

ALERT

EPA Publishes Enforcement Discretion Policy During COVID-19 Pandemic

March 27, 2020

Yesterday, on March 26, the U.S. Environmental Protection Agency (EPA) announced a *temporary* enforcement discretion policy for civil violations of federal environmental protection laws during the COVID-19 pandemic. EPA correctly recognizes that the health crisis may make it difficult or impossible for businesses to maintain staffing levels necessary to timely complete some obligations under the environmental laws.

The temporary policy is effective as of March 13, 2020.¹ To qualify for enforcement discretion, noncompliance must: (1) occur between March 13, 2020 and the termination of the policy; (2) result from the COVID-19 pandemic; and (3) fit within one of several categories identified in the guidance. Those categories are:

- Routine Compliance Monitoring and Reporting;
- Compliance with Settlement Agreements/Consent Decrees;
- Facility Operations;
- SDWA Regulated Public Water Systems; and
- Critical Infrastructure

In all cases, the regulated entity must act responsibly to minimize the effects and duration of noncompliance, document the nature of the noncompliance, and be prepared to explain why COVID-19 was the cause of the noncompliance. EPA's self-disclosure program also remains available to companies during this time.

Routine Compliance Monitoring and Reporting

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Practice Areas

Environment & Product Regulation

EPA's temporary policy provides enforcement discretion when "routine" acts of compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification cannot be performed due to the COVID-19 pandemic. These types of requirements may be part of a company's compliance obligations under the Federal Insecticide, Fungicide, and Rodenticide Act, the Toxic Substances Control Act, the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right to Know Act, the Formaldehyde Emission Standards for Composite Wood Products, and various other programs.

EPA is clear that it expects companies to continue to comply with regulatory requirements during this time, but the Agency states that it will not seek penalties for routine compliance violations caused by COVID-19. In those situations, entities should report the inability to comply with the routine compliance monitoring and reporting categories addressed in the policy using existing procedures to report noncompliance, under an applicable permit, regulation, or statute. If there is no existing mechanism to report, an entity should document the noncompliance and be prepared to provide that documentation to EPA or other applicable authority upon request.

EPA describes the steps that companies should take to qualify for enforcement discretion as follows:

1. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
2. Identify the specific nature and dates of the noncompliance;
3. 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;
4. Return to compliance as soon as possible; and
5. Document the information, action, or condition specified in a. through d.

As these factors indicate, to be eligible for enforcement discretion, facilities will need to document decisions made to prevent or mitigate noncompliance and demonstrate how the noncompliance was caused by the COVID-19 pandemic. EPA expects regulated facilities to return to compliance as quickly as possible.

Settlement Agreements and Consent Decrees

Parties to *settlement agreements* who anticipate missing a milestone should use the notice procedures set forth in the settlement, including notification for a force majeure, if applicable. The notification should explain why COVID-19 will affect the party's ability to complete a milestone and the steps taken to minimize the effects and duration of any noncompliance. EPA assures parties that it will not seek penalties if the settlement agreement involves reporting that fits with the scope of "routine compliance monitoring" as discussed above. For all other activities required under a settlement agreement, EPA staff will review these notifications and may contact a party to seek adjustments to a proposed plan of action, pursuant to the agreement.

Because *consent decrees* are not only agreements with EPA and the U.S. Department of Justice (DOJ) but also court orders, EPA says it will coordinate with DOJ and co-plaintiffs, if any, to exercise enforcement discretion for the list of routine compliance obligations. A party should use the notice provisions set forth in the consent decree, including notification of a force majeure, if applicable, for any potential noncompliance caused by COVID-19. Because courts retain jurisdiction over consent decrees and may exercise their own authority, you should closely coordinate with your legal advisors.

In general, notices of potential noncompliance under a settlement agreement or a consent decree should contain a plan of action that the notifying party should adhere to while it waits to be contacted by EPA or DOJ.

