

COVID-19: U.S. Environmental Protection Agency Enforcement Discretion Policy

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On March 26, 2020, the U.S. Environmental Protection Agency (EPA) issued a temporary policy, [“COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program,”](#) on how EPA will exercise its enforcement discretion if a facility owner or operator cannot comply with certain requirements of federal environmental laws because of impacts related to the COVID-19 pandemic.

The temporary policy for COVID-19 is tailored to circumstances of the pandemic that may affect staffing, physical access for monitoring and sampling, laboratory analysis, and other resources needed to fulfill routine compliance obligations. The policy is retroactive to March 13, 2020, and indicates that EPA will issue a public notice at least seven days prior to termination.

EPA has also issued other related COVID-19 policies or guidance that cover pesticide [imports](#), [field work at cleanup sites](#) under Superfund and other federal programs, a [nationwide fuel waiver](#) for summer gasoline, and [emergency generator operations](#) in Puerto Rico.

Scope of EPA Policy

The EPA March 26 policy outlines several criteria and procedures for a facility owner or operator to demonstrate that the impacts of COVID-19 prevented compliance with routine monitoring or reporting requirements under federal statute, regulation, or a facility-specific permit. The policy similarly applies to routine compliance obligations specified in federal consent decrees or settlements.

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The policy provides separate instructions for notification if (1) facility operations impacted by COVID-19 may present an acute risk or an imminent threat to human health or the environment or (2) a facility may exceed enforceable limitations on air emissions, water discharges, land disposal, or other unauthorized releases. The policy does not broadly waive federal requirements to control pollution and wastes and indicates that EPA would determine the appropriate enforcement response for exceedances.

The policy includes additional guidance for the continued operation of public water systems and other critical infrastructure during the pandemic. On March 31, 2020, EPA issued [supplemental guidance](#) for reporting wastewater discharges under Clean Water Act permits.

The policy does not waive criminal liability under federal environmental laws for knowing and willful violations that could have been avoided or emergency notification requirements under federal laws for spills, leaks, or other accidental releases into the environment.

EPA has also issued responses to [Frequently Asked Questions](#) about the intent of its March 26 policy.

The temporary policy is similar in principle to the use of federal enforcement discretion in other unusual situations that are beyond the control of a facility owner or operator, such as natural disasters or emergencies. Beginning in 1984, the EPA [general policy on civil penalties](#) also similarly allows for consideration of the control that a person had over the events that led to a violation. EPA has issued additional enforcement policies over time.

Related Issues

Reactions to the EPA March 26 policy have been mixed among Members of Congress, states, stakeholder organizations, and regulated entities. Some have commended EPA for taking a pragmatic approach to civil enforcement. Others have expressed concern about accountability to verify whether instances of non-compliance during the pandemic could have been avoided, potential risks if exceedances of standards or limitations go undetected while routine monitoring and reporting are suspended, and public disclosure of instances of non-compliance.

On May 13, 2020, nine states filed a [lawsuit](#) in federal district court challenging the temporary enforcement policy as unlawful and exceeding EPA's authority by "effectively waiv[ing] enforcement of noncompliance." The states' suit asks the court to vacate and stop EPA's implementation of its March 26 policy. Environmental organizations have also filed a [complaint](#) in the same district court seeking EPA's response to their [petition](#) to require that facilities immediately notify EPA and state authorities of non-compliance during the pandemic and for EPA to promptly publish such notifications on its website.

On April 2, 2020, EPA issued [letters](#) to several Members of Congress in response to various concerns about its March 26 policy. EPA emphasized that it would exercise discretion to not seek civil penalties only for routine monitoring and reporting requirements and that the agency would make these decisions on a case-by-case basis after the pandemic is over to verify the reason for non-compliance. EPA noted limitations on enforcement resources to make facility-specific determinations during the pandemic given the nationwide impact of COVID-19. EPA "cc'ed" all other Members.

EPA Administrator Andrew Wheeler also issued a [statement](#) that EPA "will continue to work with federal, state and tribal partners to ensure that facilities are meeting regulatory requirements, while taking appropriate steps to protect the health of our staff and the public."

State and Tribal Enforcement Discretion

The EPA March 26 policy acknowledges that states and tribes may take different approaches to enforcement discretion under their own laws and indicates that EPA would consider constraints during the

COVID-19 pandemic in its oversight of delegated state and tribal programs. Most federal environmental laws authorize EPA to delegate the issuance and enforcement of permits and other regulatory requirements to a state or tribe that has (1) developed or adopted requirements under its own laws that are at least as stringent as federal requirements and (2) demonstrated the capability and resources to enforce those requirements. (Most federal environmental laws treat U.S. territories as states for purposes of delegation.)

Delegated states and tribes may exercise enforcement discretion under their own laws similar to EPA under federal law. EPA oversees the use of delegated authority to ensure that a state or tribe is enforcing requirements that are at least comparable to federal law. However, EPA's decision not to enforce a federal requirement generally does not preclude a state from enforcing its own analogous requirement. Compliance flexibility in delegated jurisdictions during the COVID-19 pandemic therefore may largely depend on state or tribal enforcement discretion policies.

For a broader discussion of EPA enforcement discretion and state and tribal delegation, see CRS Report RL34384, *Federal Pollution Control Laws: How Are They Enforced?*, by Robert Esworthy.

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