



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

July 2, 2020

EPA Announces Termination of COVID-19 Enforcement Discretion Policy

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The Environmental Protection Agency (EPA) has announced the scheduled termination of its controversial Enforcement Discretion Policy (Policy). In a [memorandum](#) dated June 29, 2020 (Memorandum), Susan Bodine, the Assistant Administrator for Enforcement and Compliance Assurance (OECA), stated that the Policy will terminate on August 31, 2020. The late summer termination date is intended to provide the regulated community with adequate time to “adjust to changing circumstances” surrounding the pandemic. Citing a series of developments since the issuance of the Policy on March 26, 2020, including new federal guidelines and directives to support both the public health response and economic recovery efforts as well as the gradual return to routine facility operations across the country, the Memorandum notes that the circumstances under which the Policy may apply have been reduced.

According to the EPA, the Policy was initially intended to recognize COVID-19-related challenges to environmental compliance, including reduced staffing, and the pandemic’s impact on compliance activities required under federal environmental permits, regulations and statutes. As a result, the Agency announced that it would apply its enforcement discretion for, among other things, civil violations, non-compliance with settlement agreements and consent decrees, and facility operations resulting in permit exceedances. Since its inception, the Policy has been criticized by House Democrats, several states, and numerous conservation groups, which claimed the EPA was abdicating its enforcement obligations and encouraging non-compliance with environmental reporting and permitting requirements. Several states and conservation groups sued the EPA in federal court, challenging the Agency’s authority to issue the Policy.

The Memorandum does not address this criticism, but instead notes that the impediments to regulatory compliance caused by COVID-19, including worker shortages, have eased. As of August 31, “the EPA will not base any exercise of enforcement discretion on this temporary [P]olicy for any noncompliance that occurs after August 31, 2020.” The EPA may terminate the Policy at an earlier date if circumstances warrant, and if so will provide notification at least seven days prior to such termination. The Memorandum also notes that “Nothing herein limits the ability of the EPA to exercise enforcement discretion on a case-by-case basis regarding any noncompliance, including noncompliance caused by the COVID-19 public health emergency, before or after the temporary [P]olicy is terminated.”

Facilities that have taken advantage of the EPA’s enforcement discretion due to complications related to COVID-19 should recall that the Policy was not a blanket enforcement waiver, but instead imposed several requirements in order for the Policy to be applicable (see our prior [Update](#)). Those facilities are not required to inform the Agency that they have availed themselves of the Policy, but are required to maintain the documentation necessary to document each instance of noncompliance. In addition, those facilities are not required to “catch up” with any lapses in their reporting upon the termination of the Policy, but will be expected to meet their reporting and compliance obligations without reliance on any formal enforcement discretion policy as of the termination date.

Several states imposed similar enforcement discretion policies after the Policy was announced, and those policies likely will be re-evaluated on a state and regional level as relevant authorities monitor their reopening status.

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

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