

March 27, 2020

## Environmental Compliance Update: EPA Issues COVID- 19 Enforcement Policy

On March 26, 2020, the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance (EPA-OECA) issued a memorandum stating that it will exercise enforcement discretion for certain lapses resulting from the COVID-19 pandemic. The memorandum outlines this new temporary policy, which is effective retroactively beginning March 13, 2020. This is an update to our previous article, COVID-19 and Environmental Compliance.

For civil violations, including noncompliance with routine monitoring and reporting obligations, EPA will exercise enforcement discretion on a case-by-case basis subject to the following conditions:

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

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Where possible, entities should use existing procedures to report noncompliance; otherwise, entities should still assemble and maintain the information internally. Importantly, EPA states that it “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.” While EPA does expect a timely return to compliance once the pandemic subsides, it currently “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.”

Enforcement discretion will not be extended to criminal violations, and entities are still expected to comply with all requirements applicable to reporting and mitigating accidental releases and permit exceedances. Likewise, activities carried out under Superfund and RCRA Corrective Action enforcement instruments, as well as public drinking water standards, are not covered by the memorandum and will be addressed separately. However, EPA states that it may consider a “more tailored short-term No Action Assurance” for entities deemed to be critical infrastructure by the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency.

Most states are delegated authority to implement and enforce their own versions of federal environmental programs. As such, these delegated states are not bound by the EPA’s new policy and can make their own decisions on pursuing enforcement for noncompliance.

For more information and analysis of regulators’ response to the Coronavirus pandemic, please contact your Michael Best attorney or visit our COVID-19 Resource Center.

## **Related People**

### **David Crass**

Partner

[dacrass@michaelbest.com](mailto:dacrass@michaelbest.com)

T 202.595.7921

### **Todd Palmer**

Partner

[tepalmer@michaelbest.com](mailto:tepalmer@michaelbest.com)

T 608.283.4432

### **Leah Ziemba**

Partner

[lhziemba@michaelbest.com](mailto:lhziemba@michaelbest.com)

T 608.283.4420