



EPA Announces Temporary Policy Suspending Enforcement of Certain Environmental Compliance Obligations During Coronavirus Pandemic

03.27.2020 | By [Reed W. Neuman](#), [Ed Roggenkamp](#)

On March 26, 2020, EPA announced a temporary enforcement discretion policy to excuse violations of environmental laws in specified circumstances during the coronavirus pandemic. While the policy immediately has drawn criticism by some analysts and in the popular media as being something close to a blanket suspension of enforcement, in reality the policy appears more nuanced, and it remains to be seen how EPA will interpret and implement its scope. For now, regulated entities should assume that they must continue business as usual for compliance with environmental laws and permit requirements, unless staffing or services shortages due to the pandemic result in paperwork violations, delayed compliance with routine monitoring and reporting, or other identified minor violations occurring while the temporary EPA policy is in effect. Regulated entities seeking to obtain relief from COVID-19-related impacts must also follow notice and documentation requirements identified in the policy, as discussed further below.

By its terms, the scope of the policy is limited to EPA's civil enforcement authority of compliance requirements that are impeded by staffing shortages or other issues created by the pandemic (for example, an inability to conduct routine monitoring or send effluent samples to a laboratory for testing). Notably, the policy specifically states that drinking water systems are expected to continue normal operations and maintenance. Moreover, EPA will continue to enforce legal requirements to prevent, address, and report accidental releases of petroleum and/or hazardous substances, and the policy does not apply to CERCLA cleanups, RCRA Corrective Actions, or imports of pesticide products. (The policy states that EPA will be issuing a separate communication addressing the potential compliance effects of COVID-19 on ongoing CERCLA and RCRA response measures.) And perhaps most importantly, EPA's temporary policy does not

excuse any criminal violations, including knowing or deliberate violations of environmental laws or permit requirements.¹

EPA states that it will exercise its enforcement discretion to excuse noncompliance where regulated entities make every effort to comply, *and* the following conditions are met:

“If compliance is not reasonably practicable, facilities with environmental compliance obligations should:

1. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
2. Identify the specific nature and dates of the noncompliance;
3. 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;
4. Return to compliance as soon as possible; and
5. Document the information, action, or condition specified in a. through d.”

While it remains to be seen how EPA will implement the temporary policy, it appears that it will be particularly important to document that any noncompliance is due to the effects of the pandemic. It will also be prudent to inform EPA and other regulators of any anticipated noncompliance as soon as is reasonably possible, in order to evaluate how EPA may apply the policy on a case-by-case basis, and to take advantage of EPA's (and many states') long-standing policy of reducing civil penalties for entities that voluntarily disclose and address noncompliance.

EPA has highlighted some examples of potential noncompliance that are unlikely to be controversial. For instance, EPA intends to accept electronic signatures on documents where it would typically require wet signatures, and will encourage required training programs to take place online rather than in person. EPA also identified delays in transportation resulting from the pandemic as a reason to relax certain compliance requirements – for example, if a generator of hazardous waste encounters difficulty transporting it offsite within RCRA's time limitations due to the pandemic, and it complies with labeling and storage requirements, it will keep its generator status and not be treated as a TSD (treatment, storage, and disposal) facility. These examples suggest that EPA will excuse minor paperwork violations resulting from staffing shortages, social distancing requirements, or transportation issues caused by the pandemic.

However, Section I.B of the temporary policy also signals that EPA will not seek civil penalties for violations of routine compliance monitoring and reporting requirements during the pandemic. This portion of the policy appears to be a response to a letter sent to President Trump last week by the American Petroleum Institute (API), requesting a temporary waiver of these and other requirements as “non-essential.” EPA's temporary policy does not give such a blanket waiver of routine monitoring and reporting requirements, instead waiving those requirements only “where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.”² However, EPA also stated that it does not plan to ask facilities to “catch-up” with missed monitoring or reporting over intervals of less than three months. At this time, it is an open question whether EPA will in fact continue to enforce routine monitoring and reporting requirements without documentation of compliance difficulties caused by the pandemic, or whether the temporary policy amounts to a blanket waiver of routine monitoring and reporting requirements for up to three months.

Environmental advocacy groups publicly announced their opposition to EPA's temporary policy, raising the possibility of citizen suit enforcement of any requirements during this period. Citizen suit provisions are written into most major environmental laws, including the Clean Air Act and Clean Water Act. Private citizens can sue to enforce routine monitoring and reporting requirements under these laws, and EPA does not have authority to waive these provisions. While a "diligent prosecution" of environmental requirements can preclude a citizen suit, a policy of non-enforcement by EPA would appear to run counter to any argument that EPA is diligently prosecuting violations. And while a waiver of monitoring and reporting requirements may make citizen suits for emission violations difficult or impossible to prove, it will make citizen suits seeking penalties for noncompliance with monitoring/reporting requirements much easier. Again, this argues in favor of regulated entities continuing to comply with routine monitoring and reporting requirements unless compliance is impracticable, and thoroughly documenting any unavoidable noncompliance.

Three other aspects of EPA's temporary policy warrant comment, and we will monitor implementation of them while the policy remains in effect. First is EPA's outline of the steps it will take in the case of significant noncompliance, i.e. a failure of pollution controls or noncompliance that causes an acute risk/imminent threat to human health or the environment. (Section I.D.) This section suggests that EPA will defer to states and tribal governments on any significant noncompliance. It is important to note both that states may continue to enforce environmental laws against regulated entities, and that any significant noncompliance could also be the subject of a citizen suit.

Second is EPA's vague suggestion that EPA will consider case-by-case "No Action Assurances" for critical infrastructure facilities. This appears to signal that certain facilities may be exempted from compliance requirements altogether. However, EPA does not identify any process for providing such a No Action Assurance (or even what facilities it will consider "critical infrastructure" for purposes of this policy), and providing such an assurance would run counter to established EPA enforcement policy. This portion of the policy was also highlighted by environmental advocacy groups in their opposition, and the groups requested that EPA publicly announce any no-action assurances it provides.

Finally, EPA notes that courts retain enforcement discretion over consent decrees entered as court orders. For regulated entities subject to any such decrees – or to administrative settlement agreements with EPA – it will be critically important to follow the notice procedures contained in the agreement. Agreements of this nature typically include force majeure clauses that excuse unavoidable noncompliance, but these clauses usually require notice of the noncompliance as soon as is practicable.

The policy is effective retroactively to March 13, and will be in effect until EPA announces otherwise. EPA has committed to announcing suspension of the temporary policy on its Enforcement Policy, Guidance, and Publications web page at least seven days in advance in order to give fair warning to the regulated community. EPA also noted that it will examine the possibility of program-specific enforcement guidance going forward. We will continue to monitor EPA's implementation of this policy, and provide updates as additional details become available.

For additional information on EPA's temporary enforcement discretion policy, please contact Ed Roggenkamp or Reed Neuman.

¹ Note as well that EPA has delegated enforcement of numerous environmental requirements to the states, which will determine on their own how to address enforcement in light of the coronavirus pandemic. Many

states may decide to continue their ordinary environmental enforcement practices. This reinforces our recommendation that regulated entities should continue business-as-usual for compliance requirements as much as is practicable.

² EPA also announced on Thursday that it would soon respond to API's request to waive seasonal fuel requirements in order to allow the fuel industry to continue selling winter-grade gasoline after May 1.