



Coronavirus Environmental Enforcement & Compliance Update

04.22.2020 | By [Reed W. Neuman](#), [Ed Roggenkamp](#)

US EPA published its temporary policy on enforcement discretion during the coronavirus pandemic on March 26. This update to our previous post on developments related to that policy summarizes additional developments through April 17. It includes information on litigation and information requests by environmental groups; additional enforcement guidance from US EPA; and public statements by US EPA officials relating to the temporary enforcement policy.

Interim Guidance on Site Field Work

US EPA's temporary policy excluded CERCLA cleanups and RCRA Corrective Actions, and noted that a separate document would address the effect of the pandemic on those actions and other hazardous material response actions. On April 10, US EPA issued that document: a new Interim Guidance on Site Field Work Decisions during the pandemic. This guidance document applies to field activities under several EPA programs, including CERCLA/Superfund, RCRA corrective actions, cleanups of polychlorinated biphenyls (PCBs) under EPA's Toxic Substances Control Act (TSCA) authority, the Underground Storage Tank (UST) program, and the Oil Pollution Act. It applies to cleanup and emergency response sites where EPA is the lead agency or has direct oversight responsibility for the response action, although it applies whether the work is conducted by EPA or by states, tribes, other federal agencies, or potentially responsible parties (PRPs).

Decisions about compliance relief applicable to site field work – that is, whether to extend performance deadlines, or allow for delays in performance of field work – will continue to be made on a case-by-case basis, and the Interim Guidance merely provides guidance on how EPA regional staff should make those decisions. For example, the Interim Guidance directs EPA staff to consider whether state or local stay-at-home orders will affect site work in determining whether to continue site operations or secure a site until the public health threat is resolved. It also provides a list of factors to consider in making decisions on whether

response actions will continue, be reduced, or be paused. These factors include some relating to social distancing and public health requirements, such as whether site workers have tested positive for or exhibited symptoms of COVID-19, whether the site involves work where social distancing is impossible, and whether the site work may require interaction with high risk groups or individuals under quarantine (such as work inside residences). The Interim Guidance also includes factors specific to the nature of the environmental threat and response action, such as whether the action is necessary to prevent endangerment of human health or the environment, or would include response actions that will reduce health risk in the near-term. The Interim Guidance specifically suggests that staff should consider delaying, suspending, or rescheduling work that will not provide near-term risk reduction, such as routine sampling activities for five-year reviews of existing remedial actions. It also suggests that work to protect drinking water quality should continue.

The Interim Guidance directs parties who believe that their performance obligations may be delayed to contact their EPA project manager, and consult any applicable documents (i.e. a consent decree with EPA, or a site work plan) for provisions that allow delays for force majeure or at the project manager's discretion. For questions regarding force majeure provisions or discretionary delays, please contact Ed Roggenkamp or Reed Neuman.

Information Requests and Litigation

A coalition of environmental groups led by NRDC filed a petition with EPA on April 1, seeking a final, enforceable rule requiring public notice of a facility's failure to conduct required monitoring or reporting in reliance on EPA's temporary enforcement policy. The petition also seeks a second notice when the regulated entity returns to compliance, and a public, searchable online database of regulated entities that provide each notice. The petition requested an emergency rulemaking within seven days, and after that period expired, the groups sued EPA in federal court in Manhattan, seeking a court order directing EPA to respond to their petition. The complaint is available [here](#).

Environmental groups including the Environmental Defense Fund filed a FOIA request with EPA seeking correspondence between EPA and outside parties regarding compliance with environmental or health standards, requests for relief from enforcement or compliance, and notifications that a regulated entity will fail to comply with its environmental compliance obligations. The request seeks all records back to March 1, 2020, roughly two weeks before the effective date of EPA's policy.

Other Activities

EPA has prepared an FAQ on its temporary enforcement discretion policy, and has issued several public statements pushing back on the perception that its policy amounts to a blanket waiver of compliance requirements. EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA), Susan Bodine, participated in a webinar hosted by the American Bar Association (ABA) on Friday, April 17, and stated both that the temporary enforcement policy was not a waiver of compliance, and that intentional noncompliance with environmental requirements would be a criminal offense. Bodine also stated that EPA would promptly publish requests for "no action assurances" online.

EPA also temporarily waived summer gasoline requirements through May 20, 2020. This step is intended to mitigate the impacts of a reduction in gasoline demand resulting from the pandemic, which has resulted in a glut of winter gasoline in storage and a reduction in available gasoline storage capacity.

California responded to EPA's temporary enforcement policy on April 15, stating that it intends to "fill any enforcement gaps left by the U.S. EPA's decision to reduce environmental oversight." However, the statement also suggested that regulated entities could request extension of deadlines or waiver of specific regulatory requirements due to the pandemic. CalEPA's statement directed regulated entities to contact the specific CalEPA board, department, or office as soon as possible and before falling out of compliance. This is in contrast to EPA's temporary policy, which directs regulated entities to maintain documentation of the reasons for their noncompliance, and present it to EPA upon request. Participants in ABA's April 17 webinar identified other states, including Texas and Arkansas, that have required regulated entities to contact regulators in advance of noncompliance and publicized requests for lapses in monitoring.