

Insights

U.S. COVID-19: USEPA ISSUES ENFORCEMENT-FORBEARANCE GUIDANCE IN RESPONSE TO COVID-19

Mar 30, 2020

SUMMARY

In the United States, COVID-19 has presented unique challenges to continuous environmental compliance at many facilities, particularly in jurisdictions where emergency orders prohibit most employees from even entering the work place. The facility staff needed to prevent a catastrophic release of a chemical or other pollutant are likely to be “essential employees” that must report to duty. But it is less clear that the same classification applies to the staff responsible for the paperwork and other recurring obligations that the raft of environmental laws, regulations, permits and consent orders that may apply to facility operations requires. Put simply, COVID-19 has stretched many regulated entities thin, and they are struggling to achieve continuous compliance.

In response, on March 26, 2020, the U.S. Environmental Protection Agency (“EPA”) announced a temporary Policy describing the enforcement-forbearance approach that the EPA would take during the COVID-19 pandemic. This alert provides an overview of the EPA Policy’s applicability, how to qualify for enforcement forbearance, limitations on the Policy and its applicability, and additional guidance that the EPA has offered. The alert concludes with a “take away” offering final thoughts.

APPLICABILITY

Broadly speaking, the EPA Policy will apply to any entity regulated by federal—*i.e.*, not state or local—environmental laws, regulations, permits and consent orders. It will apply retroactively beginning March 13, 2020, and will remain in effect until the EPA provides notice of its termination. The EPA will provide notice of termination at least seven days before terminating the Policy, and will post the notice on the EPA web site. Even after termination, the EPA will apply the enforcement forbearance described in the Policy to acts or omissions that occurred during the Policy’s effective period.

With respect to forbearance—*i.e.*, “enforcement discretion”—the EPA does not expect to seek penalties for civil violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, reporting and certification requirements when the EPA agrees that COVID-19 was

the cause of the noncompliance, and the entity provides supporting documentation as directed in the Policy.

QUALIFYING FOR ENFORCEMENT FORBEARANCE

To qualify for enforcement forbearance under the Policy, a regulated entity must do the following:

1. Act responsibly under the circumstances 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 to the noncompliance, 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 identified in (1) through (4), which presumably includes describing how the regulated entity acted responsibly under the circumstances and demonstrating that the regulated entity returned to compliance as soon as possible.

Inevitably, the question will arise whether to report the COVID-19-caused noncompliance. The EPA Policy states that if, for example, the regulated entity operates pursuant to a federal permit and the permit imposes a procedure for reporting noncompliance, then the regulated entity should follow the permit procedure. But the EPA Policy states that if there is not an environmental law, regulation, permit requirement or consent-order requirement to report the noncompliance, then the regulated entity should maintain the noncompliance and enforcement-forbearance information and make it available to the EPA or an authorized state or tribe upon request.

LIMITATIONS

A regulated entity should also know what the EPA Policy does *not* do, and contexts in which it does *not* apply. The limitations include the following:

1. The EPA Policy does not suspend environmental laws, regulations, permits and consent orders. Regulated entities must still comply with the laws, regulations, permits and consent orders that apply to them. The Policy just explains that the EPA will choose not to prosecute a specific subset of violations that qualify for enforcement forbearance.
2. The EPA Policy does not apply to criminal violations, such as knowingly discharging pollutants in contravention of the Clean Water Act.
3. The EPA Policy does not apply to violations of state and local compliance obligations. The Policy does not bind state and local governments, and those entities may follow different enforcement

approaches during the COVID-19 pandemic.

4. The EPA Policy does not bind potential citizen-suit plaintiffs.
5. The EPA Policy does not apply to activities carried out under Superfund and RCRA Corrective Action enforcement instruments.
6. The EPA Policy also does not apply to imports—and the EPA is especially worried about imported pesticide products that claim to address COVID-19 impacts.

ADDITIONAL GUIDANCE

The Policy provides additional guidance, including the following:

- Facilities should contact the appropriate implementing authority if facility operations impacted by COVID-19 might create an acute risk or imminent threat to human health or environment.
- Facilities that experience failures, *g.*, of air-emission controls or waste-treatment systems, due to COVID-19 that might cause unauthorized releases should notify the appropriate implementing authority as quickly as possible.
- Facilities that generate hazardous waste but cannot transfer the waste off-site within the periods required to maintain generator status because of COVID-19 should properly label and store the waste and take the steps required to qualify for enforcement forbearance.
- The EPA has “heightened expectations” for public water systems, and expects operators of those systems to continue normal operations, maintenance and required sampling to ensure the safety of drinking water supplies.
- Regulated entities that must use certified operators should maintain normal certification and training practices. If COVID-19 prevents them from maintaining those practices, then the regulated entities should keep experienced, trained operators on the job, even if those operators miss a training or certification because of COVID-19.
- Where an EPA submission requires a “wet” signature, the EPA will accept a digital or other electronic signature. However, the EPA will not consider the inability to obtain a “wet” signature as a justification for failing to make a paper submission or certification.
- A party to an EPA administrative settlement agreement or consent decree that expects to miss an enforceable milestone should use the notice procedures *in those documents*, including notifications regarding force majeure.
- The EPA Policy does not displace or replace the EPA’s existing self-disclosure program.

THE TAKE AWAY

During the COVID-19 pandemic, the EPA expects to focus its enforcement resources on situations that may create an acute risk or imminent threat to public health or the environment. But the EPA Policy does not suspend environmental laws, regulations, permits and consent orders. And the EPA will not stop its enforcement of federal environmental violations just because of COVID-19.

Accordingly, regulated entities should make sure they understand the subset of violations that could receive enforcement forbearance under the EPA Policy and how to qualify for the forbearance.

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