

ENVIRONMENTAL COMPLIANCE IN THE TIME OF COVID-19

If your company is working with reduced or remotely located staff as a result of the COVID-19 pandemic, you may be confronting environmental compliance challenges. Personnel typically responsible for fulfilling compliance obligations may not be available due to sickness, social distancing policies, or work-from-home mandates. In addition, accessing company data systems from offsite locations may not be readily available to all personnel with compliance duties and responsibilities.

Despite these challenges, regulatory compliance obligations, including reporting deadlines, are not going away. Examples of ongoing reporting requirements include Clean Air Act Title V Semiannual Deviation reporting and Annual Compliance reporting, Emissions Inventory reporting, Greenhouse Gas reporting, New Source Performance Standards (“NSPS”) Subpart OOOOa fugitive emissions monitoring and annual reporting, Toxic Release Inventory reporting, waste management, wastewater or stormwater discharge testing and reporting, and requests for flaring extensions associated with oil and gas production.

The U.S. Environmental Protection Agency (“EPA”) and state and local environmental agencies have enforcement discretion, which they may employ if certain compliance obligations are not met during the COVID-19 outbreak, but actually changing regulatory deadlines would mean amending numerous regulations. Even agency announcements of policies to exercise enforcement discretion will take time and may not provide the necessary assurances to companies with immediate or imminent compliance obligations or address all of an entity’s compliance obligations. Adding to the weight of the situation is the fact that failing to meet environmental compliance obligations could have the very real effect of polluting air and water and potentially harming the health and safety of our colleagues, friends, and families.

What to do then? Make a plan. Consider (a) the personnel and technology you have available or can source, (b) all of the ongoing and upcoming compliance obligations and reporting deadlines applicable to your operations, and (c) the COVID-19 restrictions applicable to your city and state. Then map out how the company will fulfill those obligations and meet those deadlines. Make sure all of the company’s environmental regulatory obligations are covered—whether by personnel typically responsible for them or by personnel who can take on/share the responsibility—and that your team has the resources they need to fulfill these perhaps new and quite possibly more challenging responsibilities (*e.g.*, remote but secure access to relevant company data, online training for those taking on new responsibilities). If you have to, prioritize the compliance responsibilities that have the biggest risk to human health and/or the environment. Check in regularly with your compliance team to ensure efforts are going as planned.

Prioritizing and meeting compliance obligations now will save time, money, and headaches later. For example, it takes a lot more time to prepare pages and pages of Title V Semiannual Deviation Reports or NSPS Subpart OOOO/OOOOa Annual Reports documenting all of the deviations the company had during the prior 6-month or 12-month period than to comply in the first place and not have to report any

deviations. There will also inevitably be additional documentation burdens associated with requesting enforcement discretion from an agency for unfulfilled compliance obligations or missed deadlines. And an agency may be more inclined to exercise some enforcement discretion in matters where human health or the environment has been protected, but a filing deadline was not met.

If gaps in compliance arise, remedy them to the extent you can and as expeditiously as possible. Document both the specific reasons the COVID-19 pandemic prevented your company from being able to fulfill the applicable compliance obligations and the efforts the company took to comply despite the challenges presented by the pandemic.

Some agencies have already notified the regulated community of their intent to exercise enforcement discretion in situations where COVID-19 has led, or is expected to lead, to noncompliance. But in many cases we have no assurances for exactly when or how this enforcement discretion may be exercised. Regardless, where appropriate, we encourage companies to request such discretion.

Listed below are EPA, Texas Commission on Environmental Quality (“TCEQ”), and Railroad Commission of Texas (“RRC”) resources and notifications related to COVID-19 issued by those agencies to date that we think may be helpful.

U.S. ENVIRONMENTAL PROTECTION AGENCY

COVID-19-related information issued by the EPA can be found [HERE](#).

Specific program guidance issued by the EPA to date includes:

- [Coronavirus and Drinking Water and Wastewater](#)
- [List N: Disinfectants for Use Against SARS-CoV-2](#)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Information on TCEQ’s response to the outbreak of COVID-19 can be found [HERE](#).

TCEQ has already announced an enforcement discretion policy concerning noncompliance related to the outbreak of COVID-19 (coronavirus), establishing an email box to accept requests for such discretion. If your organization may be unable to comply with TCEQ regulations as a result of COVID-19 and/or efforts to slow the spread of the virus, TCEQ has instructed the regulated community to email both OCE@tceq.texas.gov and Ramiro.Garcia@tceq.texas.gov with, at a minimum, the following information:

- 1) A concise statement supporting the request for enforcement discretion,
- 2) The anticipated duration of the need for enforcement discretion, and
- 3) A citation of the rule or permit provision for which the enforcement discretion is requested.

TCEQ intends to provide responses to these requests within 24 to 48 hours. Regulated entities must maintain records to document activities related to the noncompliance for which enforcement

discretion is being requested. These records should include documentation of the regulated entity's best efforts to comply.

Specific program guidance issued by the TCEQ to date includes:

- [Enforcement Discretion for Certain Reporting Requirements](#). As long as Point Source 2019 Emissions Inventories and Mass Emissions Cap and Trade (MECT) and Highly Reactive Volatile Organic Compound Emissions Cap and Trade (HECT) 2019 Annual Compliance Reports are filed by **April 30, 2020**, TCEQ will consider them timely under the COVID-19 pandemic circumstances.
- [COVID-19: Waste Disposal Guidance](#)
- [COVID-19: Public Water Systems](#)

RAILROAD COMMISSION OF TEXAS

Information regarding the RRC's response to COVID-19 can be found [HERE](#).

Specific program guidance issued by the RRC to date includes:

- [Notice to Oil and Gas Operators: Extension of Notification Requirements Under Statewide Rule 32](#) (relating to flaring/venting of produced gas)

If you have questions about your environmental compliance and reporting obligations or how to manage those obligations during the COVID-19 pandemic, please contact one of the Thompson & Knight attorneys with whom you regularly work or one of the attorneys listed below.

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