



EPA ENFORCEMENT DISCRETION POLICY IN THE WAKE OF COVID-19

On March 26, 2020, in an effort to balance the health and safety of the public, EPA and state staff and contractors along with the need to protect human health and the environment during the COVID-19 pandemic, EPA announced that, for certain categories of noncompliance, the Agency would exercise enforcement discretion provided that certain conditions are met. The enforcement discretion policy, entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” (the “Policy”) applies retroactively beginning March 13, 2020 and extends indefinitely. In order to provide fair and sufficient notice to the regulated community, EPA will post a notification at <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications> at least seven days before terminating the Policy.

EPA’s enforcement discretion under the Policy applies to civil violations during the COVID-19 outbreak; it does not apply to criminal violations (or conditions of probation in criminal sentences), or activities under Superfund and RCRA Corrective Action enforcement instruments.

General conditions

During the effective period of the Policy, entities are directed to “make every effort to comply with their environmental compliance obligations.” In the event that compliance is not reasonably practicable, entities should:

- (a) Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- (b) Identify the specific nature and dates of the noncompliance;
- (c) 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;
- (d) Return to compliance as soon as possible; and
- (e) Document the information, action, or condition specified in a. through d above.

Routine compliance monitoring and reporting by regulated entities

Entities should use the existing reporting procedures to report noncompliance with routine activities such as monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. Under the Policy “EPA does not expect to seek penalties for violations of [routine activities] in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.” (Emphasis added).

EPA does not intend to require facilities to “catch up” if the underlying monitoring or reporting requirement applies to intervals of less than 3 months. For monitoring or reporting requirements that function under longer time intervals, EPA expects facilities to “take reasonable measures to resume compliance activities as soon as possible, including conducting late monitoring or submitting late reports.” In submitting a late report, facilities should include in any applicable sections or codes in the reporting form why it was unable to conduct the required sampling or monitoring.

Facilities should continue to conduct on-line training as appropriate and, if possible, operators should maintain normal certification and training practices. If this is not possible, EPA recommends that the facility keep experienced, trained operators on the job even if a training or certification is missed.

Certain submissions to EPA requiring a “wet” signature may be submitted with an electronic signature during the duration of the Policy. Although “the mere inability to obtain a ‘wet’ signature will not be considered a justification for failure to make a paper submission or certification,” EPA strongly encourages facilities to exercise the approved electronic reporting mechanisms, including email, even if a paper original is required.

Settlement agreement and consent decree reporting obligations and milestones

If parties to an administrative settlement agreement expect to miss reporting obligations or milestones as a result of the COVID-19 crisis, then the parties should use the notification procedures set forth in the agreement and make reference to any applicable force majeure event, if any.

Consent decrees with EPA and the Department of Justice (“DOJ”) are handled differently because these are court orders. EPA intends to coordinate with the DOJ to ensure that enforcement discretion is exercised. Courts, however, “retain jurisdiction over consent decrees and may exercise their own authority.” Parties to a consent decree should use the notice procedures set out in the decree with respect to any non-compliance due to COVID-19.

Facility operations

EPA stresses that it “expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment.” In the event that facility operations may create an acute risk or imminent threat to human health or the environment due to COVID-19, the entity should immediately contact the appropriate implementing authority. This also applies if the facility suffers from a “failure of air emission control or wastewater or waste treatment systems or other facility equipment that may result in exceedances of enforceable limitations on emissions to air or discharges to water, or land disposal, or other unauthorized releases.”

The appropriate implementing authority could be the EPA regional office, authorized state agency, or tribe. The notification should include (1) information on the pollutants emitted, discharged, discarded, or released, (2) the comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s), and (3) the expected duration and timing of the exceedance(s) or releases. EPA will coordinate with authorized states or tribes, as applicable, in order to carry out the appropriate responses. For cases in which EPA implements the program directly, EPA will consider the circumstances, including any operations disrupted by COVID-19, in order to determine whether an enforcement response is appropriate.

Hazardous waste generators that are unable to transfer waste off site within the time periods prescribed by the Resource Conservation and Recovery Act (“RCRA”) to maintain current generator status due to the COVID-19 crisis should continue to properly label and store the hazardous waste and follow General Conditions (a)-(e), above. If these steps are taken, as an exercise of discretion, EPA will not reclassify these entities as treatment, storage, and disposal facilities under RCRA, nor will EPA reclassify the generator status of Very Small Quantity Generators and Small Quantity Generators even if the amount of hazardous waste stored onsite exceeds the generator’s current regulatory volume threshold.

Animal feeding operations that are unable to transfer animals off-site will not be considered by EPA to be “concentrated animal feeding operations” if the non-compliance is the sole result of complications due to the COVID-19 crisis. Such facilities must comply with General Conditions (a)-(e), above.

Public water systems regulated under the Safe Drinking Water Act

Operators of public water systems are expected to maintain normal operations and maintenance to ensure safe drinking water supplies. If worker shortage impacts operations, “the EPA considers the following tiers of compliance monitoring to assure the safety of our drinking water supplies and prioritize prevention of acute risks. Of highest priority is monitoring required under National Primary Drinking Water Regulations to protect against microbial pathogens. Additional priorities include nitrate/nitrite and Lead and Copper Rule monitoring followed by contaminants for which the system has been non-compliant.” Operators should also consult their state and local regulating entities for further guidance. EPA has noted that states may implement their own priorities.

The Office of Water plans to launch a website that will compile resources for operators, particularly those that are facing staffing and contractor shortages.

Criminal violations

Criminal penalties may be assessed for knowing conduct that violates the federal environmental laws. EPA will continue to prosecute violations that exhibit criminal intent or willful wrongdoing. EPA will screen cases during the duration of the Policy and determine when to seek prosecutorial assistance from the DOJ. The screening procedure will consider whether violations were unavoidable as a result of COVID-19 or the result of an intentional disregard of the law.

Additional considerations

Regulated entities must continue to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by federal law. Regulated entities should continue to take all reasonable cautions to prevent releases, and should not expect EPA to exercise enforcement discretion should it fail to take such precautions.

EPA expects to address activities under Superfund and RCRA Corrective Action in a separate policy publication. In addition, EPA noted that it “may provide additional enforcement guidance applicable to specific programs on an ongoing basis and the EPA’s self-disclosure program remains available.” Please check back in with your UKS contact if you have questions regarding these regulatory schemes.

State oversight and enforcement continues unchanged, except where your specific state has announced a policy similar to the EPA Policy. Please look to the most recent updates from your states’ department of environmental protection for more information.

Regulated entities should contact a member of the UKS Environmental Practice Group with questions specific to your business or research facility.

David Monz, Esq. can be reached at (203) 786-8303 or dmonz@uks.com. Mark Zimmerman, Esq. can be reached at (860) 548-2624 or mzimmermann@uks.com.

Updike, Kelly & Spellacy, PC would like to thank associate Jeffrey Bausch for his contributions to this article.

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