

US EPA announces COVID-19 enforcement discretion policy

March 27, 2020

The U.S. Environmental Protection Agency (EPA) issued a memorandum on Thursday, March 26, 2020, outlining a policy (Policy) of enforcement discretion in relation to acts or omissions taken in response to the COVID-19 pandemic that result in noncompliance with federal environmental laws. The Policy, issued by EPA's Assistant Administrator for Enforcement and Compliance Assurance, states that “[i]n general, the EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification obligations 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.”¹

As the basis for this policy, EPA explains that “potential worker shortages,” travel restrictions and the “social distancing” recommended by the Centers for Disease Control and Prevention (CDC), may affect operations at facilities throughout the country and cause key personnel to be unavailable to carry out certain duties required under federal laws. As examples, EPA points to such “regulatory obligations” as monitoring of emissions, tank integrity testing, effluent sampling, laboratory holding times, personnel training and annual re-certifications, and the filing of reports and certifications required under permits.

Failure to carry out these requirements may be forgiven and penalties will not be sought, provided that: (1) the regulated entity reports its noncompliance (or holds the information if there is no reporting procedure applicable); (2) EPA agrees that COVID-19 was the cause of the noncompliance; and (3) the entity provides supporting documentation to the EPA upon request.

EPA expects regulated entities to continue to comply with federal environmental laws while the COVID-19 crisis continues. Where compliance is not possible, EPA expects facilities with compliance obligations to identify and minimize the nature and extent of the non-compliance, explain how COVID-19 caused it, return to compliance as soon as possible, and document the foregoing. The Policy identifies special considerations for particular types of facility operations, including air emission controls and wastewater treatment systems; generation of hazardous waste; animal-feeding facilities; and public water systems regulated under the Safe Drinking Water Act.

The Policy applies to settlement agreements and consent decrees, though the Policy advises parties to use force majeure notice provisions of such agreements and decrees as applicable. The Policy does not apply to imports or to criminal violations of the law. EPA also cautions that the Policy may not address every potential civil violation that may arise from COVID-19. The Policy “does not alter any provision of any statute or regulation that contains legally binding requirements, and it is not itself a regulation.”

Businesses and individuals are encouraged to seek legal advice prior to committing prohibited acts or failing to comply with requirements under federal laws, even if they appear to be directly related to or caused by COVID-19. Such persons should take note that enforcement discretion presumes disclosure and documentation.

1. *The memorandum is available on-line at: <https://www.epa.gov/sites/production/files/2020-03/documents>*

Your Key Contacts



R. Todd Silliman

Atlanta Office Managing
Partner and US
Environmental Practice
Co-Chair, Atlanta
D +1 404 527 4914
todd.silliman@dentons.com



Julie Vanneman

Shareholder, Pittsburgh
D +1 412 297 4715
julie.vanneman@dentons.com



Robert S. Schuda

Partner, Los Angeles
D +1 213 243 6136
robert.schuda@dentons.com