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EPA Issues Temporary Policy Memo on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program

SUMMARY

On March 26, 2020, the U.S. Environmental Protection Agency (EPA) issued a [temporary policy memo](#) modifying the agency's enforcement discretion in light of the sweeping impact of the COVID-19 pandemic in the United States. In an effort to focus the EPA's resources on situations imposing an imminent threat to public health or the environment, the temporary policy outlines how the EPA plans to refrain from enforcement where the pandemic creates an inability to comply with the law, and the regulated entity affected takes mitigating actions specified in the temporary policy. The temporary policy will apply retroactively beginning on March 13, 2020, and the EPA will apply this policy to any and all actions or omissions that occur while the policy is in effect, even after the policy terminates.

Under What Circumstances Does the Temporary Policy Apply?

In general, the EPA does not anticipate seeking penalties for violations by regulated entities of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations, in situations in which the EPA is in agreement that COVID-19 was the cause of the noncompliance and the entity provides, upon request, supporting documentation. Notably, the temporary policy does not apply to criminal violations, nor does it relieve a regulated entity from its responsibility to prevent, respond to, or report an accidental release. The policy also does not apply to activities being carried out under Superfund and RCRA corrective action enforcement agreements, which are to be addressed by the EPA separately.

Does the Temporary Policy Apply Automatically?

The modified enforcement discretion described in the EPA's temporary policy memo does not apply automatically. Rather, the EPA's modified enforcement discretion is conditioned on the following:

- Regulated entities should make every effort to comply with their environmental compliance obligations; and
- If compliance is not reasonably practicable, facilities with environmental compliance obligations should:
 - act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
 - identify the specific nature and dates of noncompliance;

- 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;
- return to compliance as soon as possible; and
- document the foregoing information, action, and/or conditions.

Regulated entities should use existing procedures to report noncompliance in routine activities, such as pursuant to an applicable permit, regulation or statute. If no such procedure is applicable, or if reporting is not reasonably practicable due to COVID-19, regulated entities should maintain this information internally and make it available to the EPA or an authorized state or tribe upon request.

Takeaways

- The EPA's temporary policy does not act as a blanket waiver of penalties for noncompliance, nor does it suspend existing environmental laws, permits, or other EPA authorizations.
- The temporary policy does not act as a guarantee that the EPA will not pursue enforcement action in the event of noncompliance due to COVID-19. Further, the policy does not expressly limit state environmental agencies or tribes from applying different enforcement discretion approaches under their own respective authorities.
- During the COVID-19 pandemic, regulated entities, facilities, and labs facing potential worker shortages and other constraints on their ability to carry out activities required by federal environmental permits, regulations, statutes, and/or reporting obligations and milestones should take steps to thoroughly document how and why any and all circumstances relating to the COVID-19 pandemic prevented them from being in compliance, in order to qualify for EPA enforcement discretion.

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