

US EPA Issues Temporary Enforcement Policy in Wake of COVID-19

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On March 26, 2020, US EPA issued a memorandum¹ announcing a temporary policy to address potential noncompliance with environmental legal obligations resulting from the COVID-19 pandemic, in lieu of otherwise applicable EPA enforcement response policies. The temporary policy applies retroactively to actions or omissions that occur from March 13, 2020 and until the policy terminates. US EPA will notify the public at least seven days prior to terminating the policy.

US EPA has made it clear that regulated entities are still expected to make every effort to comply with all environmental compliance obligations. However, the policy generally states that the agency will exercise enforcement discretion in instances of noncompliance caused by COVID-19 (e.g. due to decreased staffing levels or laboratories inability to timely analyze samples) and sets forth how that discretion will differ depending on the type of noncompliance at issue. The policy also sets forth how US EPA intends to use its enforcement discretion for various types of anticipated civil violations that may be caused by the COVID-19 pandemic, including violations relating to:

- routine compliance monitoring and reporting by regulated entities;
- settlement agreement and consent decree reporting obligations and milestones, including administrative settlement agreements and consent decrees entered into with EPA and the Department of Justice (DOJ); and,
- facility operations.

The US EPA memorandum further discusses specific, heightened expectations for public water systems regulated by the Safe Drinking Water Act and for facilities that are essential critical infrastructure.

The policy includes several carve-outs. It specifically does not apply to criminal violations or conditions of probation in criminal sentences, activities carried out under Superfund and RCRA Corrective Action enforcement instruments, or imports such as pesticide products entering the U.S. And the policy does not alter any provision of a statute or regulation that contains legally binding requirements, as the policy itself is not a regulation and states are thus free to take different approaches. Lastly, the policy sets forth heightened expectations for compliance from public water systems operating pursuant to the Safe Drinking Water Act.

¹ U.S. EPA, Memorandum, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program, March 26, 2020, available at <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf> (accessed April 16, 2020).

US EPA's policy does not apply to states with delegated programs. Rather, it covers only noncompliance associated with federally-issued permits, statutes, and regulations. However, many states have developed their own enforcement discretion policies for noncompliance due to COVID-19 conditions. For example, Ohio EPA issued guidance recognizing that regulated entities may be impacted by a reduction of the workforce necessary to maintain normal operations at some facilities.²

Importantly, US EPA makes clear that this temporary policy is not a guarantee that it will refrain from taking enforcement action in any particular instance of noncompliance. The policy provides guidance to regulated entities for the general manner in which US EPA intends to exercise its enforcement discretion and instructs entities to use existing procedures to report noncompliance with routine activities. Thus, entities that anticipate potential disruptions to operations as a result of COVID-19 should proactively review and assess this policy in the context of a particular noncompliance situation and thoroughly document specific causes of noncompliance and all efforts to return to being in compliance. Additionally, entities should review any state-specific guidance issued by the states where they operate.

² Ohio EPA, Coronavirus (COVID-19) Response, Questions, and Guidance, *available at* <https://www.epa.state.oh.us/covid19> (accessed April 16, 2020).