

U.S. Environmental Protection Agency (“EPA”) Issues COVID-19 Enforcement Discretion Memo

March 31, 2020

On March 26, 2020, the U.S. Environmental Protection Agency (“EPA”) issued a guidance memorandum indicating that it will temporarily exercise enforcement discretion with respect to noncompliance resulting from the COVID-19 pandemic. [1]

Scope of EPA’s Memorandum

EPA’s policy will be applied retroactively to March 13, 2020, and addresses the following:

- Routine compliance and monitoring
- Settlement agreement and consent decree reporting obligations and milestones
- Facility operations
- Public water systems regulated under the Safe Drinking Water Act
- Critical infrastructure

Routine Compliance and Monitoring

EPA acknowledges that the pandemic could hinder or prohibit the performance of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification. As a result, EPA does not intend to seek penalties for violations related to such activities if caused by the COVID-19 pandemic. However, EPA recommends that regulated entities report noncompliance with such routine activities as required by permit, statute or regulation.

Settlement agreement and consent decree reporting obligations and milestones

Parties to EPA settlement agreements that are unable to fulfill reporting obligations or timely complete milestones contained therein should invoke the force majeure provisions of such agreements and comply with the applicable notice requirements. Failure to complete routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification covered by such agreements will be treated as discussed above.

Facility Operations

Acute risk or imminent threat: Facility operators are directed to contact the appropriate EPA regional office in

the event that the COVID-19 pandemic could affect facility operations in a manner that may create an acute risk or an imminent threat to human health or the environment. In such instances, the EPA will consult with state agencies to attempt to avoid such risk. For programs administered by EPA, if there is no permit or regulatory provision that addresses the situation, then EPA will work with the facility to minimize the threat and it will consider the effect of the COVID-19 pandemic when considering whether an enforcement action is appropriate.

Unauthorized discharges: In the event of unauthorized air or wastewater discharge, facility operators are directed to notify the appropriate EPA regional office and provide it with information regarding the release including (i) the pollutant discharged, (ii) comparison of the discharge to applicable permit limitations, and (iii) the expected duration of any such exceedances.

Hazardous waste generators: Hazardous waste generators that are unable to transfer waste off-site in the timeframe required to maintain their RCRA generator status due to the COVID-19 pandemic should continue to properly label and store such materials and EPA will not treat such facilities as treatment, storage or disposal facilities. EPA will also continue to treat Very Small Quantity Generators and Small Quantity Generators as such even if the amount of hazardous waste stored at the facility exceeds the applicable threshold as a result of the COVID-19 pandemic.

CAFOs: EPA will also maintain concentrated animal feeding operation (“CAFOs”) designations for those facilities that are unable to transfer animals off-site as a result of the pandemic.

Public Water Systems Regulated Under the Safe Drinking Water Act

Unlike the facilities discussed above, EPA expects public drinking water supply operators to continue normal operations, maintenance and sampling to ensure the safety of drinking water supplies. EPA expects laboratories to continue to provide timely analysis for public water supply samples.

Critical Infrastructure

EPA may consider a No Action Assurance in the event that a facility affected by the pandemic is essential critical infrastructure and EPA determines that such action would be in the public interest. EPA will consider essential facilities those that employ workers identified by Cybersecurity and Infrastructure Security Agency guidance.

General Requirements for all Facilities

For the enforcement discretion policy to apply, facility operators must comply with the following general conditions:

- Entities should make every effort to comply with their environmental compliance obligations.
- 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.

What is Not Covered

In exercising its enforcement discretion, EPA is not relieving any entity from the obligations to prevent, respond to or report accidental releases of pollutants to the environment as required by federal law. The enforcement discretion memo also excludes criminal conduct.

Conclusion

Some have characterized EPA's enforcement discretion memo as opening the door to unencumbered environmental noncompliance. However, the requirements outlined in the memo make it clear that (i) noncompliance must result from the COVID-19 pandemic, (ii) facility operators must document the cause, (iii) operators must notify the agency in certain circumstances, and (iv) operators must implement actions to reduce the duration of noncompliance. Accordingly, this action by EPA provides the regulated community with the reasonable leeway that is needed during this difficult period.

Notably, as of the date of this advisory, neither New York State Department of Environmental Conservation nor New Jersey Department of Environmental Protection has issued similar enforcement discretion guidance so facilities regulated by those agencies should closely review their permits or applicable regulations to assess whether force majeure protections can be invoked as a result of the COVID-19 pandemic.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have any questions regarding EPA's enforcement discretion memo, please feel free to contact Brendan Mooney at (516) 357-3757 or at bmooney@cullenllp.com, Amie C. Kalac at 609-279-0900 or at AKalac@cullenllp.com, Herbert B. Bennett at 609-279-0900 or HBennett@cullenllp.com or Neil Yoskin at 609-279-0900 or NYoskin@cullenllp.com.

Footnote:

[1] A copy of the U.S. EPA Memorandum: ~~COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program~~, dated March 26, 2020, can be found at: <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

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