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## EPA Issues Temporary COVID-19 Policy on Enforcement

The EPA set forth a temporary policy regarding enforcement of environmental legal obligations as regulated entities respond to the COVID-19 pandemic.

By Karen Aldridge Crawford

*We are monitoring the coronavirus (COVID-19) situation as it relates to law and litigation. Find more resources and articles on [our COVID-19 portal](#). For the duration of the crisis, all coronavirus-related articles are outside our paywall and available to all readers.*

On March 26, 2020, Susan Bodine, the assistant administrator for the Environmental Protection Agency's (EPA) Office of Enforcement and Compliance Assurance (OECA), issued a [memorandum](#) setting forth a temporary policy regarding EPA enforcement of environmental legal obligations as regulated entities respond to the COVID-19 pandemic. Under the policy, the EPA will exercise discretion for noncompliance covered by the temporary policy and resulting from the COVID-19 pandemic. This policy will be applied to noncompliance within its scope in lieu of an otherwise applicable EPA enforcement policy. The policy will apply retroactively, beginning on March 13, 2020, and be in effect until terminated. The self-disclosure program remains available.

### Exceptions

This policy does not apply to criminal violations, nor does it relieve any entity from the responsibility to prevent, respond to, or report accidental releases of any pollutant covered by federal law and is not to be read as a willingness to exercise enforcement discretion in the wake of such a release. Resource Conservation and Recovery Act (RCRA) Corrective Action and Superfund activities performed pursuant to enforcement instruments are not covered by this policy but will be addressed separately. Further, the EPA did not address imports under this policy and expressed a serious concern about pesticides, either

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imported into or produced in the United States, that claim to address COVID-19, which is the focus of a separate [website](#).

## Enforcement Discretion: General Guidelines

The policy does apply to actions or omissions (civil violations) caused by the pandemic that occur while this policy is in effect. The party seeking enforcement discretion must make every effort to comply with its compliance obligations, but if compliance is not “reasonably practicable,” facilities are instructed to do the following:

- 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.

Memorandum from Susan Bodine, *supra*, at 3.

## Enforcement Discretion: Routine Compliance Monitoring and Reporting

The agency specifically addressed the pandemic’s constraint on routine compliance monitoring and reporting by regulated entities, including testing, sampling, laboratory analysis, training, and reporting or certification. If the pandemic causes noncompliance with such routine activities, the regulated entity “should use existing procedures to report noncompliance”; and if no such reporting procedure is applicable or reasonably practicable due to COVID-19, the entity “should maintain this information internally and make it available to the EPA or an authorized state or tribe upon request.” *Id.* The EPA policy states that the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or

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certification obligations [if] the [agency] agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation . . . upon request. *Id.*

Once the temporary policy is no longer in place, compliance is expected. No “catch-up” will be required for missed monitoring or reporting for requirements applicable to intervals of less than three months. However, biannual and annual requirements must be resumed “as soon as possible, including conducting late monitoring or submitting late reports.” *Id.*

Online training is encouraged to reduce effects on certified operators, but discretion is available for missed training or certification caused by the COVID-19 pandemic.

## **Enforcement Discretion: Settlement Agreements and Consent Decrees**

If a regulated entity is obligated pursuant to a settlement agreement with the agency, the agreement’s provisions and notice procedures for missing milestones, such as force majeure, will apply. The EPA will treat routine compliance monitoring and reporting in accordance with the temporary policy and not seek stipulated penalties or other penalties for noncompliance, as long as notification pursuant to the settlement agreement and documentation/support as required by the temporary policy are provided.

If the entity is a party to a consent decree with the EPA and the U.S. Department of Justice (DOJ), which is also a court order, the entity should proceed with the notice to the EPA and/or the DOJ pursuant to provisions of the agreement/decree and maintain all documentation as required for noncompliance covered by the temporary policy; the EPA then will coordinate with the DOJ and other parties regarding enforcement discretion. The courts will maintain jurisdiction/authority, however.

## **Enforcement Discretion: Facility Operations**

Facilities are expected to continue management and operation in a safe and protective manner. If impacted by the COVID-19 pandemic in such a way as to create an acute risk or imminent threat to human health or the environment, a facility should contact the appropriate implementing authority (EPA region, authorized state, or tribe), and that

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authority together with the EPA will follow appropriate protocols in determining whether an enforcement response is appropriate.

If enforceable limitations on emissions to air or discharges to water or on land disposal result from equipment failure, the facility should notify the implementing authority as quickly as possible and include information on the pollutant, the degree of exceedance (compared to limitation), and the expected duration and timing of exceedance or release. The agency will evaluate the risk and determine whether an enforcement response is appropriate.

Hazardous waste generators and animal feeding operations are provided with specific instructions on how to follow the policy in a manner that allows the facilities to maintain their pre-pandemic regulatory status, even if the pandemic causes exceedance of a regulatory threshold.

## **Enforcement Discretion: Public Water Systems**

Public water systems regulated under the Safe Drinking Water Act are expected to continue normal operations, maintenance, and sampling to ensure the safety of drinking water supplies. This policy makes clear that EPA considers continued operation of drinking water systems as the highest priority in the face of worker shortage and laboratory capacity issues, recommending that other implementing agencies adopt similar policies and priorities.

## **Enforcement Discretion: Critical Infrastructure**

The policy retains the agency's authority to address critical infrastructure on a case-by-case basis, possibly providing a short-term No Action Assurance with conditions to protect the public, if in the public interest.

## **State Oversight**

The policy recognizes that the states may adopt their own policies but encourages states to take the safety and health of their inspectors and facility personnel into account and use discretion when making decisions. Furthermore, the policy provides that it "will take the

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COVID-19 pandemic into consideration in any review of a state compliance and enforcement program.” *Id.* at 7.

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