



CRISIS PRACTICE

Coronavirus

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EPA Temporary Enforcement Guidance for COVID-19 Pandemic

OVERVIEW

On March 26, 2020, the U.S. Environmental Protection Agency (“EPA”) issued guidance on the agency’s temporary policy for enforcement of environmental legal obligations during the COVID-19 pandemic.¹

Under the temporary policy, EPA will exercise enforcement discretion over certain noncompliant civil actions conditioned on regulated entities making every effort to comply with environmental obligations. Further, EPA may consider tailored No Action Assurances for facilities that are essential critical infrastructure on a case-by-case basis. The temporary policy will apply retroactively beginning on March 13, 2020 and EPA will provide notification at least seven days prior to terminating the policy.

EPA recognized under the temporary policy that COVID-19 may impact the ability of regulated entities to carry out federal environmental requirements, including compliance with (1) permits, regulations, and statutes; (2) obligations established by settlements and consent decrees; and (3) limitations on air emissions, water discharges, and hazardous waste management. Accordingly, the EPA policy provides guidance for these three categories of environmental obligations. EPA left open the ability to introduce additional guidance for specific programs, and emphasized the agency’s self-disclosure program will remain available while the temporary policy is in effect.

The temporary policy is not applicable to criminal violations, Superfund or Resource Conversation and Recovery Act (“RCRA”) Corrective Actions, or imports (e.g., pesticide products). In addition, EPA described heightened expectations for public water systems regulated under the Safe Drinking Water Act during the pandemic.

CONDITIONS FOR ENFORCEMENT DISCRETION

Enforcement discretion under the EPA temporary policy is conditioned on regulated entities making every effort to comply with environmental



obligations. In situations where compliance is not reasonably practicable because of COVID-19, regulated entities should:

- a. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- b. Identify the specific nature and dates of the noncompliance;
- c. 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;
- d. Return to compliance as soon as possible; and
- e. Document the information, action, or condition specified in a through d, above.²

ROUTINE COMPLIANCE MONITORING AND REPORTING

Under the temporary policy, EPA does not anticipate pursuing penalties associated with violations of “routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations”³ where the agency agrees COVID-19 caused the noncompliance and appropriate documentation is provided upon request.

Regulated entities should continue to use existing procedures to report noncompliance pursuant to environmental permits, regulations, or statutes where possible. If reporting is not reasonably practicable due to COVID-19, such information should be maintained internally and made available to EPA, or an authorized state or tribe, upon request.

EPA expects full compliance following termination of the temporary policy. However, regulated entities will not be required to “catch-up” with missed obligations, and reasonable measures should be taken to resume compliance with ongoing obligations such as annual reporting requirements.

SETTLEMENT AGREEMENTS AND CONSENT DECREES

Parties subject to settlement agreements or consent decrees with EPA should utilize notice procedures, including notification of force majeure, for anticipated or actual noncompliance due to COVID-19. Parties should adhere to procedures proposed in such notices unless and until contacted by EPA for settlement agreements, or the U.S. Department of Justice (“DOJ”) for consent decrees. EPA will treat routine compliance obligations under administrative settlements similarly to routine compliance monitoring and reporting discussed above. EPA will coordinate with DOJ to exercise enforcement discretion over stipulated penalties for routine compliance obligations under consent decrees, however courts retain jurisdiction over consent decrees and may exercise their own authority.

FACILITY OPERATIONS

Regulated facilities are expected to continue to manage and operate in a safe manner to protect the public and environment. If a failure of air emissions controls, or wastewater or waste treatment occurs that may result in exceedances of enforceable limitations, the operator should contact the implementing authority as soon as possible. Notification should include information about pollutants that are discharged or released, applicable limitations, and the expected duration or timing of the exceedance or release. EPA will coordinate its response with state or tribal authority, and will consider the circumstances surrounding the incident, including the impact of COVID-19, in evaluating whether an enforcement action is appropriate.

Generators of hazardous waste regulated under RCRA that are disrupted by COVID-19 should continue to properly label and store hazardous waste and adhere to the conditions discussed above. EPA will exercise enforcement discretion to treat such entities as hazardous waste generators and not treatment, storage, or disposal facilities, and EPA will allow



very small quantity generators and small quantity generators to retain their status even if volume thresholds are exceeded due to the pandemic.

CRITICAL INFRASTRUCTURE

For facilities that are essential critical infrastructure, EPA may consider tailored short-term No Action Assurances on a case-by-case basis if the agency determines it is in the public interest. EPA will consider facilities that employ essential critical infrastructure workers as determined by the Cybersecurity and Infrastructure Agency (“CISA”) guidance⁴ for such short-term No Action Assurances.

King & Spalding has a robust and diverse Environmental, Health & Safety practice and boasts an experienced and interdisciplinary Crisis Management Practice that includes a Coronavirus Task Force with seasoned practitioners in environmental regulation and incident response to help clients navigate the constantly evolving situation and to address the unique challenges that COVID-19 presents.

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¹ EPA Memorandum from Susan Parker Bodine, Assistant Administrator for Enforcement and Compliance Assurance, regarding COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program (March 26, 2020).

² *Id.* at 3.

³ *Id.*

⁴ CISA Memorandum from Christopher C. Krebs, Director, regarding Identification of Essential Critical Infrastructure Workers During COVID-19 Response (March 19, 2020).