

## USEPA Issues Enforcement Discretion Policy for COVID-19 Pandemic

In recognition of the hardship the current COVID-19 pandemic has and will continue to impose on the public and the regulated community, on March 26, 2020 the U.S. Environmental Protection Agency (EPA) announced that it will exercise enforcement discretion by temporarily relaxing environmental rules on certain civil violations. The scope of EPA's enforcement discretion is described in a seven-page memorandum entitled [COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program](#) (the Policy). The Policy describes the steps regulated facilities must take to qualify for enforcement discretion and applies retroactively to March 13, 2020.

### Does the Policy Apply to Me?

The Policy applies to civil violations during the COVID-19 outbreak, including requirements such as routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification. The Policy addresses different categories of noncompliance differently (e.g., under the Policy EPA does not expect to seek penalties for noncompliance with routine monitoring and reporting obligations that are the result of COVID-19 but does expect operators of public water systems to continue to ensure the safety of drinking water supplies).

The Policy does not apply to: (1) any criminal violations or conditions of probation in criminal sentences; (2) activities carried out under Superfund and RCRA Corrective Action enforcement instruments; or (3) imports (EPA is especially concerned about pesticide products entering the United States, or produced, manufactured, distributed in the United States, that claim to address COVID-19 impacts and will focus on ensuring compliance with requirements applicable to these products).

### Does the Policy Release Me of My Reporting/Compliance Obligations?

No. The Policy does not release regulated entities from their reporting and/or compliance obligations. Facilities are expected to make every effort to comply with their environmental compliance obligations. Under the Policy, where compliance is not reasonably practicable, facilities with environmental compliance obligations 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.

To be clear, during the COVID-19 pandemic, environmental compliance is expected, and the Policy should not be viewed as a blanket waiver of environmental compliance requirements. But, if compliance is not practicable, facilities must take the actions identified above to benefit from the Policy. Facility EHS personnel should prepare detailed records to demonstrate those actions were taken, as EPA or an authorized state (e.g., New York State Department of Environmental Conservation (DEC)) could ask to examine such records.

### Routine Compliance Monitoring and Reporting

If applicable, facilities should utilize existing procedures to report noncompliance with routine activities required by an applicable permit, regulation or statute. However, if reporting is impracticable due to COVID-19, the permittee should maintain the information internally and make it available to EPA upon request. In general, EPA does not intend to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations if it determines that COVID-19 was the cause of the noncompliance and the facility provides supporting documentation to that fact. Causative factors might include unavailability of personnel (facility or third-party consultants) or travel restrictions, among others. Again, documentation is crucial to demonstrating that the facility qualifies for enforcement discretion under the Policy.

Upon termination of the Policy, full compliance will be expected of all facilities. For monitoring or reporting requirements with intervals of less than three months, facilities will not be required to “catch-up” with missed obligations. For those monitoring or reporting requirements required on a biannual or annual basis, facilities will be expected to “take reasonable measures to resume compliance activities as soon as possible, including conducting late monitoring or submitting late reports.”

### Required Training

EPA does not expect training to be affected by the COVID-19 pandemic, as many training and certification classes are offered online. However, in situations where it is not practicable to maintain normal certification and training practices, EPA states in the Policy, “that it is more important to keep experienced, trained operators on the job, even if a training or certification is missed.”

### Signatures

In place of original signatures, under the Policy, EPA will accept digital or other electronic signatures. The requirement of an original signature will not justify the failure to submit a required paper submission or certification. Additionally, EPA will accept emailed submissions even if the requirement calls for the submission of a paper original.

### Settlement Agreement and Consent Decree Reporting Obligations and Schedules

The Policy also provides enforcement discretion to signatories of EPA administrative settlement agreements (e.g., Consent Agreement/Final Orders, Administrative Compliance Orders) and judicial consent decrees.

If a party to an EPA administrative settlement agreement containing reporting obligations and milestones anticipates missing any enforceable milestones, the procedures set forth in the agreement should be utilized, including notification of a force majeure (if such a provision is contained in the agreement). If there is no force majeure provision, a facility could conceivably notify EPA of the anticipated noncompliance pursuant to the modification provision. The EPA will generally not seek penalties for noncompliance with routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and associated reporting or certification obligations contained in administrative settlement agreements.

For consent decrees entered into with both the EPA and the Department of Justice (DOJ), the Policy states that EPA will coordinate with DOJ to exercise enforcement discretion with regard to stipulated penalties for routine compliance obligations. However, courts retain jurisdiction over consent decrees and may therefore exercise their own authority. As with EPA administrative settlement agreements, the notification procedures set forth in the consent decree should be utilized, including notification of a force majeure, for any noncompliance alleged to be caused by COVID-19.

After a facility makes its notification, it should act in accordance with the information in its notice unless and until it is contacted by EPA or DOJ.

## How Might the Policy Affect My Facility Operations?

The Policy states that “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 a facility’s operations are impacted by COVID-19 such that it may create “an acute risk or an imminent threat to human health or the environment,” EPA strongly encourages the facility to consult with EPA’s regional office. EPA will consult with the applicable state or tribe and discuss measures to minimize or prevent the risk created by the COVID-19 noncompliance.

Facilities which experience failure of air emission control or wastewater or waste treatment systems or other facility equipment that may result in exceedances of enforceable limitations or discharges should notify the implementing authority, (EPA regional office, authorized state or tribe) as quickly as possible. Such notification should include: (1) information on the pollutants emitted, discharged, discarded or released; (2) the comparison between the expected emissions or discharges, disposal or release and any applicable limitation(s); and (3) the expected duration and timing of the exceedance(s) or releases. Upon notification, the EPA will consult with the authorized state or tribe and evaluate whether the risk posed by the exceedance, disposal or release is acute or may create an imminent threat to human health or the environment.

Generators of hazardous waste that are unable to dispose of waste within the RCRA required time periods should continue to properly label and store such waste as well as take other steps identified in the Policy. If all steps are properly followed, EPA will consider such entities to be hazardous waste generators, and not treatment, storage and disposal facilities. Additionally, Very Small Quantity Generators and Small Quantity Generators that exceed the volume allowed for storage on site due to COVID-19 will retain their status.

## How Long Will the Policy Be in Effect?

The Policy is in effect indefinitely. The EPA will continue to assess the need for and scope of the Policy on a regular basis. If needed, the Policy will be updated and/or modified by the agency. In addition, EPA will post a notification at least seven days prior to the termination of the temporary Policy.

The Policy contains many details that are beyond the scope of this Information Memo. Accordingly, facility EHS staff and management should review the Policy carefully. Further, the Policy cannot possibly address every potential noncompliance scenario that could arise at a facility, and that means its application to a given facility’s circumstances may be uncertain. Certainly, a facility should not willfully or knowingly ignore environmental compliance obligations with the expectation that it will benefit from enforcement discretion – doing so seriously risks the imposition of criminal penalties. However, in the absence of such “bad actors,” the overall tone of the Policy suggests that if a facility acts in a responsible manner, and in accordance with the Policy requirements (including completion of needed documentation), EPA will not institute civil enforcement.

Note that the Policy is not binding on state environmental agencies. Indeed, the Commissioner of the New York State DEC criticized the Policy, indicating that environmental enforcement in New York will not be relaxed. Nor does the Policy serve as a legal limitation on the potential for citizen suits under applicable federal environmental statutes. But the Policy has the ability to provide a measure of relief in cases where it is warranted.

If you have questions about this Information Memo, please contact [Robert R. Tyson](#), any attorney in the [Environmental and Energy practice](#), or the attorney at the firm with whom you are regularly in contact.

