

Environmental Enforcement Discretion During COVID-19

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The U.S. Environmental Protection Agency (EPA) has issued a temporary policy regarding enforcement of environmental legal obligations during the COVID-19 pandemic. The temporary policy is to exercise “enforcement discretion” for civil violations during the outbreak. The policy addresses different categories of noncompliance differently. For example, routine reporting and monitoring will be treated differently from actual environmental protection such as ensuring safe drinking water.

Acknowledging the impact of the pandemic on EPA staff and on those regulated, EPA will use its discretion to allow or forgive noncompliance if terms of the policy are met. The policy makes it clear that EPA expects regulated facilities to comply with requirements, where reasonably practical, and to return to compliance as soon as possible. To be eligible, facilities will need to document decisions made to prevent or mitigate noncompliance and demonstrate how noncompliance was caused by COVID-19.

Specific steps regulated facilities must take to qualify for enforcement discretion. First, every effort should be made to comply. However, if compliance is not reasonably practicable, the facility should:

1. mitigate any noncompliance caused by COVID-19;
2. identify the specific nature and dates of noncompliance;
3. identify how COVID-19 was the cause, decisions and actions taken, and steps taken to comply;

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Michael J. Linder

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4. return to compliance as soon as possible; and
5. document all elements of items a-d.

The policy then discusses examples and approaches in various industries and settings.

The policy is retroactive beginning on March 13, 2020 and EPA will monitor to determine if modifications are needed and when it should be terminated. EPA will publically announce the pending termination with 7 days advance notice.

Although EPA's policy announcement is significant, it should be remembered that states conduct over 90 percent of inspections and enforcement so checking with the relevant state agency is critical if noncompliance is anticipated or experienced.

A number of states have issued statements similar to EPA's policy either through letters or by posting on agency web sites. However, each state is approaching the situation differently. For example, the Missouri Department of Natural Resources has set up a process similar to EPA's while the Kansas Department of Health and Environment has issued a letter expressing a more general approach. Texas Commission on Environmental Quality has also issued guidance. It is recommended that each state web site be consulted as appropriate or telephone contact be made with the agency to determine any needed notification or specific steps to be taken if the pandemic is or may be causing noncompliance. In some cases, both the EPA policy and any state specific requirements will need to be followed.

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