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EPA Issues New Temporary COVID-19 Relaxed Enforcement Policy That Could Affect State Enforcement

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On March 26, 2020, the U.S. Environmental Protection Agency (EPA or Agency) sent a Memorandum to all governmental and private sector partners titled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program.” The temporary policy provides for enforcement flexibility for a variety of compliance obligations arising under air, water discharge permits, safe drinking water certification programs, and hazardous waste handling requirements where those compliance responsibilities may be impeded due to social distancing, lockdown and related requirements in response to COVID-19.

The policy provides that states that have been authorized by EPA to assume primary enforcement responsibility for specific federal regulatory programs are free to “take a different approach under their own authorities” and contains several other references to state and local enforcement and obligations, but leaves open whether EPA intends to apply the policy so as to limit state enforcement in some cases. It remains to be seen, for example, whether EPA will apply the phrase “under their own authorities” to include federal programs that states are individually authorized to enforce or programs that EPA has approved to operate in lieu of their federal counterparts—as opposed to those independent state programs that go beyond federal regulations. In short, the implications of how the policy may affect state or local regulatory programs are uncertain at this time and no doubt will be the subject of ongoing discussion and debate.

Basic elements of policy. According to the policy, EPA intends to exercise its enforcement discretion to excuse penalties arising from an entity’s failure to comply with reporting, testing, recordkeeping, and training requirements, as well as limits and prohibitions on environmental releases or discharges, provided that documentation is maintained by the regulated entity. Documentation should contain a detailed list of each non-compliance event and demonstrate that (1) compliance was not reasonably practicable due to difficulties presented by a COVID-19 prevention measure, (2) responsible measures were taken to minimize the effects and duration of non-compliance, and (3) the entity employed its “best efforts” to return to compliance as soon as possible. In cases of non-compliance with routine compliance monitoring and reporting requirements, the entity is required to report the non-compliance to EPA in conformance with existing regulatory requirements or, where no self-reporting requirement applies, to maintain the foregoing documentation and provide it to EPA upon request. EPA will not require entities to “catch up” with missed compliance requirements that are required to be reported less frequently than quarterly. In cases in which the non-compliance involves a potential for acute risk or imminent threat, the entity is “strongly encouraged” to consult with EPA, including in instances where the matter falls under the auspices of an authorized state enforcement program. In addition,

exceedences of permitted limits or other unauthorized discharges must be reported to EPA "as quickly as possible." Similar requirements apply to reporting obligations arising under EPA consent orders and settlement agreements.

Acute risk or imminent threat. Where "facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment," the policy provides guidance on actions that both the regulated entity and EPA should take. EPA makes clear that facilities whose operations present an acute risk or an imminent threat to human health or the environment will not be immune from future compliance action. In such cases, the policy states that "EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate."

The acute risk/imminent threat portion of the policy raises questions as to how EPA intends to apply it in various settings, including in the context of authorized state enforcement of federal regulations and state programs that EPA has approved to apply in lieu of federal regulations. Due to the policy's ambiguity in how it will apply to authorized states and approved state regulatory programs, it is unclear, for example, whether EPA intends to override state enforcement of federal (or equivalent state) requirements in cases involving air emissions, water discharges or other releases of toxic or acutely toxic pollutants or hazardous substances in quantities or concentrations that present an acute or imminent risk. In such cases, the policy directs the responsible entity operating the facility to contact EPA or the state, depending on which agency has primary enforcement responsibility. If the entity notifies the state, the policy "strongly encourages" the state to consult with its corresponding EPA regional office; EPA will inform the state if the notice is made directly to EPA. EPA will then consult with the state in accordance with EPA's July 11, 2019 memorandum on Enhancing Effective Partnerships Between EPA and States in Civil Enforcement and Compliance Assurance Work (State Enforcement Memo), available here. Among other things, EPA outlines its default position in the State Enforcement Memo— that it would generally defer to states in cases of "emergency situations or situations where there is a substantial risk to human health or the environment," but depending on the circumstances may take direct action or action to supplement state enforcement resources.

