US EPA Issues Temporary Policy on COVID-19 Implications for the Agency’s Enforcement and Compliance Assurance Program

Friday, March 27, 2020

On March 26, 2020, US EPA Assistant Administrator, Susan Bodine, authored and released guidance to all governmental and private sector entities entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program.” The seven-page guidance memorandum outlines the Agency’s “temporary” policy governing issues of noncompliance that arise (1) as a result of the COVID-19 pandemic and (2) during the time period that the temporary policy is in place. The temporary policy is currently running indefinitely, retroactive as of March 13, 2020, and provisionally replacing otherwise applicable US EPA enforcement response policy until the Agency reports otherwise. The Agency will post a notification here at least seven days prior to terminating the temporary policy.

Scope

The temporary policy will apply to actions and omissions that occur while this policy is in effect, even after the policy terminates. However, in the temporary policy US EPA also clarifies that authorized states or tribes may take a different approach under their own authorities, and that US EPA will coordinate with other federal
agencies in situations where there is shared jurisdiction. Therefore, as always, each particular circumstance that could potentially fall under this temporary policy must be analyzed on a case-by-case basis to best gauge compliance requirements.

The primary thrust of the temporary policy is a recognition that, due to increasing travel and social distancing restrictions, both governments and corporations will be compromised in efforts to meet:

- reporting obligations and milestones set forth in settlements and consent decrees;
- enforceable limitations on air emissions and water discharges;
- requirements for the management of hazardous waste; and/or
- requirements to ensure and provide safe drinking water;

each of which US EPA plans to manage differently, as outlined in the temporary policy. Notably, however, the policy does NOT apply to Superfund and RCRA Corrective Action enforcement instruments, which US EPA says it will address separately, nor does it apply to imports.

**Enforcement Discretion**

As detailed more fully in the temporary policy, agency enforcement discretion related to Civil Violations is contingent upon regulated entities making every effort to comply with their compliance obligations and taking certain enumerated measures to track, minimize, and end noncompliance as soon as possible. This means that while US EPA will be working with regulated entities to lessen the regulatory burdens resulting from COVID-19, regulated entities are not released entirely from their compliance obligations—even during the application of this temporary policy.

With regard to Civil Violations, the specific guidance set forth in the temporary policy addresses:

- Routine compliance monitoring and reporting by regulated entities;
- Settlement agreement and consent decree reporting obligations and milestones;
- Facility operations (NOTE: The EPA explicitly “expects all regulated entities to continue to manage and operate their facilities in a manner that is safe and that protects the public and the environment”);
- Public water systems regulated under the Safe Drinking Water Act; and
- Critical infrastructure.

The temporary policy also outlines measures US EPA will take with regard to State Oversight, EPA Actions, Accidental Releases and Criminal Violations. We expect more related guidance to be released soon, and we will keep you updated as it