

Environmental Alert: EPA's Temporary Policy – COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program

April 1, 2020

<https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

On March 26, 2020, the U.S. Environmental Protection Agency (EPA) released a temporary policy in response to the unprecedented COVID-19 pandemic. This temporary policy describes how EPA intends to use enforcement discretion for most types of environmental noncompliance resulting from the COVID-19 pandemic. The policy applies retroactively to March 13, 2020 and will continue indefinitely, with the EPA providing seven days' notice prior to terminating the policy.

The EPA's temporary policy addresses various types of environmental violations differently but stresses that entities should continue to make every effort to comply with their environmental obligations. With respect to civil violations, the temporary policy holds that if compliance "is not reasonably practicable" due to worker shortages or other difficulties resulting from the COVID-19 pandemic, 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 1 through 4.

For routine compliance monitoring and reporting, the EPA encourages facilities to use approved electronic reporting submissions, or to make submissions by e-mail, and to use existing procedures to report noncompliance with routine activities. Nonetheless, EPA also notes that it "does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request."

Administrative settlements and consent decrees for environmental obligations typically contain force majeure clauses and EPA notes in the temporary policy that those force majeure procedures should be followed. Those force majeure clauses vary some but generally require that preliminary notice be given within two to seven days of the force majeure event with follow up written explanation in 14 to 20 days with all supporting information. Arguably the force majeure clauses require notice from the event that "may" or "might" cause the delay, not from the date of the delay itself. Lathrop GPM has already successfully assisted several clients in giving notice to EPA of force majeure noncompliance caused by COVID-19.

The temporary policy further emphasizes that the EPA "expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment." If any 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 . . . or other unauthorized releases, the facility should notify the implementing authority" as quickly as possible. Moreover, if facility operations impacted by the COVID-19 pandemic "create an acute risk or an imminent threat to human health or the environment," a facility must also contact the implementing authority. EPA will work with relevant authorities to "minimize or prevent the acute or imminent threat to health or the environment from the COVID-19-caused noncompliance" and will "consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate."

The temporary policy specifically calls out generators of hazardous waste and animal feeding operations. For both of these types of facilities, if disruptions occur caused by the COVID-19 pandemic that prevent the facility from transferring the waste or animals off-site within the required regulatory time periods, the EPA will maintain the facilities' current statuses (e.g. a hazardous waste generator may not become a treatment, storage and disposal facility and small quantity generators may maintain that status; similarly, animal feeding operations may not change status as a result of being unable to transfer animals off site).

Furthermore, the temporary policy maintains stringent measures for public water systems. The EPA expects that operators of such systems will continue normal operations and maintenance as well as required sampling, and that laboratories performing analysis for water systems will continue to provide timely analysis of samples and results to ensure the safety of our drinking water supplies. Nevertheless, even for public water systems, the EPA will consider the circumstances, including the COVID-19 pandemic, when determining whether any enforcement response is appropriate.

Finally, the EPA's temporary policy generally does not apply to criminal penalties for knowing conduct that violates the law. The EPA notes its "Criminal Investigative Division remains vigilant and is prepared to pursue violators...."



Contrary to some press reports between March 26 and March 30 responding to the temporary policy, the temporary policy does not mean EPA is ceasing enforcement or that no reporting is required on the part of the regulated community. In a statement issued on March 30, 2020, the EPA reiterated that it "expects regulated facilities to comply with regulatory requirements, where reasonably practicable, and to return to compliance as quickly as possible, once the COVID-19 threat is over." In fact, on the same day the temporary enforcement policy was issued, EPA Region 10, with EPA headquarters approval, issued two Unilateral Administrative Orders (UAOs) to three PRPs.

State governments and federal congressional leaders have had mixed and largely political reactions to the EPA's temporary policy. Some states — such as New York, Maryland, and California — have pledged to continue standard enforcement practices despite the EPA policy. Other states — such as Washington, Oklahoma, Pennsylvania, and Louisiana — have largely aligned their practices with the EPA's temporary policy, prioritizing enforcement actions critical to public health and safety and recognizing that the COVID-19 pandemic could make it more difficult for facilities to comply. On March 31, eight federal congressional representatives sent a letter to EPA characterizing the temporary policy as "unprecedented and dangerous" and "granting polluting industries a free pass to contaminate our air and water."

The temporary policy states that further guidance will be forthcoming covering Superfund and RCRA. The policy also notes that it does not preclude the necessity of accidental release reporting obligations such as for spills of hazardous materials. Finally, the policy is silent on the issue of citizen suits. It is unclear how environmental noncompliance caused by COVID-19 might be utilized by citizen suit plaintiffs in future private party litigation.

There are numerous environmental issues and obligations that may be affected by the COVID-19 pandemic. Companies that violate their environmental obligations as a result of the pandemic may have some relief through the EPA's temporary enforcement policy. However, the policy is a temporary and discretionary policy, and EPA is not stopping all enforcement. Companies should work closely with their legal advisors to maintain compliance with environmental obligations, or where necessary to document noncompliance caused by COVID-19.

If you have any questions regarding this alert, please contact Bill Ford, Sara Oishi, or your Lathrop GPM attorney.