

ENVIRONMENTAL ENFORCEMENT DURING THE COVID-19 PANDEMIC

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I. Introduction

The COVID-19 pandemic has led to rapid-fire legislative, executive, and regulatory responses in the United States. One notable example is the Environmental Protection Agency’s [temporary policy](#) of nonenforcement of certain “routine” environmental monitoring and reporting obligations. Issued March 26, 2020, but retroactively effective to March 13, the policy identifies violations for which EPA does not plan to seek penalties, and a broader commitment to consider a totality of circumstances—including the COVID-19 pandemic—in determining whether enforcement action is appropriate in other scenarios. The policy is not industry specific and does not have an explicit end date. Its broad applicability makes it likely to affect a wide range of businesses, including oil and gas, mining, renewable energy, water, and transportation.

II. Key Elements of the Policy

A. No Enforcement of Routine Monitoring and Reporting Violations

Recognizing the compliance challenges that regulated entities will encounter during the COVID-19 pandemic, the policy identifies two categories of obligations for which it does not plan to seek penalties for noncompliance (provided entities act in accordance with the policy).

The first category is “routine” monitoring and reporting, including compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. Regulated entities should continue to use existing procedures (such as pursuant to an applicable permit, regulation, or statute) to report noncompliance with these routine activities. But if reporting is not reasonably practicable for COVID-19 related reasons, regulated entities instead should maintain reporting information internally and be prepared to share it with EPA or other regulators upon request. As long as such information is made available and EPA agrees that the noncompliance was due to COVID-19, EPA does not plan to seek penalties for such violations. When the policy is terminated—which can happen on seven days’ notice—EPA expects regulated entities to return to full compliance.

The second category covers reporting and milestones pursuant to settlement agreements and consent decrees. If, as a result of COVID-19, parties anticipate missing enforceable milestones set forth in EPA administrative settlement agreements, those parties should utilize those agreements’ applicable notice procedures. Judicial consent decrees, by contrast, are court orders, meaning courts retain ultimate jurisdiction over their implementation. But EPA staff will coordinate with the Department of Justice to exercise enforcement discretion with regard to stipulated penalties and other consent-decree remedies for violations of compliance obligations. Notably, both types of documents contain force majeure provisions that should be considered and invoked as appropriate.

B. Flexible Approach to Enforcement Against Facility Operators and Public Water Systems

EPA's policy also reflects a commitment to consider a totality of circumstances—including the COVID-19 pandemic—in determining whether enforcement action is appropriate with respect to facility operations and public water systems.

The policy reiterates EPA's expectation that all regulated entities manage and operate their facilities in a manner that is safe and protects the public and the environment. That is, EPA is not authorizing the regulated community to pollute or violate environmental laws and permits. But where violations are due to COVID-19—for example, disruptions resulting in failures of a facility's air-emissions controls or wastewater systems, or that prevent transfer of hazardous waste off-site within statutory time periods—the policy makes clear that EPA will consider those challenges when determining whether to take enforcement action.

The policy applies a similarly flexible approach to public water system operators regulated under the Safe Drinking Water Act. Clean and safe drinking water, of course, is always important. But it is essential during the pandemic, both to prevent serious illness and to guarantee an adequate supply for drinking and handwashing. EPA thus expects public water systems to continue normal operations, maintenance, and other activities to ensure the safety of drinking water. Recognizing, however, COVID-19's potential impact on both operational and laboratory workforces, EPA's policy identifies tiers of compliance monitoring, and also encourages operators and laboratories to consult with EPA regarding any issues they are encountering.

C. Possible "No Action Assurance" for Critical Infrastructure

For facilities designated as critical infrastructure by the federal Cybersecurity and Infrastructure Security Agency (and thus exempt from most COVID-19 shelter-in-place orders), EPA's policy says it will consider, on a case-by-case basis, a tailored, short-term "No Action Assurance" letter with conditions to protect the public.

III. Limitations of Temporary Policy

Despite its breadth, EPA's policy does not provide a full reprieve from enforcement. Notably, it does not suspend citizen suits, which provide an avenue for citizens or groups to compel compliance in the absence of agency enforcement. Such filings have become more frequent, and regulated entities should proceed with caution in this time of suspended federal enforcement. And it is important to note that states, local governments, and tribes with independent authority may continue to take enforcement action on environmental matters.

In addition, EPA's policy does not apply to criminal violations, conditions of probation, Superfund activities, Resource Conservation and Recovery Act (RCRA) corrective actions, imports (e.g., pesticide products), ongoing enforcement matters, requirements relating to accidental releases, or obligations under settlement agreements and consent decrees (other than as discussed above).

In all cases, the enforcement discretion set forth in the policy is conditioned on a regulated entity making every effort to comply with its environmental obligations. Where compliance is not possible due to COVID-19, companies must document the nature of the noncompliance, how COVID-19 caused it, and their efforts both to comply and minimize the impact of any noncompliance.

IV. Forecasts

We anticipate further federal and state guidance on environmental compliance during the COVID-19 pandemic. For example, EPA is expected to issue specific guidance for CERCLA and RCRA compliance (which is not covered under the new policy). Regulated entities should continue to closely monitor these quickly evolving enforcement guidelines. EPA's policy is not a license to violate environmental laws or avoid permit requirements. Even where environmental compliance and enforcement has been expressly relaxed, companies should be aware of the temporary—and unprecedented—nature of the guidelines, make reasonable efforts to comply, and carefully document any instances of unavoidable noncompliance.