



# A Robinson+Cole Legal Update

## Coronavirus (COVID-19)

March 31, 2020

## EPA Issues COVID-19 Enforcement Discretion Policy

Having been “inundated with questions from both state regulators and the regulated community about how to handle the current extraordinary situation,” the Environmental Protection Agency (EPA) recently announced a temporary policy regarding enforcement of federal environmental legal obligations. In its March 26, 2020 [Memorandum on COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Programs](#) (Memorandum), the EPA announced that it will relax its enforcement discretion for certain incidents of non-compliance resulting from the COVID-19 pandemic provided the regulated entity complies with measures spelled out in the Memorandum. The Memorandum is not a regulation, does not alter any provision of any statute or regulation containing legally binding requirements, and does not alter a facility’s compliance obligations in any way. In a memo from March 30, 2020, the EPA emphasized that “this temporary policy is not a license to pollute.”

### TIMING

The Memorandum is retroactive from March 13, 2020, and remains in effect until the EPA announces its termination. The EPA will post a notification regarding the end of the temporary policy seven days prior to termination.

### SCOPE AND APPLICABILITY

The temporary policy recognizes that the consequences of the pandemic may affect facility operations and, by extension, may impact compliance activities required under federal environmental permits, regulations and statutes. As a result, the EPA will apply enforcement discretion for, among other things, civil violations, non-compliance with settlement agreements and consent decrees, and facility operations resulting in permit exceedences. The policy does not apply to any criminal violations or activities carried out under Superfund or Resource Conservation and Recovery Act (RCRA) Corrective Action enforcement instruments.

The EPA’s enforcement discretion, which may include waiver of civil penalties or declination of an enforcement response, applies to the following types of civil violations:

- Routine Compliance Monitoring and Reporting, including integrity testing, sampling, laboratory analysis, training, and reporting or certification;
- Settlement Agreement and Consent Decree Reporting Obligations and Milestones; and
- Facility Operations, including:
  - Failures of air, water and/or waste treatment systems or emission control equipment; and
  - Violations of hazardous waste accumulation requirements under RCRA

Public water systems regulated under the Safe Water Drinking Act have a heightened responsibility to protect public health, and the EPA expects operators of such systems to continue normal operations and maintenance.

### EFFECT

The Memorandum does not alter an entity's compliance obligations, but it does recognize that compliance may not be reasonably practicable in all instances in light of the pandemic. Under such circumstances, the EPA will exercise its enforcement discretion in evaluating COVID-19- related noncompliance. To avail themselves of the benefits of the temporary policy, regulated entities must:

- Act responsibly to minimize effects and duration of noncompliance;
- Identify the nature and duration 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);
- Return to compliance as soon as possible; and
- Document the information, action, or condition specified above.

Nothing in the policy relieves any entity from the obligation to prevent, respond to, or report accidental releases of pollutants as required by federal law, or should be read as a willingness to exercise its enforcement discretion in the event of a release.

## STATE AND TRIBAL PROGRAMS

The Memorandum recognizes that authorized states or tribes may take a different approach under their own authorities. The EPA will take the pandemic into consideration in any review of a state compliance and enforcement program.

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Robinson+Cole's [Environmental, Energy + Telecommunications](#) attorneys are ready to assist clients and friends with questions regarding the EPA Enforcement Memorandum.

Read more legal updates, blog posts, and speaking engagements related to this area on [Robinson+Cole's Coronavirus Response Team](#) page and feel free to contact any member of our team with questions.

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