

The Environmental Impact of a Suspension or Shut Down in Operations

By Brett D. Heinrich and Dana B. Mehlman

March 26, 2020

If you are operating in a state where your governor has issued a stay at home order (NY, NJ, CT, CA, PA, IL, OH, MI, LA, DE, KY, WI)¹ and you have been forced to suspend or shutdown some or all of your operations, it is critical that you are aware of the proper procedures to avoid costly environmental violations.

Each state has specific requirements that apply to different types of businesses, so it is essential to know what the specific order mandates for states in which you have facilities. Here is a short but essential checklist to guide you in your decision making and action, regardless of your jurisdiction:

- 1. CHECK YOUR PERMITS:** Although this may seem obvious, it is surprising how many manufacturers do not follow the specific guidelines. Your permit may contain specific instructions including procedures on how to shut down your operations or descriptions of which processes must be followed if you suspend or shut down operations.
- 2. AIR PERMITS:** For each state that has a State Implementation Plan (SIP) meeting the requirements of the Clean Air Act (CAA), there are specific startup, shutdown, and malfunction (SSM) provisions. Under the CAA, exemptions from emission limits during SSM periods are considered violations, however, some United States Environmental Protection Agency (U.S. EPA) regions have allowed states more latitude in deciding how to handle SSM events. Does your air permit have a shut down, start-up directive? If not, check the applicable regulations and contact counsel. There has been a significant amount of litigation and confusion about the start-up, shut down regulations on the federal and state levels. This is an area where precision is important.
- 3. HAZARDOUS WASTE:** Do you need to dispose of hazardous waste during a suspension of operations? Are you at risk of violating the 90-day rule if your operations do not resume within a short period of time? Are your drums of hazardous waste properly labeled, covered and stored? Oftentimes the dates and sequencing for hazardous waste can be confusing if you generate multiple streams and quantities of hazardous waste. This is especially true if you are considering comingling wastes for expedited disposal during an emergency shut down scenario. Even in situations where a compliance deadline may seem in the distant future, disruptions to operations and limited availability of personnel for an undetermined amount of time will present challenges, if you are not properly prepared.
- 4. CLEAN WATER ACT:** Are you at risk of fouling your waste water treatment plant operations by prolonged inactivity or have you determined that your waste water operations must continue during this worldwide pandemic? Either way you will be forced to make some tough decisions. According to the U.S. EPA, over 25% of the U.S. industrial dischargers and/or waste water treatment plants are out of compliance. If your operations run close to the compliance edge, you need to be extra diligent. Once operations have resumed, do you run the risk of sending a slug load to the local waste water treatment plant? What activities can you do now to avoid a future violation?
- 5. EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW (EPCRA):** EPCRA requires that by July 1 of each year, companies in the manufacturing, mining, and electricity generation industries submit an annual report as part of the Toxics Release Inventory (TRI). As of this writing, there has been no word from the U.S. EPA that they will grant an extension to the upcoming EPCRA reporting deadline. Will you have access to information and the proper workforce in

¹ As of March 24, 2020. Please note, this is continually changing. Please check on the states in which you are operating.

place in order to meet this deadline or is a request for an extension appropriate?

U.S. EPA ACTIONS: In many situations, federal and state regulatory agencies have the discretion to approve extensions, waivers, and exemptions that have the potential to provide relief and flexibility to facilitate compliance in times of emergency. Disasters in the past, such as 9/11 and hurricanes Katrina and Harvey, have prompted federal and state environmental regulators to lift requirements to help businesses contribute to response efforts, however, to date, at the federal level none have been modified and no environmental policies have been announced in the wake of the COVID-19 crisis. To date, the U.S. EPA has not said a great deal in response to questions about what it is planning and how it may respond to industry requests.

Over the next several weeks, Vedder Price (VP) will be monitoring the U.S. EPA website and other sources of information constantly. If a significant development arises, we will issue an additional Environmental Alert.

Armed with this information and increased awareness, manufacturers can put themselves in the best possible position to weather this storm and resume operations without a significant risk of violating the applicable environmental rules and regulations.

VP has a full-service environmental practice that can assist companies with every aspect of environmental compliance. VP can also assist your company with crisis management planning and execution. Visit our [Coronavirus Task Force Page](#) for additional information about how you and your colleagues can address the multitude of transactional, regulatory, litigation, and employee relations issues that you are facing as a result of this public health crisis.

If you have any questions regarding the topics discussed in this article, please contact **Brett D. Heinrich** at +1 (312) 609 7799 , **Dana B. Mehlman** at +1 (312) 609 7509 or any Vedder Price attorney with whom you have worked.

vedderprice.com