to the COVID-19 emergency, the Agency recommends that the entity send a short email containing the specific regulatory or permit requirement which cannot be complied with:

- A concise statement describing the circumstances preventing compliance
- The anticipated duration of time that the noncompliance will persist
- The mitigative measures that will be taken to protect public health and the environment during the need for enforcement discretion
- A central point of contact for the regulated entity, including an email address and phone number

The Ohio EPA memo is not based on any statutory or regulatory authority, but solely upon the agency's enforcement discretion. It is not binding on U.S. EPA or a citizens group, and cannot supersede any requirement in an Ohio consent decree. Also, it does not obligate any regulatory entity to make such notifications above or beyond those obligations already found in applicable statutes, regulations, permits, orders, or consent decrees. Nevertheless, the memo presents a reasonable and practical vehicle to engage Ohio EPA cooperation during this period. The memo can be found at this site:

<https://www.epa.ohio.gov/covid19>

B. Public Water Systems. On March 21, 2020, modified on March 26, 2020, the Ohio EPA issued a document titled: "Coronavirus COVID-19 Response, Questions, and Guidance" document. Unlike Ohio EPA's memo on enforcement discretion, in this memo Ohio EPA responds to multiple requests for clarification from public system operators around Ohio. It provides only guidance and suggestions to public water systems on how to maintain system integrity and worker protection. Ohio EPA is not announcing exemptions from current requirements; however, Ohio EPA continues to monitor current developments. Ohio EPA provides the COVID-19 operational guidance for operators, including:

- Have backup staff identified in the event personnel become sick
- Perform solo visits

- Practice social distancing
- Stagger visits – visit systems in times when other individuals are not present (outside normal working hours for non-community systems)
- Have contingencies in place (appropriately certified professional backups, certified professional operators, personnel knowledgeable of the system)
- Disinfecting common surfaces before and after shift changes

The Agency is not reducing minimum staffing requirements, and encourages operators to work with neighboring utilities, professional organizations, Ohio WARN, and contractors to provide backup as necessary. Ohio EPA intends to monitor continuing COVID-19 developments and will remain flexible in developing necessary responses, including the use of compliance deadline extensions and enforcement discretion. <https://epa.ohio.gov/ddagw/covid19#187665330-operations>

C. A Short Word on Federal Developments. U.S. EPA is considering an array of actions across various media to provide regulatory relief due to COVID-19. Expected relief from the agency will include: postponement of the dead-line for switching to summer grade fuels, deadlines at clean-up sites, and more discretion to States for enforcement decisions for water, utilities, and wastewater plants. The full report can be found at. EPA Plans to Waive Some Compliance Requirements Amid Coronavirus Crisis.

On March 26, 2020, U.S. EPA published guidance announcing it would not seek penalties for noncompliance with several environmental statutes for facilities affected by the coronavirus outbreak. This would include penalties for failure to meet monitor testing, sampling, and training type activities. The policy does not apply to Superfund or Corrective Action remedial activities. EPA is expected to announce a policy for those matters soon. EPA's enforcement discretion is not automatic. It is conditioned on the ability of the regulated entity to meet these conditions:

"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; 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."

The guidance documents can be found in full at

<https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.