Public water systems. The policy singles out public water system certification requirements as an exception to its benefits, explaining that "[p]ublic water systems have a heightened responsibility to protect public health because unsafe drinking water can lead to serious illnesses and access to clean water for drinking and handwashing is critical during the COVID-19 pandemic." For all public water providers, EPA said it expects: (1) continuation of normal operations, (2) continued water sampling, and (3) timely laboratory analysis of samples. Where these operations are affected by an employee shortage, the policy notes that a public water system may need to prioritize compliance. In such a case, EPA will rank the following in order of importance: (1) monitoring required under National Primary Drinking Water Regulations to protect against microbial pathogens; (2) nitrate/nitrite monitoring; (3) lead monitoring; and (4) copper monitoring. EPA said it encourages the States—the primary enforcer on drinking water issues—to adopt priorities similar to those outlined by EPA.

Policy period. The policy will apply retroactively to begin on March 13, 2020, and to "actions or omissions that occur while this policy is in effect even after the policy terminates." EPA has not set an end date for the policy but will publish a notice at least seven days in advance of its termination.

Effects of dual federal regulation. EPA notes in the policy that it will "undertake to coordinate with other federal agencies in situations where EPA shares jurisdiction over a regulated entity's environmental compliance obligations." These agencies include the U.S. Department of Justice, the U.S. Army Corps of Engineers, and the U.S. Coast Guard, among others.

Documentation requirements. Documentation regarding the "specific nature" and dates of noncompliance should be detailed, including, at a minimum, the specific location, media, violation,

date, and time of the noncompliance. Merely identifying “COVID-19” as the source of noncompliance is insufficient—entities should describe in as much detail the specific COVID-19 obstacles that led to the non-compliance.

The policy states that entities should use their best judgment regarding the health and safety of their workers and complying with EPA’s requirements that may put workers at risk during the period of COVID-19 pandemic threats. During this time, EPA will accept electronic signatures, in place of “wet” signatures, where typically required.

Not covered. EPA identifies specific enforcement mechanisms that are not covered by the policy. Where the policy is silent, the typical regulation, statute, guidance, or permit limits apply. EPA specifically notes that the policy does not apply—meaning it is business as usual—for the following: (1) criminal violations; (2) conditions of probation in criminal sentences; (3) activities carried out under Superfund and Resource Conservation and Recovery Act (RCRA) Corrective Action enforcement instruments; (4) reporting of accidental releases; (5) imports, particularly pesticide products regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); and (6) online training requirements. The policy notes, however, that additional guidance will be forthcoming on activities carried out under Superfund and RCRA Corrective Action enforcement instruments.

Settlement agreements. EPA advises that parties subject to administrative settlement agreements with EPA should use the notification procedures included in the agreement to advise of noncompliance due to the pandemic, stating that it “will generally not seek stipulated or other penalties for noncompliance” for testing and reporting requirements. Regarding late submission of reporting requirements, the Agency will not require entities to “catch up” with missed reports, when the agreement requires reporting less frequently than quarterly.

This guidance does not automatically apply to consent decrees with the Department of Justice, but EPA advises that it will work with the Department to make adjustments. Even so, such modifications are subject to court approval. However, parties should follow the notification procedures for contingencies that are set forth in the consent decree, *i.e.* force majeure.

Unauthorized releases: For unauthorized air or wastewater discharges, or emissions/discharges in exceedance of a permit, an entity should “notify the implementing authority . . . as quickly as possible.” The documentation should be detailed and include: (1) information on the pollutants, (2) the expected versus actual emissions, and (3) duration of the release. Further, the entity should include how the COVID-19 pandemic caused or contributed to the release.

EPA will not change a party’s status in cases where the pandemic leads to an inability to transfer off-site. For operations subject the Resource Conservation and Recovery Act, EPA will not convert a parties’ typical designation (*i.e.,* generator or small quantity generator) because of additional waste that it stored on site during the time period of the policy, so long as the generator stored the waste on site due to an inability to transfer the waste off-site and it properly labels and stores the waste. Similarly, where facilities are unable to transfer animals off-site, that facility will not become a confined animal feeding operation (CAFO) and be subject to the associated regulations.