

Temporary Federal Enforcement Discretion Policy to Respond to COVID-19

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The United States Environmental Protection Agency (“EPA”) released a memorandum on Thursday, March 26, 2020, addressing the impacts of the COVID-19 pandemic on the agency’s Enforcement and Compliance Assistance Program. The temporary policy is intended to relax regulatory consequences for most forms of noncompliance that are unavoidable due to COVID-19 related workforce shortages, social distancing requirements, and other limitations.

EPA’s temporary policy provides a general grant of enforcement discretion to forego penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations. This discretion is applicable to obligations created under permits, regulatory requirements, or administrative settlement agreements where EPA agrees that the noncompliance is due to COVID-19. EPA does not have unilateral discretion over enforcement of consent decrees, but will coordinate with the Department of Justice to exercise enforcement discretion pursuant to the policy in appropriate cases.

When compliance is not reasonably practicable, EPA advises that facilities should:

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.

In general, documentation of this information is required for EPA to consider the application of the temporary policy. Such documentation should be provided to EPA through the channels outlined in the applicable regulation, permit, or settlement agreement, or maintained internally if no such procedure applies or if communication becomes impractical due to COVID-19 to be made available to regulators upon request.

The temporary policy emphasizes that every effort should be made to comply with environmental compliance obligations during the pandemic and to return to full compliance when the policy is no longer in effect. EPA does not intend to seek “catch-up” monitoring reports from facilities for requirements that apply to intervals of less than three months, but facilities may be required to conduct late monitoring and reporting for bi-annual or annual reporting obligations.

Notably, there are several caveats and addendums to the temporary policy. The policy does not apply to any criminal violations, activities conducted under Superfund and RCRA Corrective Action enforcement actions, or import activity. The general grant of enforcement discretion is also extended to certain noncompliance due to the inability of hazardous waste generators and animal feeding operations to transport waste due to COVID-19.

The policy memorandum also includes heightened responsibility provisions for public water systems due to the critical need for safe drinking water during the public health emergency. EPA is dedicated to providing resources to assist public drinking water facilities facing staffing shortages and other challenges, and emphasizes the priority of monitoring for the National Primary Drinking Water Regulations as the highest tier of compliance monitoring to maintain safe drinking water.

EPA’s expectation is that agency resources will be focused on situations with the potential to create an imminent threat to the public for the duration of the COVID-19 exigency. Regulated entities are asked to contact the appropriate implementing authority if a facility’s operations are impacted by COVID-19 so as to create a potential acute risk to human health or the environment.

Should your business have any environmental compliance obligations that may be impacted by COVID-19, Nexsen Pruet’s Environmental Attorneys stand ready to provide any guidance you require.

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