



USEPA Exercises Enforcement Discretion in Response to the COVID-19 Pandemic

Publication:

Riker Danzig Environmental UPDATE May 2020

In response to the COVID-19 pandemic, the United States Environmental Protection Agency ("USEPA") has decided to exercise enforcement discretion. That is, USEPA will review any violations and determine if they result from the pandemic; if so, USEPA will decide the proper enforcement action, if any. See USEPA Memorandum, COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program, dated March 26, 2020 (the "Policy").

Specifically, USEPA recognizes that the COVID-19 pandemic will impact certain facility and laboratory operations, which may result in potential violations of reporting obligations, permit limits, regulations and statutes.

USEPA has set forth guidelines for regulated facilities seeking enforcement discretion due to the pandemic. In order to seek enforcement discretion, a regulated facility must meet the following requirements:

1. Make every effort to comply with environmental requirements;
2. If compliance is not reasonably practicable, it must
 - a. Document the information, actions and conditions identified in a. through d.
 - b. Return to compliance as soon as possible;
 - c. Identify how COVID-19 was the reason for non-compliance and identify the decisions and actions in response and the efforts to comply;

d. Identify the specific nature and dates of non-compliance;

e. Act responsibly;

USEPA is applying the Policy retroactively starting March 13, 2020 and will provide notice before terminating the Policy.

Importantly, the Policy notes that states may take a different enforcement approach. Where USEPA shares jurisdiction with a state, it will consult or coordinate with the state on enforcement obligations in certain circumstances.

The Policy also contains specific information about different instances of non-compliance. For instance, with respect to routine compliance monitoring and testing, a regulated entity that is unable to meet its obligations should use existing procedures to report non-compliance. USEPA, in general, is not going to seek penalties for violations of routine monitoring or testing if such non-compliance is the result of the COVID-19 pandemic. Additionally, when the pandemic ends and the Policy is no longer needed, USEPA is not going to require the regulated entity to play “catch up” on missed routine monitoring and testing, if such non-compliance did not exceed a three-month period. For bi-annual or annual reporting, however, after the Policy is terminated, USEPA expects the regulated entity to assume compliance as soon as possible, including submittal of late reports. Also, if a submission requires an original signature, USEPA now is accepting a digital or electronic signature.

Entities that are unable to comply with USEPA settlement agreements or consent decrees should follow the notice procedures set forth in those documents. With respect to consent decrees, USEPA will coordinate with the Department of Justice on enforcement discretion for stipulated penalties. It should be noted that courts maintain jurisdiction over consent decrees and can take their own actions regarding non-compliance.

If non-compliance resulting from the COVID-19 pandemic may result in an imminent threat to human health or the environment or cause a facility to fail to meet emission limitations for air, water or wastewater, an entity should immediately contact the proper authority (USEPA, State or Tribe) responsible for implementing the relevant program. In cases of an imminent threat, USEPA encourages facilities to work with USEPA regional offices, even if USEPA is not the implementing authority. USEPA will work with facilities to properly address these issues.

Moreover, a facility that is a generator of hazardous waste that is unable to transfer its hazardous waste off-site within the time limits set forth in the Resource Conservation Recovery Act (“RCRA”) should continue to properly label and store its waste. In these cases, even though the facility failed to remove its waste timely under RCRA, USEPA will continue to consider the facility a hazardous waste generator and not a facility that treats, transfers or

stores hazardous wastes. Very Small Quantity and Small Quantity Generators of hazardous waste will retain their status even if their storage volume thresholds are exceeded during this time period.

USEPA expects that public water supply systems will continue normal operations and maintenance. All other facility operations not specifically identified by USEPA in the policy, should follow the guidelines above if non-compliance is unavoidable.

The Policy makes it clear that it does not relieve any entity from responsibility to prevent, respond to or report accidental releases of hazardous substances and pollutants. The Policy is not a free pass to release pollutants.

The Policy does not apply to Superfund and RCRA Corrective Action enforcement instruments. USEPA will be addressing compliance with these instruments in separate correspondence. It also does not apply to imports, such as pesticides, or criminal violations.

Although the Policy sets forth guidelines for USEPA enforcement discretion during this trying time, facilities should take all possible steps to meet their regulatory obligations. If this is not possible given the COVID-19 pandemic, the facilities should work with counsel to determine how to proceed and properly document any non-compliance in order to avail itself of the USEPA Policy.

For more information, please contact the author Laurie Sands at lsands@riker.com or any attorney in our [Environmental Practice Group](#).

Attorney:

Laurie J. Sands

Practice:

Environmental Law