Hazardous Waste

The temporary policy addresses generators of hazardous waste that are unable to transfer waste offsite within the time periods required under RCRA to maintain their generator status due to disruptions caused by the COVID-19 pandemic. These facilities should continue to properly label and store such waste and take the steps identified to document their eligibility under this policy described above. If these steps are taken, EPA will treat such entities as hazardous waste generators, and not as treatment, storage, and disposal facilities. In addition, as an exercise of enforcement discretion, the EPA will allow Very Small Quantity Generators and Small Quantity Generators to retain that status, even if the amount of hazardous waste stored onsite exceeds a regulatory volume threshold due to the generator's inability to ship waste offsite due to the COVID-19 pandemic.

Critical Infrastructure

The guidance defines essential critical facilities as those that employ essential critical infrastructure workers as determined by the Cybersecurity and Infrastructure Security Agency (CISA). Critical Facilities may obtain short-term No Action Assurances, with conditions, if EPA determines such an assurance to be in the public interest. More information on CISA's criticality determinations is available [here](#).

What the Policy Does Not Cover

There are several areas for which enforcement discretion is not provided by yesterday's announcement:

- The temporary policy does not apply to **imports**. EPA specifically identifies pesticide products entering the United States, or produced, manufactured, or distributed in the United States, that claim to address COVID-19 impacts as subject to enforcement, and thus close attention can be expected to apply. EPA states that it "expects to focus on ensuring compliance with requirements applicable to these products to ensure protection of public health."
- Companies are not relieved from the responsibility to prevent, respond to, or report **accidental releases** of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by federal law.

- Similarly, facilities are expected to immediately contact the appropriate implementing authority (EPA region, authorized state, or tribe) if: (1) facility operations impacted by the COVID-19 pandemic may create **an acute risk or an imminent threat** to human health or the environment; or (2) if a facility suffers from **failure** of air emission control or wastewater or waste treatment systems or other facility equipment that **may result in exceedances of enforceable limitations on emissions to air or discharges to water, or land disposal, or other unauthorized releases**. EPA expects that actions will be taken in these cases to minimize or prevent an acute or imminent threat to health or the environment from the COVID-19-caused noncompliance.
- The Agency says that it expects soon to issue separate enforcement policy guidance for **Superfund or RCRA Corrective Actions**. Compliance with these requirements is **not affected** by yesterday's announcement.
- EPA identifies the continued operation of drinking water systems to be the highest priority and states that it "has heightened expectations for public water systems" to continue normal operations and maintenance as well as required sampling.
- EPA's policy affirms that states or tribes may take a different approach under their own authorities. Therefore, coordination in cases of shared or separate jurisdiction will be needed.
- It is also important for companies to be mindful that EPA draws a very clear line with this policy on signature and electronic reporting requirements: if a submission to the EPA requires a "wet" signature of a responsible official, the EPA will accept a digital or other electronic signature and companies are strongly urged to use electronic reporting if paper mailings are normally provided. The mere inability to obtain a "wet" signature will not be considered a justification for failure to make a paper submission or certification.
- Finally, the policy does not apply to any conduct that EPA deems to be an intentional disregard for the law. If EPA suspects intentional conduct, the matter will be referred to the Criminal Investigative Division as usual.

Conclusion

EPA's temporary policy is a commonsense framework to help ensure that regulated entities can focus on minimizing the environmental impacts of the COVID-19 pandemic rather than satisfying certain regulatory obligations, where achieving both is not possible. Before deviating from standard operating procedures, regulated entities must be confident that they fit within one of the categories outlined in the policy document. They must also follow the specific requirements for that category, as well as the general requirement that noncompliance be minimized and well-documented.

Wiley is Working

Wiley is telecommuting and available for you in this challenging time to field your questions and to address your eligibility under this policy. Please do not hesitate to contact us for assistance.

[1] EPA will continually reassess whether the policy is appropriate, but the agency will post a notice on its website seven days in advance of terminating the policy.

Visit our COVID-19 Resource Center