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Blog Post

EPA's Temporary Policy Regarding Enforcement Discretion during the COVID-19 Pandemic

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Recognizing that many companies will face difficulty in complying with environmental laws due to workforce reduction or other COVID-19 impacts, the U.S. Environmental Protection Agency ("EPA") issued a temporary policy regarding enforcement of environmental legal obligations during the COVID-19 pandemic on March 26, 2020, which applies retroactively beginning on March 13, 2020 (the "Enforcement Policy"). Under the Enforcement Policy, EPA will exercise enforcement discretion for certain noncompliance covered by the Enforcement Policy and resulting from the COVID-19 pandemic. Many states have also made announcements regarding enforcement discretion for environmental noncompliance caused by the COVID-19 pandemic or otherwise providing relief from certain environmental compliance obligations during the COVID-19 pandemic.

Businesses that anticipate difficulty complying with environmental laws due to COVID-19-related workforce reduction or other COVID-19 impacts should familiarize themselves with the requirements set forth in the Enforcement Policy and consult with counsel to evaluate its applicability and the availability of enforcement relief under a state-specific enforcement policy.

The Enforcement Policy

Under the Enforcement Policy, EPA does not expect to seek penalties for noncompliance of routine environmental legal compliance obligations (specifically, compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification) in situations where EPA agrees that COVID-19 was the cause of the noncompliance and the business provides supporting documentation to EPA

upon request. The Enforcement Policy requires businesses to use existing procedures to report noncompliance with such routine obligations, unless no such procedure is applicable or if reporting is not reasonably practicable due to COVID-19.

- **Administrative Settlement Agreements.** EPA intends to treat routine compliance obligations in EPA administrative settlement agreements in the same manner and will not generally seek stipulated or other penalties for noncompliance with such obligations. If a business anticipates missing milestones in an EPA administrative settlement agreement, it should utilize the notice procedures set forth in the agreement, including notification of a force majeure, as applicable.
- **No Requirement to Catch Up.** After the Enforcement Policy is no longer in effect, absent exigent circumstances, EPA does not plan to ask facilities to “catch-up” with missed monitoring or reporting if the underlying requirement applies to intervals of less than three months. For other monitoring or reports, such as those required on a bi-annual or annual basis, EPA expects facilities to take reasonable measures to resume compliance activities as soon as possible after the Enforcement Policy is no longer in effect, including conducting late monitoring or submitting late reports.
- **Consent Decrees.** With respect to consent decrees entered into with EPA and the U.S. Department of Justice, EPA staff will coordinate with the Department to exercise enforcement discretion with regard to stipulated penalties for routine compliance obligations and will consult with any co-plaintiffs to seek agreement to this approach. However, courts retain jurisdiction over consent decrees and may exercise their own authority. Businesses should utilize the notice procedures set forth in the consent decree, including notification of a force majeure, as applicable, with respect to any noncompliance alleged to be caused by COVID-19.

Conditions for Enforcement Discretion

The enforcement discretion contained in the Enforcement Policy is conditioned upon the following:

1. businesses making every effort to comply with their environmental compliance obligations; and
2. if compliance is not reasonably practicable, facilities with environmental compliance obligations 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).

Limitations of the Enforcement Policy

The Enforcement Policy explicitly does not relieve any entity from the responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste and other pollutants, as required by federal law. The Enforcement Policy also does not apply to (1) activities that are carried out under Superfund and RCRA Corrective Action enforcement instruments (EPA will address these matters in separate communications), (2) imports (EPA is particularly concerned about imported pesticide products) or (3) criminal violations or conditions of probation in criminal sentences.

Specific Requirements and Guidance for Certain Noncompliance Situations and Operations and Industries in the Enforcement Policy

The Enforcement Policy sets forth specific requirements for facilities and EPA's approach to enforcement in the following noncompliance situations:

- **Acute risk or imminent threat to human health or the environment.** A facility should contact the appropriate implementing authority (EPA regional office, authorized state or tribe) if facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment. If an entity contacts EPA due to noncompliance that could result in an acute risk or an imminent threat to human health or the environment, EPA will consult with states or tribes with an authorized program or, where EPA implements the program directly, take specified steps to address the situation.
- **Unauthorized release.** If a facility suffers from 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 facility must notify the implementing authority as quickly as possible. The notification must include (1) information on the pollutants emitted, discharged, discarded or released; (2) a 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 consult with states or tribes with authorized programs or, where EPA implements the program directly, evaluate whether the release may create an acute risk or imminent threat to human health or the environment and take specified steps to address the situation.

The Enforcement Policy also contains specific guidance pertaining to generators of hazardous waste, animal feeding operations, operators of public water systems and critical infrastructure.

Businesses Should Carefully Evaluate the Applicability of the Enforcement Policy

Businesses that anticipate difficulty complying with environmental laws due to COVID-19-related workforce reduction or other COVID-19 impacts should be prepared to meet the conditions for enforcement discretion and other requirements set forth in the Enforcement Policy. Businesses that perform more environmentally sensitive operations should also keep in mind the specified notification requirements contained in the Enforcement Policy. For activities that are carried out under Superfund and RCRA Corrective Action enforcement instruments, keep an eye out for future announcements from EPA. We also anticipate that states will continue to make announcements regarding environmental compliance and enforcement relating to COVID-19 impacts and encourage businesses to consult with counsel to determine and evaluate the applicability of the Enforcement Policy and any state policies or guidance that may be relevant.

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