

EPA Issues Temporary COVID-19 Relaxed Enforcement Policy

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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.

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.

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 regulation. EPA notes in the policy that states and tribes authorized to assume primary enforcement responsibility for certain federal programs may take a different approach under “their own enforcement authorities.” In addition, the policy states that EPA will coordinate with other federal agencies in situations where the Agency shares jurisdiction over a regulated entity’s environmental compliance obligations. Other federal agencies or department that share

enforcement responsibilities with EPA 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.

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 actions—“EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.”

For programs that are run by a state or tribe, EPA will follow its prior guidance, available [here](#).

For programs run directly by EPA, EPA will, at the regional level, “evaluate whether an applicable permit, statutory, or regulatory provision addresses the situation.” Where no such permit, statutory, or regulatory provision addresses the situation, EPA will work directly with the facility to “minimize or prevent the acute or imminent threat to health or the environment.”

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 RCRA, 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.

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.