

March 27, 2020

EPA Will Exercise Enforcement Discretion in Certain Circumstances

by the Environment and Natural Resources Group

On March 26, 2020, the U.S. Environmental Protection Agency (EPA) announced it would relax its enforcement of certain environmental laws where the noncompliance is caused by circumstances created by the COVID-19 crisis. In short, recognizing the challenges companies are facing during the pandemic, in many cases, EPA said it will exercise its enforcement discretion to not punish companies that display a “good faith effort” during the pandemic to comply with certain environmental laws. For the most part, the policy is applied retrospectively, but there are several elements that require companies to reach out to EPA in advance of foreseeable violations.

EPA’s temporary enforcement [policy](#) applies retroactively beginning on March 13, 2020. EPA will provide at least seven days’ notice of termination of the policy, presumably when the pandemic ends. The policy covers compliance with all environmental laws other than EPA’s principal cleanup liability programs, the Superfund program (CERCLA) and the Resource Conservation and Recovery Act corrective action program. EPA promises that additional guidance on enforcement of those two programs will be forthcoming. The policy makes clear that criminal conduct will not be excused.

In general, EPA does not expect to seek penalties for noncompliance with routine monitoring, testing, sampling, training, and reporting or certification obligations, if EPA agrees that COVID-19 was the cause of the noncompliance. To increase the likelihood that EPA will not seek civil penalties, regulated entities must fully document the noncompliance, including how the pandemic caused the noncompliance, and must also document the actions taken in response and efforts taken to come into compliance as soon as possible.

Once the temporary enforcement policy is no longer in effect, EPA does not plan to ask entities to “catch-up” with missed routine monitoring or reporting if the underlying requirement applies to intervals of fewer than three months. However, EPA will expect facilities to conduct late monitoring or to submit late reports for requirements that apply to longer intervals.

While the temporary enforcement policy is in effect, EPA will accept electronic signatures and e-mail submissions where original signatures and paper copies are otherwise required.

Generally speaking, the foregoing also applies to noncompliance with obligations under EPA administrative settlement agreements. In addition, if parties to those agreements anticipate missing enforceable milestones as a result of COVID-19, parties should follow the notice procedures set forth in the agreements, including notification of a *force majeure*, if applicable. With respect to consent decrees,

EPA will consult with the Department of Justice to exercise enforcement discretion with regard to stipulated penalties. The policy cautions that courts retain jurisdiction over consent decrees and may exercise their own authority.

If facility operations impacted by COVID-19 “may create an acute risk or an imminent threat to human health or the environment,” the facility must contact EPA or the state agency, as appropriate. In cases where EPA implements the program, EPA “will consider the circumstances, including the COVID-19 pandemic, when determining whether an enforcement response is appropriate.” EPA will follow the same process if enforceable limitations on air emissions or water discharges are exceeded.

The policy also explains that EPA will exercise enforcement discretion for facilities that are generators of hazardous waste under RCRA if they are unable to arrange for shipping of hazardous waste off-site.

“Essential critical infrastructure” industries may be able to negotiate a short-term “No Action Assurance,” with certain conditions. The Cybersecurity and Infrastructure Security Agency (CISA) of the Department of Homeland Security released a non-exhaustive list of “essential critical infrastructure” on March 19, 2020, to help guide state and local officials on which sectors and functions should continue during the COVID-19 pandemic and related shelter-in-place orders and social distancing recommendations. The list includes workers in Critical Manufacturing, Healthcare, Chemical, Pharmaceutical, and Energy industries.

EPA is continuing to evaluate the pandemic and its potential impacts and may provide additional guidance addressing enforcement and compliance as the need arises. We anticipate that states that have been delegated enforcement of federal environmental programs will feel compelled to follow EPA’s lead, and even EPA points out that it will take the COVID-19 pandemic into consideration in any review of a state compliance and enforcement program. [Texas](#) is a notable example of a state following EPA’s lead. Companies should be aware, however, that some state environmental agencies appear so far to be charting their own course with respect to enforcement discretion. For example, [Pennsylvania](#) and [Arizona](#) have made statements indicating that they expect continued compliance during the pandemic.

As we await further guidance and pronouncements from federal and state officials, Ballard Spahr attorneys can assist companies in strategizing any anticipated noncompliance and communications with enforcement agencies.

The attorneys in Ballard Spahr’s [Environment and Natural Resources group](#) advise companies across industries on environmental compliance matters. Our attorneys are monitoring developments and providing strategic guidance to clients as they respond to the unprecedented impact of the pandemic.