

Post-COVID-19 Environmental Compliance Checklist

A Lexis Practice Advisor® Practice Note by Heidi B. Friedman, Thompson Hine LLP



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This checklist is intended to assist a company in assessing its environmental compliance status after COVID-19 federal and state limitations are lifted or reduced. It is not meant to be exhaustive, but to provide guidelines to minimize the risk of future enforcement actions based on the state and federal guidance issued by environmental agencies to date. As with everything related to the COVID-19 pandemic, the situation is constantly changing, and this checklist may need to be modified as agencies further clarify expectations and requirements.

Companies undertaking this assessment should also consider reviewing [recent guidance provided by OSHA](#) to help identify risk levels in workplace settings and determine any appropriate control measures to implement as well as state-specific mandates that are likely to address overall COVID-19 best practices to keep employees, consultants and contractors safe and healthy.

Start-up of a closed facility or resuming normal production

Prior to initiating start-up (if facility was closed)

- If the facility provided notice of shut-down to a local or state agency or U.S. EPA voluntarily or based on a state

requirement (e.g., cessation of regulated operations), provide notice of start-up in accordance with applicable requirements.

- Review the facility's environmental permits for any required start-up procedures.
- Verify that available staff can meet applicable compliance requirements (e.g., has required hazardous waste training, etc.).

Upon start-up or resumption of normal production, conduct a compliance assessment (ideally at the direction of the legal department)

This assessment is intended to determine the facility's compliance with all permits, orders and regulatory requirements during shut-down or ramp-down. The list below contains examples of typical requirements but is not meant to be exhaustive.

Air and water

- Was all required sampling, testing or monitoring performed?
- Has necessary equipment (e.g., pollution control devices, oil water separators) been inspected and confirmed to be operational?
- Did the facility comply with necessary record-keeping requirements (in addition to U.S. EPA's COVID-19-specific recordkeeping requirements – see below)?
- Were all required reports submitted (in addition to U.S. EPA's COVID-19-specific reporting requirements – see below)?

- If the facility's air emission source typically exceeds permit limits during start-up, assess the state's "start-up, shutdown, and malfunction" regulations, which may provide relief in certain circumstances.
- Did the facility take any action (e.g., drain tanks, etc.) that would increase the volume or change the type of wastewater generated, which may require additional notifications or approvals?

Hazardous waste

- Is there any hazardous waste accumulated beyond permissible time limits?
- Were hazardous waste storage areas inspected?
- Were all necessary reports submitted and documentation maintained?
- Does the facility anticipate initial increases in hazardous waste generation requiring notice of an episodic generation event?
- Were process units containing hazardous substances out of operation for greater than 90 days?

Spill prevention and control

- Were required inspections conducted and documented?
- Do any new conditions warrant action?
- Was EPCRA reporting completed?
- Were all periodic reports required under administrative or judicial orders and agreements submitted?
- Were permit renewal applications for expired or expiring permits submitted or extensions confirmed?
- Was any required employee training/certification missed?

If noncompliance items are known or identified

Prepare detailed documentation of any noncompliance item in accordance with U.S. EPA and state agency guidance. Ideally, the facility should have prepared documentation at the time of noncompliance, but review documentation for completeness and create or supplement as necessary. Factors to document include:

- Dates of noncompliance.
- Reason for noncompliance (e.g., stay-at-home order, staff reduction to comply with CDC guidelines, sickness (i.e., COVID-19 diagnosis), inability to access data or conduct inspection remotely, disruption in waste disposal service, disruption in laboratory

services, disruption in contractor performance, lack of necessary supplies).

- Process to return to compliance. Note: U.S. EPA's March 26, 2020 memorandum, "[COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program](#)," states that it will not require "catch-up" compliance for missed monitoring or reporting if the interval is less than three months or if late bi-annual or annual monitoring and/or submission should occur. Each state may have its own parameters to consider.
- Lack of impact on human health or the environment (if possible).
- How to prevent noncompliance in a similar situation in the future (if possible).
- Cite applicable portions of U.S. EPA COVID-19 guidance or state COVID-19 guidance.
- Consider voluntary disclosure of noncompliance to U.S. EPA and/or the appropriate state agency (where applicable state policies exist).
- Prepare documentation of return to compliance.
- Consider retraining on area of noncompliance.

CERCLA, RCRA, TSCA or UST sites where work was stopped or postponed

If a notice was provided to U.S. EPA or any state agency about delay or nonperformance, provide a follow-up notice, and if no notice was provided, notify as soon as possible:

- If a force majeure clause was triggered, identify the end of force majeure event or need for an extension.
- Dates of delay or noncompliance.
- Reason for delay or noncompliance (stay-at-home order, safety and availability of work crews, not possible to conduct work when following CDC guidelines, sickness (i.e., COVID-19 diagnosis), close interaction with high-risk groups (i.e., residents), logistical challenges (e.g., transportation, lodging, meals), disruption in waste disposal service, disruption in laboratory services, lack of necessary supplies).
- Describe any missed sampling, reporting, investigation or remediation activities.
- If U.S. EPA or a state agency approved the deferral or postponement, reference agency response.

- Cite U.S. EPA's "[Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19](#)" (if applicable) and any applicable state guidance.
- Plan to return to compliance; consider conducting missed work versus skipping event.
- Lack of "critical" nature of work, i.e., not "mission critical" (if possible).
- Lack of impact on human health and the environment (if possible).
- Consult all applicable orders and decrees for relevant provisions or requirements.
- If noncompliance included work that was not on-site, such as failure to prepare or submit investigation reports, modeling, cleanup documentation, work plans or financial assurance, consider additional reasons for noncompliance as set forth in the "Start-up of a closed facility or resuming normal production" section above.
- As work resumes, confirm that health and safety plans have been modified to address COVID-19 prevention.

If the company is paying a penalty to the Department of Justice (DOJ) under a consent decree

- Were necessary payments made?
- If payments were missed, see the April 14, 2020 memorandum "Debt Collection Activities During the COVID-19 Pandemic" issued by the Environment and Natural Resources Division of the DOJ Environmental Enforcement Section, which confirms that DOJ suspended debt collection through May 31, 2020.
- Determine the ability and time frame to make payments and provide the required notifications to DOJ.

Create a task force to prepare a contingency plan for a future return to stay-at-home or similar circumstances

- This type of proactive action can serve to further mitigate any identified noncompliance.
- Are additional remote compliance options available to maintain compliance during a closure?

- Can back-up contractors be identified?
- Is there an appropriate signature process in place for remote submission of environmental reports and documents?
- Are compliance obligations tracked in a portable and easy to follow format?
- Are remediation obligations tracked in a portable and easy to follow format?

Be prepared for agency actions and alternative enforcement

It is likely that federal and state agencies will return to work in waves and that there may be reduced staff, reduced funding and continued reliance on a work from home format. These circumstances still require companies' continued vigilance for risk mitigation. Short-term agency enforcement may be supported by:

- Written agency information requests.
- Informal letters seeking information or support related to potential noncompliance.
- Phone calls from regulators seeking information related to employee complaints or potential noncompliance.

A company's initial response to any of these inquiries sets the foundation for potential mitigation and/or penalties, so information must be provided in a strategic, thoughtful manner in accordance with applicable COVID-19 policies (if COVID-related).

A reduced agency response can also lead to increased risk and liability through citizen suits or litigation by residents in the area of a facility. Assess the value of proactive notifications/communications to all stakeholders for any COVID-19-related noncompliance.

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